

**STATE OF CALIFORNIA**

**CALIFORNIA LAW  
REVISION COMMISSION**

**RECOMMENDATION AND STUDY**

*relating to*

**Oral Modification Of Written Contracts**

**January 1975**

**CALIFORNIA LAW REVISION COMMISSION**

**Stanford Law School  
Stanford, California 94305**

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October 21, 1974

**To: THE HONORABLE RONALD REAGAN**  
***Governor of California* and**  
**THE LEGISLATURE OF CALIFORNIA**

The California Law Revision Commission was authorized by Resolution Chapter 45 of the Statutes of 1974 to study whether the law relating to modification of contracts should be revised. See also Resolution Chapter 202 of the Statutes of 1957.

The Commission herewith submits its recommendation and a research study relating to this topic. The study was prepared by Richard Timbie, a former part-time member of the Commission's legal staff. It was previously published in the *Hastings Law Journal* and is republished here with permission. Only the recommendation (as distinguished from the research study) expresses the views of the Commission.

Respectfully submitted,  
MARC SANDSTROM  
*Chairman*



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# RECOMMENDATION

*relating to*

## ORAL MODIFICATION OF WRITTEN CONTRACTS

### Introduction

The parties to a written contract frequently find it convenient or necessary to modify the contract by oral agreement to meet unforeseen conditions, to remedy defects, or to resolve ambiguities in the contract as written, or for some other reason. In the majority of situations, both parties perform in accordance with the written contract as modified. In some situations, however, a dispute arises concerning the terms of the oral modification, the nature of the performance, or whether there was a modification at all. This recommendation deals with the rules governing oral modification of written contracts under general contract law (Civil Code Section 1698) and under the Commercial Code (Section 2209).

### Civil Code Section 1698

California statutes offer inadequate guidance to the parties who attempt to modify a written contract orally. Since 1874, the rule provided in Civil Code Section 1698 has been that “a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.”<sup>1</sup> As a result of a great amount of litigation, the courts have established exceptions to the application of the rule against oral modification in order to achieve just results in particular cases.<sup>2</sup> These exceptions include the following:

(1) An oral agreement which has been executed by only one of the parties may be enforced by that party, notwithstanding Section 1698.<sup>3</sup>

(2) The parties may extinguish the written contract by an oral novation and substitute a new oral agreement.<sup>4</sup>

<sup>1</sup> It has been suggested that this provision resulted from an inadequate attempt to state the common law rule that contracts *required* to be in writing can be modified only by a writing. See 2 A. Corbin, *Contracts* § 301 (1950); 15 S. Williston, *Contracts* § 1828 (3d ed. 1972).

<sup>2</sup> See cases cited in Timbie, *Modification of Written Contracts in California, infra*, reprinted from 23 Hastings L.J. 1549 (1972) hereinafter referred to as “background study”), and 1 B. Witkin, *Summary of California Law Contracts* §§ 715-719 at 600-604 (8th ed. 1973).

<sup>3</sup> See D.L. Godbey & Sons Constr. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952). See also background study, *infra* at 328-329.

<sup>4</sup> See Pearsall v. Henry, 153 Cal. 314, 95 P. 154 (1908).

(3) The parties may rescind the written contract by an oral agreement, thereby satisfying the terms of Section 1698.<sup>5</sup>

(4) An oral modification may be upheld as a waiver of a condition of the written contract.<sup>6</sup>

(5) A party who has changed his position in reliance on the oral agreement may be protected by the doctrine of equitable estoppel.<sup>7</sup>

(6) An oral agreement may be held to be an independent collateral contract, making Section 1698 inapplicable.<sup>8</sup>

The effect of these exceptions has been largely to emasculate the rule against oral modification<sup>9</sup> and make the statutory language deceptive at best. The vagueness and complexity of the rule and its exceptions have invited litigation.

The Commission accordingly recommends that Section 1698 be replaced by a new section that is consistent with the court-developed rules governing modification of written contracts. Specifically, the new section should provide that the parties may modify a written contract by a written contract, by an oral agreement executed by both parties, or by an oral agreement supported by new consideration and executed by the party seeking enforcement. This would continue the substance of existing Section 1698 as interpreted by *D.L. Godbey & Sons Construction Co. v. Deane*.<sup>10</sup>

This section would merely describe cases where proof of an oral modification is permitted; the section would not, however, affect in any way the burden of the party claiming that there was an oral modification to produce evidence sufficient to persuade the trier of fact that the parties actually did make an oral modification of the contract. The section would not affect related principles of law; the rules concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a condition of a written contract, or oral independent collateral contracts would continue to be applicable in appropriate cases.

<sup>5</sup> See *Treadwell v. Nickel*, 194 Cal. 243, 258-261, 228 P. 25, 32-33 (1924).

<sup>6</sup> See *Bardeen v. Commander Oil Co.*, 40 Cal. App.2d 341, 104 P.2d 875 (1940).

<sup>7</sup> See *Wade v. Markwell & Co.*, 118 Cal. App.2d 410, 420-421, 258 P.2d 497, 502-503 (1953).

<sup>8</sup> See *Lacy Mfg. Co. v. Gold Crown Mining Co.*, 52 Cal. App.2d 568, 577-578, 126 P.2d 644, 649-650 (1942).

<sup>9</sup> The doctrines of waiver, estoppel, oral independent collateral contract, and executed oral agreement have been applied to enforce oral modifications of written contracts despite a provision requiring modifications of the contract to be written and signed. See *MacIsaac & Menke Co. v. Cardox Corp.*, 193 Cal. App.2d 661, 14 Cal. Rptr. 523 (1961); *1st Olympic Corp. v. Hawryluk*, 185 Cal. App.2d 832, 8 Cal. Rptr. 728 (1960); *Howard J. White, Inc. v. Varian Associates*, 178 Cal. App.2d 348, 2 Cal. Rptr. 871 (1960); *Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council*, 128 Cal. App.2d 676, 276 P.2d 52 (1955). Compare Uniform Commercial Code § 2-209, discussed *infra*.

<sup>10</sup> 39 Cal.2d 429, 246 P.2d 946 (1952). See also *Raedeke v. Gibraltar Sav. & Loan Ass'n*, 10 Cal.3d 665, 517 P.2d 1157, 111 Cal. Rptr. 693 (1974).

## Commercial Code Section 2209

Subsection (2) of Section 2-209 of the Uniform Commercial Code permits the oral modification of a written contract for the sale of goods unless the contract expressly provides that it may not be rescinded or modified except by a signed writing.<sup>11</sup> This provision was changed when the Uniform Commercial Code was enacted in California. Subdivision (2) of Section 2209 of the California Commercial Code provides that “a written contract within this division may only be modified by a written agreement or by an oral agreement fully executed by both parties.”<sup>12</sup>

The Law Revision Commission recommends that California adopt the official text of Uniform Commercial Code Section 2-209. California is the only state that departs from the official text of this provision.<sup>13</sup> The great volume of interstate business calls for a single national rule in the area of sales transactions, particularly concerning the manner of drafting forms. The case law that develops in other states will be of assistance to California lawyers in understanding and applying Section 2209 if our section is revised to conform to the official text.

<sup>11</sup> Section 2-209 of the Uniform Commercial Code provides as follows:

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

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

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

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

<sup>12</sup> The California Commercial Code provision was influenced by, but differs significantly from, the rule provided by Civil Code Section 1698. Section 1698 provides: “A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise.” In *D.L. Godbey & Sons Constr. Co. v. Deane*, 39 Cal.2d 429, 246 P.2d 946 (1952), the California Supreme Court held that an oral agreement modifying a written contract is “executed” under Section 1698 if consideration was given for the oral agreement and it has been performed by the party relying on the modification. The language of California Commercial Code Section 2209(2) overrules the *Godbey* exception for purposes of Division 2 of the Commercial Code by requiring execution of the agreement by both parties.

<sup>13</sup> See *Permanent Editorial Board for the Uniform Commercial Code, Report No. 2*, at 34-35 (1965). See also 1 *Uniform Laws Annotated—Uniform Commercial Code* 128 (master ed. 1968). Subsection (3) of Uniform Commercial Code Section 2-209 was omitted from the code as originally enacted in California. It was added in 1967, thereby making the California provision the same as Section 2-209 of the Uniform Commercial Code with the exception of subdivision (2). Cal. Stats. 1967, Ch. 799, § 3.

## Proposed Legislation

The Commission's recommendation would be effectuated by enactment of the following measures:

### Bill No. 1

*An act to amend Section 1697 of, to amend the heading of Chapter 3 (commencing with Section 1697) of Title 5 of Part 2 of Division 3 of, to add Section 1698 to, and to repeal Section 1698 of, the Civil Code, relating to modification of contracts.*

*The people of the State of California do enact as follows:*

#### Chapter heading (technical amendment)

Section 1. The heading of Chapter 3 (commencing with Section 1697) of Title 5 of Part 2 of Division 3 of the Civil Code is amended to read:

#### CHAPTER 3. ~~ALTERATION~~ MODIFICATION AND CANCELLATION

#### Civil Code § 1697 (technical amendment)

Sec. 2. Section 1697 of the Civil Code is amended to read:

1697. A contract not in writing may be ~~altered~~ *modified* in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the ~~new alteration~~ *modification*.

**Comment.** Section 1697 is amended to substitute "modification" for "new alteration" to conform with the terminology used in new Section 1698. See *Recommendation Relating to Oral Modification of Written Contracts*, 13 Cal. L. Revision Comm'n Reports 301 (1976).

#### Civil Code § 1698 (repealed)

Sec. 3. Section 1698 of the Civil Code is repealed.

~~1698. A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.~~

**Comment.** Former Section 1698 is superseded by new Section 1698.

**Civil Code § 1698 (added)**

Sec. 4. Section 1698 is added to the Civil Code, to read:  
1698. (a) A contract in writing may be modified by a contract in writing.

(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.

(c) A contract in writing may be modified by an oral agreement supported by new consideration to the extent that the oral agreement is executed by the party seeking enforcement of the modification.

(d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a condition of a written contract, or oral independent collateral contracts.

**Comment.** Section 1698 states rules concerning modification of a written contract. See *Recommendation Relating to Oral Modification of Written Contracts*, 13 Cal. L. Revision Comm'n Reports 301 (1976). Subdivisions (a) and (b) continue the substance of former Section 1698. Subdivision (c) codifies the rule in *D.L. Godbey & Sons Constr. Co. v. Deane*, 39 Cal.2d 429, 246 P.2d 946 (1952). See also *Raedeke v. Gibraltar Sav. & Loan Ass'n*, 10 Cal.3d 665, 517 P.2d 1157, 111 Cal. Rptr. 693 (1974).

The rules provided by Section 1698 merely describe cases where proof of an oral modification is permitted; these rules do not, however, affect in any way the burden of the party claiming that there was an oral modification to produce sufficient evidence to persuade the trier of fact that the parties actually did make an oral modification of the contract. The rules stated in Section 1698 apply whether or not the contract expressly provides that modifications must be in writing, but nothing in the section excuses compliance with any other statutory requirements.

Subdivision (d) makes clear that Section 1698 does not affect related principles of law. See *Wade v. Markwell & Co.*, 118 Cal. App.2d 410, 420-421, 258 P.2d 497, 502-503 (1953) (estoppel); *Pearsall v. Henry*, 153 Cal. 314, 95 P. 154 (1908) (oral novation and substitution of a new agreement); *Treadwell v. Nickel*, 194 Cal.

243, 258-261, 228 P. 25, 32-33 (1924) (rescission of a written contract by an oral agreement); *Bardeen v. Commander Oil Co.*, 40 Cal. App.2d 341, 104 P.2d 875 (1940) (waiver of a condition of a written contract); and *Lacy Mfg. Co. v. Gold Crown Mining Co.*, 52 Cal. App.2d 568, 577-578, 126 P.2d 644, 649-650 (1942) (oral independent collateral contract). These principles may be applied as well to permit oral modification where the written contract expressly provides that modifications must be in writing. See *MacIsaac & Menke Co. v. Cardox Corp.*, 193 Cal. App.2d 661, 14 Cal. Rptr. 523 (1961); *1st Olympic Corp. v. Hawryluk*, 185 Cal. App.2d 832, 8 Cal. Rptr. 728 (1960); *Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council*, 128 Cal. App.2d 676, 276 P.2d 52 (1955). Compare Com. Code § 2209(2), (4), (5).

## Bill No. 2

*An act to amend Section 2209 of the Commercial Code, relating to modification of contracts.*

*The people of the State of California do enact as follows:*

### Commercial Code § 2209 (amended)

Section 1. Section 2209 of the Commercial Code is amended to read:

2209. (1) An agreement modifying a contract within this division needs no consideration to be binding.

~~(2) A written contract within this division may only be modified by a written agreement or by an oral agreement fully executed by both parties.~~

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

(3) The requirements of the statute of frauds section of this division (Section 2201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subdivision (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by

reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

**Comment.** Subdivision (2) of Section 2209 is amended to conform to the language of the Uniform Commercial Code.





# A STUDY RELATING TO MODIFICATION OF WRITTEN CONTRACTS IN CALIFORNIA \*

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## Modification of Written Contracts in California\*

By RICHARD TIMBIE\*\*

**A**T common law, the parol evidence rule bars evidence of a prior or contemporaneous oral agreement to alter the terms of an unambiguous written contract. A written contract can, however, be rescinded or modified by a subsequent oral contract unless the subject matter of the contract as modified is within the statute of frauds.<sup>1</sup> Even an express provision in the written contract that it can be modified only in writing will not bar oral modification, for such a provision can be expressly or impliedly altered, waived, or revoked by an oral agreement.<sup>2</sup> California is one of a very few states that has rejected the common law rule and bars enforcement of executory oral alterations of written contracts.<sup>3</sup>

The California statute, Civil Code section 1698,<sup>4</sup> was enacted in 1872 as part of the first California Civil Code.<sup>5</sup> Like most of that

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\* This article was prepared to provide the California Law Revision Commission with background information for its study of this subject. The opinions, conclusions, and recommendations of the author do not necessarily represent or reflect the opinions, conclusions, or recommendations of the commission.

\*\* J.D., 1971, Stanford Law School.

1. 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1828 at 5178-79 (rev. ed. 1938) [hereinafter cited as WILLISTON]; see 6 A. CORBIN, CONTRACTS § 1294 at 201-05 (1962) [hereinafter cited as CORBIN]; RESTATEMENT OF CONTRACTS § 407 (1932).

2. 6 CORBIN, *supra* note 1, § 1295 at 205-08; 6 WILLISTON, *supra* note 1, § 1828 at 5179.

3. Four other states have adopted versions of the California rule. MONT. REV. CODES ANN. § 13-907 (1947); N.D. CENT. CODE § 9-09-06 (1959); OKLA. STAT. ANN. tit. 15, § 237 (1966); S.D. COMP. LAWS ANN. § 53-8-7 (1967). A New York statute and the Uniform Commercial Code have adopted a rule barring oral modification only pursuant to an express provision in a written contract requiring modification or rescission to be in writing. See N.Y. GEN. OBLIGATIONS LAW § 15-301 (McKinney 1964); UNIFORM COMMERCIAL CODE § 2-209.

4. CAL. CIV. CODE § 1698 (West 1954).

5. CAL. CIV. CODE ANN. § 1698 (1872).

code, section 1698 was derived from David Dudley Field's proposed New York Civil Code.<sup>6</sup> However, the analogous Field Code provision was merely a codification of the common law rule limiting modification of contracts under seal:

A contract under seal may be altered by an agreement under seal, or by an executed agreement without seal; and not otherwise, except as to time of performance, which may be extended by any form of agreement.<sup>7</sup>

The Field Code provision governing modification of unsealed contracts restated the common law rule validating modification by oral or written contract.<sup>8</sup> Since the 1872 California Civil Code abolished the distinction between sealed and unsealed instruments,<sup>9</sup> the common law rule limiting modification only of sealed contracts was inapplicable in California. Rather than apply to all written contracts the common law rule validating oral modification of unsealed written contracts, the California Code Commissioners adopted a rule similar to that which has governed sealed contracts under the common law:

1698. A contract in writing may be altered by a contract in writing, or by an executed oral agreement; and not otherwise.<sup>10</sup>

The code commissioners made no attempt to articulate their reasons for adopting this unprecedented rule,<sup>11</sup> and the few commentators who have discussed the California rule have not attempted to evaluate it in policy terms.<sup>12</sup> It is, however, possible to identify three general policies that might be furthered by a rule restricting oral modification of written contracts. First, such a rule tends to alleviate the danger that a party will attempt to avoid his duties under a written contract

6. *See Commissioners of the Code, THE CIVIL CODE OF THE STATE OF NEW YORK* (1865).

7. *Id.* § 843 (footnotes omitted).

8. *See id.* § 842.

9. CAL. CIV. CODE § 1629 (West 1954); *cf.* CAL. CODE CIV. PROC. § 1932 (West 1955).

10. CAL. CIV. CODE § 1698 (West 1954). As originally enacted in 1872, the section ended with the phrase "except as to the time of performance, which may be extended by any form of agreement." This qualification, taken verbatim from section 843 of the Field Code (*see text accompanying note 7 supra*), was deleted by an amendment in 1874. AMENDMENTS TO CAL. CODES 1873-74, at 862.

11. *See CAL. CIV. CODE ANN.* § 1698, Note (1872). The Commissioners' Note to section 1698 was taken largely from the footnotes to Field Code section 843, and it refers to the statute as a liberalization of the rule formerly governing sealed contracts rather than as a limitation on modification of unsealed written contracts.

12. *But see Macaulay, Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 827-32 (1961) (evaluating in policy terms certain cases interpreting section 1698).

or justify his altered performance through a fraudulent allegation of an oral agreement to modify the written contract. Second, to the extent that the rule induces the parties to written contracts to commit their modifications to writing, it increases certainty and clarity in contractual relations and tends to reduce the incidence of litigation over the existence and terms of such modifications. When a party signs a written modification, he is more likely to reflect on its terms and to consider himself bound by it than when he orally assents to a proposed modification. More importantly, the potential for misunderstandings and disputes over the terms of such agreements is reduced when the modification is memorialized in a writing to which the parties can refer for clarification of their rights and duties. Third, the task of the courts in determining the rights and duties of the parties once litigation arises is simpler and more efficient when a modification agreement is written than when it is oral. Much, if not all, of the evidence introduced to prove the existence and terms of an alleged oral agreement will often consist of the conflicting, self-serving, parol claims of the parties.

There are, on the other hand, sound policy considerations against a strict rule barring oral modification. Such a rule can be an instrument for perpetrating fraud when one party induces another to perform or otherwise change his position in reliance on an oral modification and then avoids his reciprocal duties by invoking the rule barring oral modification. Even in the absence of fraud, the justifications for the rule assume that its existence will cause parties to a written contract to put their modification agreements in writing. Nevertheless, experience has proved that despite section 1698 parties make oral agreements altering their written contracts and perform in reliance on those oral agreements. When such agreements are supported by consideration and otherwise valid, refusal to enforce them conflicts with the general principles of freedom of contract—that the law will enforce bargained exchanges freely made by private individuals. Moreover, once a party has performed in reliance on such an oral modification, refusal to enforce it conflicts with a fundamental principle of equity by causing an unjust loss to the party who has performed and a windfall to the party who is allowed to avoid his obligations under the oral agreement or demand performance pursuant to the original written contract.

The history of the California courts' interpretation and application of section 1698 has reflected the tension between the policies justifying the rule barring oral modification and the policies against applying

the rule in particular classes of cases. When the desirable effects of the rule are not offset by countervailing policy considerations, the courts have interpreted it liberally and applied it consistently. In classes of cases in which the rule serves no purpose or in which its application would result in injustice, the courts have avoided its operation by stretching the facts of the cases to take the alleged agreement out of section 1698, by stretching equitable doctrines of waiver and estoppel to avoid the bar of section 1698, or by interpreting the statute not to apply. This process of judicial avoidance and interpretation entailed a great deal of litigation over the meaning of section 1698 and the scope and substance of the exceptions to it, but it has now resulted in a set of well-settled rules governing the modification of written contracts.

The purpose of this article is to evaluate California law governing alteration of written contracts. It will first survey the judicial interpretation of section 1698 in order to ascertain the scope and content of the California rule and the degree to which the California rule, as interpreted by the courts, differs from the common law. It will then discuss two other rules that have been formulated to limit oral modification of written contracts: section 2—209 of the Uniform Commercial Code (UCC), which invalidates oral modifications only if the parties include a provision in the original written contract requiring modification to be made in writing, and section 2209 of the California Commercial Code<sup>13</sup> (California's version of the UCC) which replaces the Uniform Commercial Code rule with a rule substantially similar to section 1698 but attempts to overrule one judicially formulated exception to section 1698. Finally, section 1698 will be evaluated in comparison with the common law, UCC section 2—209, and California Commercial Code section 2209 to determine what changes should be made in California law in order to best achieve clarity and consistency, to further the policies behind the law's preference for written agreements, and to avoid sanctioning fraud or requiring unjust results when a party has relied to his detriment on an oral modification.

### **Judicial Interpretation and Application of Section 1698**

Section 1698 purports to govern the enforceability of all attempts to modify a written contract by a subsequent agreement.<sup>14</sup> Both the

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13. CAL. COMM. CODE § 2209 (West Supp. 1971).

14. Modification of oral contracts is governed by section 1697 of the Civil Code, which validates all written or oral modification agreements whether or not they are supported by consideration. CAL. CIV. CODE § 1697 (West 1954).

policies involved in a given class of cases, which have affected the courts' interpretation of and willingness to apply the statute, and the result called for by the statute depend upon three factors: whether the modification agreement is written or oral, whether or not it is supported by consideration, and whether one or both parties has rendered part or full performance pursuant to the modification agreement. The scope and content of the statute is, therefore, most clearly ascertainable when it is analyzed in terms of these three factors.

### Modifications in Writing

Section 1698 validates executory alteration of a written contract only by a "contract" in writing.<sup>15</sup> The California Supreme Court has interpreted this language literally, holding that an executory written modification must be signed by the party against whom enforcement is sought and must meet the requirements of a valid contract.<sup>16</sup> The most significant ramification of this interpretation is the applicability of the "pre-existing duty rule:" The modification agreement must be supported by new consideration, not simply by the pre-existing duty of a party under the original contract.<sup>17</sup> Accordingly, an executory written agreement to pay more for the same performance called for in the written contract or to render the same performance in return for reduced performance by the other party is unenforceable. However, when both parties' rights and duties are altered by the agreement or when the agreement substitutes one form of performance for another, the surrender of rights and termination of obligations under the written contract constitutes sufficient consideration to render the modification enforceable.<sup>18</sup>

The pre-existing duty rule is consistent with the common law, which treats an executory agreement not supported by consideration as an executory gift.<sup>19</sup> Absent detrimental reliance, executory gifts are unenforceable, whether or not they are in writing.<sup>20</sup> Further, although the issue has not arisen in any reported case, an executed written modification agreement would clearly be as enforceable as an executed oral agreement irrespective of the presence or absence of consideration.

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15. See text accompanying note 10 *supra*.

16. *Main St. & Agricultural Park R.R. v. Los Angeles Traction Co.*, 129 Cal. 301, 305, 61 P. 937, 938-39 (1900).

17. *Id.*

18. *D.L. Godbey & Sons Constr. Co. v. Deane*, 39 Cal. 2d 429, 246 P.2d 946 (1952).

19. See *Julian v. Gold*, 214 Cal. 74, 79, 3 P.2d 1009, 1011 (1931).

20. See 1 CORBIN, *supra* note 1, §§ 4, 114.

## Oral Modifications

### *Fully Executed Oral Agreements*

Section 1698 validates two means of modifying a written contract: by a "contract in writing" and by an "executed oral agreement." The California courts have interpreted the use of the word "agreement" in the latter phrase, as juxtaposed to "contract" in the former, to imply that an executed modification need not constitute a valid contract in order to be enforceable; in particular, such an agreement need not be supported by consideration.<sup>21</sup>

When both parties have performed pursuant to an oral modification agreement, whether or not supported by consideration, neither party can enforce any provision of the original written contract that is inconsistent with the executed alteration.<sup>22</sup> In *Scott v. TraveLodge Corporation*,<sup>23</sup> for example, the parties to a lease orally agreed to reduce the rent payable by TraveLodge in light of the lessor's breach of various covenants in the lease obligating the lessor to build and maintain a bar and restaurant adjacent to the property leased by TraveLodge. Because TraveLodge had paid and the landlord had accepted the reduced rent called for by the oral modification, the agreement was executed and barred both the lessor's suit for the difference between the rent called for in the original lease and the reduced rent actually paid and the lessee's counterclaim for the damages arising out of the lessor's breach of his covenant to build and maintain the restaurant.

Only the oral agreement, not necessarily the written contract as modified, need be executed to render the modification enforceable.<sup>24</sup> Thus, in *Waldteufel v. Sailor*<sup>25</sup> a real estate broker was due an \$855 commission under a written brokerage contract for finding a buyer for defendant's land. He orally agreed to accept instead \$1,000 in \$100 installments, payable as the buyer made payments to the defendant for the land. After two installments had been paid the buyer

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21. *Julian v. Gold*, 214 Cal. 74, 76, 3 P.2d 1009, 1010 (1931); *Treadwell v. Nickel*, 194 Cal. 243, 258-59, 228 P. 25, 32 (1924); see *Jewell v. Colonial Theater Co.*, 12 Cal. App. 681, 684, 108 P. 527, 528 (1910); *Hause v. Phillips*, 2 Cal. App. 15, 17, 82 P. 1127, 1128 (1905).

22. *E.g.*, *Fidler v. Schiller*, 212 Cal. App. 2d 569, 573-74, 28 Cal. Rptr. 48, 51 (1963); *Bleakley v. Carnes*, 209 Cal. App. 2d 577, 588-89, 26 Cal. Rptr. 115, 122 (1962); *Keeble v. Brown*, 123 Cal. App. 2d 126, 131-32, 266 P.2d 569, 573 (1954); *Roberts v. Wachter*, 104 Cal. App. 2d 271, 279-80, 231 P.2d 534, 539 (1951).

23. 265 Cal. App. 2d 881, 71 Cal. Rptr. 547 (1968).

24. See *Platt v. Butcher*, 112 Cal. 634, 44 P. 1060 (1896).

25. 62 Cal. App. 2d 577, 144 P.2d 894 (1944) (alternative holding).



defaulted. The broker sued for the remainder of the commission due under the written contract, and the court affirmed a judgment for the defendant on the ground that the oral modification had been fully executed and barred enforcement of the written contract.

The California rule enforcing an executed oral alteration of a written contract whether or not supported by consideration is consistent with the common law rules. An oral contract to alter the terms of a written contract is enforceable at common law whether or not it is executed.<sup>26</sup> In addition, a gratuitous oral agreement that has been fully performed constitutes an executed gift, which is enforceable at common law.<sup>27</sup>

### *Wholly Executory Oral Agreements*

When neither party has rendered performance pursuant to an alleged oral agreement to modify a written contract, the agreement is unenforceable under California law irrespective of the presence or absence of consideration.<sup>28</sup> Nevertheless, if one party, although he has not rendered performance pursuant to the alleged oral agreement, has materially changed his position or otherwise relied on the other party's oral promise, the party attempting to avoid the oral agreement may be estopped to raise its invalidity under section 1698.<sup>29</sup>

Insofar as it bars enforcement of executory gratuitous oral alterations, California law accords with the common law.<sup>30</sup> Insofar as it invalidates executory oral agreements supported by consideration, however, the California rule differs from the common law, which enforces such contracts unless they are barred by the Statute of Frauds.<sup>31</sup>

### *Oral Modifications Fully Performed in Part*

When an oral agreement modifying a written contract is to be performed by the parties in installments or in severable units—for ex-

26. See note 1 & accompanying text *supra*.

27. See notes 19-20 & accompanying text *supra*.

28. *E.g.*, *Molera v. Cooper*, 173 Cal. 259, 261-62, 160 P. 231, 232 (1916); *Goodman v. Citizens Life & Cas. Ins. Co.*, 253 Cal. App. 2d 807, 817, 61 Cal. Rptr. 682, 688 (1967); *Middlecamp v. Zumwalt*, 100 Cal. App. 715, 721-23, 280 P. 1003, 1006 (1929).

29. *Wagner v. Shapona*, 123 Cal. App. 2d 451, 459-60, 267 P.2d 378, 383 (1954), *disapproved on other grounds*, *Neff v. Ernst*, 48 Cal. 2d 628, 634, 311 P.2d 849, 853 (1957); *Wade v. Maxwell & Co.*, 118 Cal. App. 2d 410, 421, 258 P.2d 497, 503 (1953).

30. See note 20 & accompanying text *supra*.

31. See note 1 & accompanying text *supra*.

ample, a lease or employment contract calling for periodic payment of rent or salary, a loan contract or sales contract calling for payment in installments, or an output or requirements contract calling for delivery and payment in installments—a dispute may arise as to the enforceability of the oral agreement after part of the agreement has been performed by both parties. Two early California Supreme Court cases held such agreements, supported by consideration, are enforceable insofar as they have been performed but invalid insofar as they are executory. In dicta, however, these cases indicated that, in the absence of consideration for the modification, such agreements are invalid both as to the executed installments and as to the executory installments.<sup>32</sup> The holding in those cases has been followed consistently in subsequent cases involving oral modifications supported by consideration and fully performed in part.<sup>33</sup> The dicta, on the other hand, gave rise to a great deal of litigation and confusion until they were rejected over twenty-five years later. In some cases the courts found that the gratuitous modifications which had been fully performed in part were wholly unenforceable, thus allowing the promissor<sup>34</sup> to enforce the original written contract both as to the executed installments and as to the executory installments.<sup>35</sup> In other cases involving a gratuitous agreement to accept reduced payment under a written contract, the courts found the executed installments enforceable by characterizing the oral modification as a waiver. Acceptance of the reduced payments by the promissor constituted a waiver of his right to full payment under the terms of the written contract; as to the past installments, the waiver was executed and therefore irrevocable, but as to the future installments, the waiver was revocable since it was not supported by consideration.<sup>36</sup> One other case arrived at the same re-

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32. *Sinnige v. Oswald*, 170 Cal. 55, 57, 148 P. 203, 204 (1915); *In re McDougald's Estate*, 146 Cal. 196, 199, 79 P. 875, 876 (1905).

33. *E.g.*, *Eluschuck v. Chemical Eng'rs Termite Control, Inc.*, 246 Cal. App. 2d 463, 469, 54 Cal. Rptr. 711, 715 (1966); *Taylor v. Taylor*, 39 Cal. App. 2d 518, 522, 103 P.2d 575, 577 (1940); *Anderson v. Adler*, 42 Cal. App. 776, 779, 184 P. 42, 43 (1919).

34. A gratuitous modification is more appropriately characterized as a unilateral promise than an "agreement" since, by definition, the duties of only one party are altered by the modification. See text accompanying notes 47-50 *infra*. In speaking of such modifications, the term "promissor" will be used to denote the party who assumes a new duty or gives up a right, and the other party will be referred to as the "promisee."

35. *Wayland v. Latham*, 89 Cal. App. 55, 63-64, 264 P. 766, 770 (1928); *Gordon v. Green*, 51 Cal. App. 765, 768, 197 P. 955, 956 (1921).

36. *Alden v. Mayfield*, 164 Cal. 6, 9, 127 P. 45, 47 (1912); *Thompson v. Gorner*, 104 Cal. 168, 170, 37 P. 900, 901 (1894).

sult by characterizing the executed portion of the oral agreement as a severable agreement which had been fully executed and was, therefore, enforceable.<sup>37</sup>

In 1931, in *Julian v. Gold*,<sup>38</sup> the California Supreme Court abandoned the waiver rationale and adopted a rule based on an interpretation of section 1698. In *Julian* a landlord had orally agreed to reduce the rent on business property leased by the defendant. After the lessor had paid and the landlord had accepted the reduced monthly payments for two of the three years remaining under the written lease, the landlord brought suit to collect the difference between the rent paid and the rent due under the written contract. The trial court awarded a verdict to the plaintiff on the ground that the oral agreement was not supported by consideration and had not been fully executed. The supreme court reversed in an opinion which does not even refer to the fact that the oral agreement had been performed for only two of the three years remaining on the lease; instead, the court simply assumed that the fully performed portion of an oral modification constitutes an executed oral agreement under section 1698. Most of the opinion is devoted to a discussion of the issue of the necessity for consideration to validate executed oral agreements. After dismissing as dicta the prior statements that consideration is required, the court held that oral modifications, insofar as they have been executed, are enforceable irrespective of the presence or absence of consideration.<sup>39</sup>

In *Julian* the enforceability of the oral agreement for the portion of the contract that had not yet been performed was not at issue, but the language of the opinion implied that such an agreement is unenforceable insofar as it is executory. A subsequent case, *Stoltenberg v. Harveston*,<sup>40</sup> explicitly adopted such a rule:

In so far as the payments of rent made under the oral agreement of the parties are concerned, there can be no question that as to those payments actually made and accepted as rent in full for the period covered by them, the oral agreement reducing

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37. *Wright v. Beeson*, 159 Cal. 133, 137-38, 112 P. 1091, 1092 (1911).

38. 214 Cal. 74, 3 P.2d 1009 (1931), noted in Comment, 20 CALIF. L. REV. 552 (1932).

39. *Id.* at 76, 3 P.2d at 1010. The court alternatively based its holding on California Code of Civil Procedure § 2076 (West 1955) which provided: "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amounts, terms, or kind which he requires, or be precluded from objecting afterwards." See 214 Cal. at 79, 3 P.2d at 1011.

40. 1 Cal. 2d 264, 34 P.2d 472 (1934).

the rent was executed and no claim for the recovery of rent during the period covered by said payments can be maintained. (*Julian v. Gold . . .*) As to the monthly payments of rent due under said lease and not actually paid by the lessees, a different rule governs. As to such payments the oral agreement to accept amounts less than those called for in the written lease had not been executed.<sup>41</sup>

The *Julian-Stoltenberg* rule has been followed consistently in reported cases involving oral modifications fully performed in part, whether gratuitous<sup>42</sup> or supported by consideration,<sup>43</sup> but three qualifications should be considered in conjunction with the rule. First, the rule is not applicable to installments or portions of the contract that have not been performed in conformity with the oral modification. Thus, when installments have come due under the oral agreement but they have not been paid or an amount less than was due under the oral agreement has been paid, the modification is not executed as to those installments, and the promisor can demand payment of the full amount called for in the written contract.<sup>44</sup> Second, when the oral modification is supported by consideration and only one party has fully performed one or more installments pursuant to the oral agreements, those installments may be held to be executed under a rule to be considered in the following section.<sup>45</sup> Third, when a party has materially changed his position in reliance on the oral agreement, the court may invoke the doctrine of estoppel to bar the other party from asserting the invalidity of the executory portion of the oral modification.<sup>46</sup>

The *Julian-Stoltenberg* rule conforms to the common law as applied to gratuitous agreements, which are enforceable as gifts only insofar as they are executed. It departs from the common law only in refusing to enforce the executory portion of oral modifications supported by consideration.

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41. *Id.* at 266, 34 P.2d at 472.

42. *E.g.*, *California Canning Peach Growers v. Williams*, 11 Cal. 2d 221, 230, 78 P.2d 1154, 1159 (1938); *Kaliterna v. Wright*, 94 Cal. App. 2d 926, 934-35, 212 P.2d 32, 37 (1949); *Elliot v. Agajanian*, 19 Cal. App. 2d 244, 250, 64 P.2d 1159, 1162 (1937).

43. See cases cited in note 33 *supra*.

44. *See, e.g.*, *Cirimele v. Shinazy*, 124 Cal. App. 2d 46, 49-50, 268 P.2d 210, 212-13 (1954); *Rogers v. Rogers*, 49 Cal. App. 2d 366, 369-70, 121 P.2d 819, 821 (1942); *Western Mach. Co. v. Graetz*, 42 Cal. App. 2d 296, 299, 108 P.2d 711, 713 (1940).

45. See text accompanying notes 74-85 *infra*.

46. *See, e.g.*, *Wilson v. Bailey*, 8 Cal. 2d 416, 422-24, 65 P.2d 770, 772-73 (1937); *Wagner v. Shapona*, 123 Cal. App. 2d 451, 459-60, 267 P.2d 378, 383 (1954); *Panno v. Russo*, 82 Cal. App. 2d 408, 412, 186 P.2d 452, 454 (1947).

*Oral Agreements Performed by Only One Party*

The most controversial issue arising under section 1698, and that which has engendered the greatest amount of litigation, is the enforceability of oral modifications that have been performed by only one party. Performance by only one party presents no new analytic issue when the modification is gratuitous. A gratuitous oral agreement, by definition, alters the duties of only one party; if the agreement altered the duties of both parties, the surrender of rights and assumption of duties would constitute consideration.<sup>47</sup> Thus, execution of a gratuitous agreement entails performance by only one party—the promisor.<sup>48</sup> For example, if *A* and *B* have a written contract and *A* orally promises to pay more for *B*'s performance under the contract or to accept reduced performance by *B*, only *A*, the promisor, can execute the agreement. Performance by *B* would be referable only to his obligations under the written contract since he has assumed no new duties under the oral agreement. The modification, as opposed to the contract as modified, is wholly executory until *A* has paid the increased compensation or accepted the decreased performance by *B* and is fully executed when *A* has done so. Although courts have generally not recognized the logical inconsistency in speaking of performance by the promisee, they have properly held that performance by the promisor renders a gratuitous oral agreement enforceable<sup>49</sup> while performance by the promisee does not.<sup>50</sup>

When an oral modification is supported by consideration, both parties must necessarily have assumed some character of duty not called for under the written contract.<sup>51</sup> The agreement, therefore, is no longer wholly executory when one party has performed, but it is not fully executed until both parties have performed. Section 1698 validates only executed oral agreements, and Civil Code section 1661, enacted at the same time as section 1698, defines "executed": "An executed

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47. See note 18 & accompanying text *supra*.

48. See note 34 *supra*.

49. *E.g.*, see cases cited in note 42 *supra*.

50. See, *e.g.*, *Goodman v. Citizens Life & Cas. Ins. Co.*, 253 Cal. App. 2d 807, 817, 61 Cal. Rptr. 682, 688 (1967); *Nicholson v. Smith*, 98 Cal. App. 2d 163, 164, 219 P.2d 39, 40 (1950); *Southern Pac. Milling Co. v. Billiwack Stock Farm, Ltd.*, 50 Cal. App. 2d 79, 85, 122 P.2d 650, 653 (1942); *Columbia Cas. Co. v. Lewis*, 14 Cal. App. 2d 64, 72, 57 P.2d 1010, 1013 (1936); *Harvey v. DeGarmo*, 129 Cal. App. 487, 492-93, 18 P.2d 971, 973 (1933); *Harbor Constr. Co. v. Walters*, 101 Cal. App. 470, 477-78, 281 P. 1062, 1065 (1929).

51. Even when the agreement calls for substitute performance by *A* in return for the same performance by *B* that is called for in the written contract, *B* has assumed a duty to accept the substitute performance.

contract is one, the object of which is fully performed. All others are executory."<sup>52</sup> Read together, these statutes appear to preclude enforcement of oral modifications until the agreement has been fully performed by both parties.

In 1952, in *D.L. Godbey & Sons v. Deane*,<sup>53</sup> the California Supreme Court announced the rule, purported to be an interpretation of section 1698, that an oral agreement altering the terms of a written contract is executed, and therefore enforceable, if it is supported by consideration and has been performed by one party. Commentators have generally regarded the *Godbey* rule as a departure from prior law that oral agreements must be fully performed by both parties in order to be executed.<sup>54</sup> A careful survey of the cases prior to *Godbey* reveals that the rule was not a departure from existing law but simply a rationalization of it. Despite dicta in numerous cases that an oral modification is unenforceable until fully performed by both parties,<sup>55</sup> no reported California case arriving at a result inconsistent with the *Godbey* rule could be found by this author. Rather, California courts have consistently been unwilling to invalidate an oral modification supported by consideration when one party has performed in reliance on the oral agreement and refusal to enforce it would result in either a loss to the party seeking to enforce the agreement or a windfall to the other.<sup>56</sup>

Case law prior to *Godbey*. Several cases prior to *Godbey* enforced such an oral modification by ignoring the fact that one party

52. CAL. CIV. CODE § 1661 (West 1954).

53. 39 Cal. 2d 429, 246 P.2d 946 (1952).

54. See 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* § 319 at 345 (1960); Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 828 (1961); 40 CALIF. L. REV. 599 (1952); 4 HASTINGS L.J. 59 (1952). See also text accompanying note 109 *infra*.

55. *E.g.*, *Stoltenberg v. Harveston*, 1 Cal. 2d 264, 266-67, 34 P.2d 472, 472-73 (1934); *Pearsall v. Henry*, 153 Cal. 314, 325, 95 P. 154, 157 (1908); *Henehan v. Hart*, 127 Cal. 656, 658, 60 P. 426, 427 (1900); *Walther v. Occidental Life Ins. Co.*, 40 Cal. App. 2d 160, 166, 104 P.2d 551, 554 (1940); *Klein Norton Co. v. Cohen*, 107 Cal. App. 325, 330-31, 290 P. 613, 616 (1930).

56. The sole exception to this generality is a line of cases involving brokerage contracts for the sale of real property. The Statute of Frauds requires such agreements to be in writing—see CAL. CIV. CODE § 1624 (West 1954)—and when an oral modification is alleged which is inconsistent with a written brokerage contract or purports to revive or extend such a contract beyond its termination date, courts have refused to enforce the alleged oral modification despite performance by the broker. See *Platt v. Butcher*, 112 Cal. 634, 636, 44 P. 1060 (1896); *Boyd v. Big Tree Ranch Co.*, 22 Cal. App. 108, 110, 133 P. 623, 624 (1913); *Beaver v. Continental Bldg. & Loan Ass'n*, 15 Cal. App. 190, 194, 116 P. 1105, 1106 (1911).

had yet to perform and announcing the result that the agreement was executed.<sup>57</sup> These cases all had several elements in common: the performance rendered was markedly different from that called for by the written contract and was referable to the alleged agreement; performance constituted consideration for the agreement; the performance demanded of the other party was a cash payment pursuant to the modified contract; and the court's refusal to enforce the oral modification would have resulted in a substantial windfall for the other party. These cases, in which the court avoided a manifestly unjust result by simply announcing a conclusion without giving any justification or support, constitute only a small fraction of the cases that reached a result consistent with the *Godbey* rule. In most such cases, the court expressly or impliedly assumed that section 1698 requires an oral modification to be performed on both sides in order to be enforceable but avoided invalidating the agreement by applying and expanding the mitigating doctrines of novation and substitution, collateral contract, and estoppel to take the case out of section 1698.

Prior to *Godbey*, the most frequently employed method of enforcing an oral modification fully performed by one party, despite section 1698, was to interpret the oral agreement as a novation or an oral termination of the written contract and the substitution of an oral contract. Since section 1698 applies only to modifications of written contracts, it has been held not to affect the common law rule that a written contract, whether or not it is within the Statute of Frauds, can be rescinded or terminated orally.<sup>58</sup> In *Pearsall v. Henry*,<sup>59</sup> the California Supreme Court held that an oral agreement is enforceable if, instead of modifying a prior written contract, it terminates the written contract and substitutes the terms of a new oral contract. Whether the oral agreement constitutes a modification of the written contract or termination of the written contract and a substitution of the oral contract was held to be a question of fact that depends on the intent of the parties at the time of the oral agreement.<sup>60</sup> The *Pearsall* rule,

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57. *Roberts v. Wachter*, 104 Cal. App. 2d 271, 280, 231 P.2d 534, 539 (1951); *Nuttman v. Chais*, 101 Cal. App. 2d 476, 478, 225 P.2d 660, 661 (1950); *Estate of Morrison*, 68 Cal. App. 2d 280, 285, 156 P.2d 473, 475-76 (1945); *State Fin. Co. v. Hershel Cal. Fruit Prods. Co.*, 8 Cal. App. 2d 524, 529, 47 P.2d 821, 823 (1935); see *Wood v. Nelson*, 220 Cal. 139, 141, 29 P.2d 854, 855 (1934); *Anderson v. Johnston*, 120 Cal. 657, 659, 53 P. 264, 264-65 (1898); *Moore v. Borgfeldt*, 96 Cal. App. 306, 311, 273 P. 1114, 1117 (1929).

58. *McClure v. Alberti*, 190 Cal. 348, 350, 212 P. 204, 205 (1923).

59. 153 Cal. 314, 95 P. 154 (1908).

60. *Treadwell v. Nickel*, 194 Cal. 243, 259, 228 P. 25, 32 (1924).

therefore, meant that one could ascertain the enforceability of an oral agreement that was inconsistent with a prior written contract only through a lawsuit, and as a result, it engendered a great deal of litigation.<sup>61</sup>

In addition to causing litigation, the *Pearsall* rule provided courts with a ready means of avoiding the bar of section 1698 in cases in which one party had performed an oral modification. In some of the cases that enforced an oral agreement performed by one party as a novation or substituted contract, the written contract had expired by its own terms<sup>62</sup> or the parties clearly intended to terminate the written contract,<sup>63</sup> and in others the new agreement was so different from the written contract that an intent to abrogate the written contract could legitimately be inferred.<sup>64</sup> In many cases, however, the "substituted" oral agreement incorporated most of the terms of the written contract and could equally well have been characterized as an oral modification.<sup>65</sup> The distinguishing characteristic of these latter cases was not the character of the oral agreement, but the fact that one party had performed in reliance on the oral modification and his performance was inconsistent with the written contract and referable to the oral agreement. The courts assumed that section 1698 required full performance by both parties but, by interpreting the agreement as a novation or substitution, avoided inequity and arrived at a result consistent with the *Godbey* rule.<sup>66</sup>

Because section 1698 refers only to alteration of a written con-

61. See 6 CORBIN, *supra* note 1, § 1295, at 208-09.

62. *E.g.*, *Treat v. Ogden*, 56 Cal. App. 2d 70, 75, 132 P.2d 493, 495 (1942); see *McKeon v. Giusto*, 44 Cal. 2d 152, 280 P.2d 782 (1955).

63. *E.g.*, *Gottlieb v. Tait's Inc.*, 97 Cal. App. 235, 237-38, 275 P. 446, 447 (1929); *Roberts v. Mills*, 56 Cal. App. 556, 561, 205 P. 872, 874 (1922).

64. *E.g.*, *Martin v. Butter*, 93 Cal. App. 2d 562, 566, 209 P.2d 636, 638 (1949); *Arsenio v. Smith*, 50 Cal. App. 173, 175, 194 P. 756, 757 (1920); *Proud v. Strain*, 11 Cal. App. 74, 77, 103 P. 949, 950 (1909).

65. *E.g.*, *Pearsall v. Henry*, 153 Cal. 314, 317, 95 P. 194, 157 (1908); *Stockton Combined Harvester & Agricultural Works v. Glen Falls Ins. Co.*, 121 Cal. 167, 175, 53 P. 565, 569-70 (1898); *Tucker v. Schumacher*, 90 Cal. App. 2d 71, 75, 202 P.2d 327, 329 (1949); *Miles v. Zadow*, 87 Cal. App. 406, 409, 262 P. 396, 398 (1927); *Dugan v. Phillips*, 77 Cal. App. 268, 277, 246 P. 566, 569 (1926); *Producers Fruit Co. v. Goddard*, 75 Cal. App. 737, 755-57, 243 P. 686, 693 (1925); *Robinson v. Rispin*, 33 Cal. App. 536, 544-45, 165 P. 979, 982-83 (1917); *Credit Clearance Bureau v. George A. Hochbann Contracting Co.*, 25 Cal. App. 546, 547, 144 P. 315 (1914).

66. Since the *Gobey* case was decided, only two reported cases have relied on the novation or substitution rationale to enforce an oral agreement, and in those cases there was clear evidence of an intent to undertake a novation. *Realty Corp. of America v. Burton*, 162 Cal. App. 2d 44, 56, 327 P.2d 948, 955 (1958); *Bush v. Vernon*, 135 Cal. App. 2d 33, 37, 286 P.2d 903, 906 (1955).



tract, it constitutes no bar to the making and enforcement of collateral oral contracts that are not inconsistent with the prior written contract although they deal with the same subject matter. Thus, if a written contract contains a provision authorizing oral modification, a subsequent oral contract not inconsistent with the terms of the written contract is enforceable.<sup>67</sup> Similarly, if a written contract contains no express provision covering an element of a transaction, even if a term covering that matter might otherwise be implied, courts have held a collateral oral agreement to be enforceable whether or not it is consistent with the implied term. For example, if a written sales contract contains no price term, the court will normally imply an agreement to sell at the market price, but a collateral oral agreement to sell at a fixed price other than the market price is not barred by section 1698.<sup>68</sup> In a few cases prior to *Godbey*, the court applied an even broader interpretation of "collateral contract" in order to enforce oral modifications supported by consideration that had been performed by one party when the oral agreement could be construed to resolve an ambiguity in the written contract<sup>69</sup> or when the original contract indicated that the parties intended that it should be subject to modification.<sup>70</sup>

The doctrine of equitable estoppel is clearly applicable when a party has materially changed his position in reliance on an oral agreement in some way other than by performing pursuant to the agreement.<sup>71</sup> Estoppel has also been invoked to enforce oral agreements to extend time for performance or to waive a condition in a written contract when the party seeking to enforce the oral agreement alleges that he was able to perform pursuant to the written contract and would have done so but for the oral modification.<sup>72</sup> The doctrine of estoppel is directly in conflict with section 1698 when the alleged reliance is performance pursuant to an oral modification. If such performance will raise an estoppel to assert the invalidity of the oral agreement, then the requirement in section 1698 that oral modifications be executed becomes meaningless. Nonetheless, in cases prior to *Godbey* in which one party had rendered performance referable to an oral modification supported by consideration, the courts often relied on

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67. See, e.g., *Hunt v. Mahoney*, 82 Cal. App. 2d 540, 187 P.2d 43 (1947).

68. *Bare v. Richman & Samuels, Inc.*, 60 Cal. App. 2d 413, 417, 140 P.2d 895, 898 (1943).

69. *Katz v. Bedford*, 77 Cal. 319, 323, 19 P. 523, 525-26 (1888).

70. *Lacy Mfg. Co. v. Gold Crown Mining Co.*, 52 Cal. App. 2d 568, 577, 126 P.2d 644, 649 (1942).

71. See notes 29 & 46 & accompanying text *supra*.

72. *E.g., Bidegaray v. Ormaca*, 48 Cal. App. 665, 669, 192 P. 176, 178 (1920).

the doctrine of estoppel to avoid invalidating oral agreements that substantially modified the terms of prior written contracts.<sup>73</sup>

The Godbey rule. In *D.L. Godbey & Sons Construction Co. v. Deane*<sup>74</sup> Justice Traynor, writing for the majority of the California Supreme Court, validated the results of the prior cases decided on the grounds of novation, collateral contract, and estoppel but obviated the necessity for such mitigating doctrines in avoidance of section 1698 by interpreting the text of the statute to allow enforcement of oral modifications supported by consideration when performed by one party. The facts of the case and the reasoning of the opinion will be examined in detail since, in addition to supporting the contention that the court intended to clarify and rationalize, rather than change, the case law relating to section 1698, they shed light on the intended scope of the rule.

Godbey was a subcontractor who had contracted to pour the concrete foundation and retaining walls for a building being constructed by Deane, the prime contractor. Their written contract called for payment to be made at a rate of \$.76 per cubic foot, based on actual measurement of the forms, but the plan called for substantial pourings to be made outside the forms as well. Godbey alleged that, in order to avoid a dispute in the future, he and Deane orally agreed to modify the contract such that payment would be based on the contract rate of \$.76 per cubic foot but would be computed from the quantity of concrete actually delivered to the jobsite. Under the modified contract, Godbey was to furnish Deane each day with copies of the delivery tickets accompanying the deliveries of concrete to the jobsite. Godbey performed the contract and furnished the delivery tickets daily. Deane then paid him under the terms of the original contract for the amount poured within the forms, and Godbey sued for the additional amount due under the oral modification. Deane's demurrer was sustained by the trial court on the ground that the oral agreement was not executed and was, therefore, unenforceable under section 1698. The California Supreme Court reversed.

Acknowledging that a gratuitous oral agreement to pay increased compensation for the performance called for under the written contract would be unenforceable unless executed by the promisor, Justice Traynor first discussed the issue of consideration for the oral modifica-

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73. *E.g.*, *Haumeder v. Lipsett*, 90 Cal. App. 2d 167, 175-76, 202 P.2d 819, 823 (1949); *Fuller v. Mann*, 119 Cal. App. 568, 573-74, 6 P.2d 999, 1001 (1932); *Gribbling v. Bohan*, 26 Cal. App. 771, 773, 148 P. 530, 531 (1915).

74. 39 Cal. 2d 429, 246 P.2d 946 (1952).

tion. He found that the agreement was supported by sufficient consideration:

Since the modification was made before performance was started, the substitution of the new rights and duties based upon the new method of measurement was adequate consideration for the relinquishment of the reciprocal rights of the parties under the old. . . . Moreover, plaintiff promised to provide daily reports, and both parties were relieved of the necessity of computing the volume of the forms from linear measurements.<sup>75</sup>

Having found that the oral agreement met the requisites of a valid contract, the court could have enforced it by finding a termination of the written contract and a substitution of the oral contract.<sup>76</sup> There was also adequate precedent for a finding that the oral agreement constituted a collateral contract to resolve an ambiguity or mistake in the written contract,<sup>77</sup> which had failed to provide for the fact that some of the pourings would be outside the forms. Justice Traynor, however, made no mention of these exceptions and proceeded to base his holding squarely on an interpretation of the term "executed oral agreement" in the text of section 1698. He noted that several cases had stated in dicta that an oral alteration is not executed until fully performed by both parties, but he found the proper rule in the results, rather than the rationales, of the relevant cases:

[I]n cases in which there was adequate consideration for the oral modification, and in which the party relying thereon had fully performed, the contract has been enforced as modified whether or not the other party had performed on his part.<sup>78</sup>

In support of this statement, Justice Traynor cited one case in which the court had found a termination and substitution,<sup>79</sup> two cases in which the court had found a collateral contract,<sup>80</sup> and six cases in which the court had simply announced the unsupported conclusion that the oral modification was executed without reference to the fact that it had only been performed on one side.<sup>81</sup>

75. *Id.* at 431-32, 246 P.2d at 947.

76. See text accompanying notes 62-65 *supra*.

77. See text accompanying notes 69-70 *supra*.

78. 39 Cal. 2d at 433, 246 P.2d at 948.

79. *Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.*, 121 Cal. 167, 53 P. 565 (1898).

80. *Katz v. Bedford*, 77 Cal. 319, 19 P. 523 (1888); *Lacy Mfg. Co. v. Gold Crown Mining Co.*, 52 Cal. App. 2d 568, 126 P.2d 644 (1942).

81. *Wood v. Nelson*, 220 Cal. 139, 29 P.2d 854 (1934); *Anderson v. Johnston*, 120 Cal. 657, 53 P. 264 (1898); *Roberts v. Wachter*, 104 Cal. App. 2d 271, 231 P.2d 534 (1951); *Nuttman v. Chais*, 101 Cal. App. 2d 476, 225 P.2d 660 (1950); *State Fin. Co. v. Hershel Cal. Fruit Prods Co.*, 8 Cal. App. 2d 524, 47 P.2d 821 (1935); *Oatman v. Eddy*, 4 Cal. App. 58, 87 P. 210 (1906).

Although the *Godbey* rule is consistent with the results of virtually all prior cases, it is a significant clarification and simplification of the law. First, it disposes of the misleading rubric, often quoted but never applied, that oral alterations supported by consideration are unenforceable until fully performed by both parties. Second, it relieves courts of the necessity of drawing difficult, and often meaningless, distinctions between oral alterations supported by consideration, oral novations, and collateral oral contracts. After *Godbey* all three of these classes of cases are treated alike in theory, as well as in fact, if one party has performed. Finally, the rule resolves a complex body of rules, *sub rosa* decisions, and express and implied exceptions into a single, simple rule, thereby reducing uncertainty of private parties as to their rights and duties under an oral agreement inconsistent with a prior written contract.

A survey of the subsequent reported cases tends to support the assertion that the *Godbey* rule has reduced both uncertainty and litigation. In the nineteen years since *Godbey* was decided, only seven reported cases have involved the issue of the enforceability of an oral agreement inconsistent with a written contract, supported by consideration, and performed on one side. Only two of these cases relied on an exception to section 1698;<sup>82</sup> the rest simply found the modification to be executed.<sup>83</sup> In the past ten years, no such case has been reported.

Qualifications of the *Godbey* rule. The *Godbey* case involved an oral modification that was fully performed by one party, and the performance rendered was, in part, referable to the alleged agreement. The court, therefore, did not have occasion to consider the enforceability of such agreements when the party seeking to enforce the agreement has performed only in part or when none of his performance is referable to the oral modification. Although no reported case has been found involving the former situation, it is reasonable to assume that the *Julian-Stoltenberg* rule would apply equally to cases involving referable part performance by one party to protect his reliance interest

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82. *Realty Corp. of America v. Burton*, 162 Cal. App. 2d 44, 57, 327 P.2d 948, 956 (1958) (novation—alternative holding); *Bush v. Vernon*, 135 Cal. App. 2d 33, 37, 286 P.2d 903, 906-07 (1955) (novation).

83. *MacIsaac & Menke Co. v. Cardox Corp.*, 193 Cal. App. 2d 661, 670, 14 Cal. Rptr. 523, 528 (1961); *Townsend Pierson, Inc. v. Holly-Coleman Co.*, 178 Cal. App. 2d 373, 377, 2 Cal. Rptr. 812, 815 (1960); *Chohon v. Kersey Kinsey Co.*, 173 Cal. App. 2d 548, 552, 343 P.2d 614, 617 (1959); *Realty Corp. of America v. Burton*, 162 Cal. App. 2d 44, 57, 327 P.2d 948, 956 (1958) (alternative holding); *Miller v. Brown*, 136 Cal. App. 2d 763, 775, 289 P.2d 572, 579 (1955).

by enforcing the modification insofar as it has been executed by that party's performance.<sup>84</sup>

In the latter situation, where no referable performance has been rendered, there are sound policy reasons for denying enforcement. First, the performance constitutes no extrinsic evidence of the existence and terms of the alleged agreement, and the court would be forced to rely exclusively on the conflicting parol claims of the parties. Second, having rendered only the performance called for under the original written contract, the party attempting to enforce the alleged oral agreement has no equitable claim to protection of his reliance interest. If enforcement is denied, he will be no worse off than if the oral agreement had never been made. An early California Supreme Court case held that an oral modification is not executed under section 1698, even if full performance by both parties is alleged, unless some of the objective conduct by one or both parties was not required by the written contract and is referable to the oral agreement.<sup>85</sup> That holding is presumably still good law and should apply with even more force to a case in which the performance by only one party is alleged.

### Summary

Although section 1698 appears to be a radical departure from the common law rule, courts have so interpreted and limited the statute that it requires a different result than would the common law in only a small fraction of the cases that can arise involving modification of a written contract. Both section 1698 and the common law require an executory modification to be supported by consideration. The most significant difference between section 1698, as interpreted by the courts, and the common law is that a wholly executory modification supported by consideration is enforceable under section 1698 only if it is in writing; at common law no writing is required.

A written or oral gratuitous agreement to alter a written contract—which can take the form of a reduction in the promisee's performance, an extension of time for the promisee's performance, an increase in the promisor's performance, or a waiver of a condition precedent to the promisor's performance—simply constitutes a promise to make a gift. Under both section 1698 and the common law such an agreement is enforceable only to the extent that the promisor has

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84. *Cf. Scott v. TraveLodge Corp.*, 265 Cal. App. 2d 881, 71 Cal. Rptr. 547 (1968); *Roberts v. Wachter*, 104 Cal. App. 2d 271, 231 P.2d 534 (1951).

85. *MacKenzie v. Hodgkin*, 126 Cal. 591, 598, 59 P. 36, 38 (1899).

performed the agreement, unless the promisee has materially changed his position in reliance on the gratuitous promise. The promisor cannot demand restitution of increased compensation already paid pursuant to an oral agreement, nor can he demand full performance under the written contract if he has already accepted reduced performance. In the case of a gratuitous waiver of a condition or extension of time for performance, the promisor cannot assert the promisee's failure to perform the condition or his failure to render timely performance as a breach of the contract or as a justification for his own failure to perform. He may, however, revoke the gratuitous waiver or time extension at any time and demand performance of the terms of the written contract for the future.

Except when barred by the Statute of Frauds, an oral modification supported by consideration is always enforceable at common law. Under section 1698, such an agreement is enforceable to the extent that it has been performed by both parties or to the extent that one party has rendered performance not required by the original written contract and referable to the oral agreement. Absent a material change of position by a party in reliance on the agreement, it is unenforceable to the extent that neither party has rendered referable performance.

### **Other Statutes Limiting Oral Modification**

An examination of two other statutes is necessary before California law governing modification of written contracts can be intelligently evaluated. One is section 2—209 of the Uniform Commercial Code (UCC) which bars oral modification only when the prior written contract contains an express provision requiring modification to be made in writing. The other is section 2209 of the California Commercial Code which, although enacted as a part of the California version of the Uniform Commercial Code, replaces part of UCC section 2—209 with a rule similar to section 1698.

#### **UCC Section 2—209**

The Uniform Commercial Code rule governing modification of written contracts was derived from a similar statute enacted in New York in 1941:

An executory agreement hereafter made shall be ineffective to change or modify, or to discharge in whole or in part, a written agreement or other written instrument hereafter executed which contains a provision to the effect that it cannot be changed

orally, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.<sup>86</sup>

Like section 1698, the New York rule was adopted simultaneously with the elimination of the seal and the abrogation of the common law rule that a sealed instrument could not be modified except in writing.<sup>87</sup> The New York Law Revision Commission, which proposed the statute, identified as its purposes avoiding fraudulent claims of modification,<sup>88</sup> increasing certainty in contractual relations, and bringing to the attention of the parties to a written contract the effects of their acts.<sup>89</sup> In 1952, in response to a decision<sup>90</sup> which enforced an oral agreement on the ground that it constituted an oral termination and substituted oral contract, the law revision commission recommended, and the legislature enacted, an amendment that expressly precluded that interpretation and attempted to insure that the statute's goal of certainty of contract could not be undermined by other similar judicial limitations.<sup>91</sup> Nonetheless, the New York courts were unwilling to invalidate oral modifications supported by consideration when to do so would result in a loss of reliance to the party seeking to enforce the oral agreement or a windfall to the other party.<sup>92</sup> They soon formulated an exception that is remarkably like the *Godbey* rule: An oral modification supported by consideration is enforceable if one party has rendered performance that is "unequivocally referable" to the alleged oral agreement.<sup>93</sup> In addition, an executory oral modification, whether or not supported by consideration, may be rendered enforceable on the theory of equitable estoppel if the party seeking to enforce the oral agreement has materially changed his position in reliance on the other party's oral promise.<sup>94</sup>

In adopting the private Statute of Frauds principle of the New

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86. Act of April 13, 1941, [1941] N.Y. Laws, ch. 329, § 4 at 1008, *as amended*, as N.Y. GEN. OBLIG. LAW § 15-301(1) (McKinney 1964).

87. *Id.* § 2, at 1006-07.

88. NEW YORK STATE, REPORT OF THE LAW REVISION COMM'N 359 (1941).

89. NEW YORK STATE, REPORT OF THE LAW REVISION COMM'N 41 (1952).

90. *Green v. Doniger*, 300 N.Y. 238, 90 N.E.2d 56 (1949).

91. Act of April 19, 1952, [1952] N.Y. Laws, ch. 831, §§ 1 & 2, at 1809, *codified as* N.Y. GEN. OBLIG. LAW § 15-301(2) (McKinney 1964).

92. *See generally* Note, *Modification of a Contract in New York: Criteria for Enforcement*, 35 U. CHI. L. REV. 173 (1967).

93. *Bakhshandeh v. American Cyanamid Co.*, 8 App. Div. 2d 35, 38, 185 N.Y.S. 2d 635, 638 (Sup. Ct. 1959), *aff'd*, 8 N.Y.2d 981, 169 N.E.2d 188, 204 N.Y.S.2d 881 (1960).

94. *Meadow Brook Nat'l Bank v. Feraca*, 33 Misc. 2d 616, 224 N.Y.S.2d 846 (Sup. Ct. 1962).

York statute, the commissioners of the UCC made two significant changes. First, in order to increase the likelihood that the parties to a contract are aware of the implications of their actions, they required that in certain circumstances the private Statute of Frauds provision on a form contract be signed separately. Second, instead of promulgating a rigid rule and leaving to the courts the task of creating exceptions to avoid unjust results, the commissioners included an express exception based on the theories of waiver and estoppel. UCC section 2—209, as enacted by the fifty jurisdictions other than California in which the code has been adopted,<sup>95</sup> provides:

(1) An agreement modifying a contract within this article needs no consideration to be binding.

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

(3) The requirements of the statute of frauds section of this Chapter (Section 2—201) must be satisfied if the contract, as modified, is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

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

Subsection 1 of UCC section 2—209 abolishes the pre-existing duty rule. Thus, unlike the common law and section 1698, the Uniform Commercial Code allows enforcement of executory gratuitous written modifications and, when the private Statute of Frauds is not invoked in the original contract, allows enforcement of executory oral modifications not barred by the Statute of Frauds. The official comments to UCC section 2—209 make clear that the rejection of the pre-existing duty rule was based on a judgment that, when legitimate business considerations impel a party to relieve another of a part of his obligations under a written contract or to increase the compensation to be paid for the other party's performance, such an agreement

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95. California is the only jurisdiction that has altered section 2-209 in the course of enacting the code. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 2, at 34-35 (1964).



should, in general, be enforceable.<sup>96</sup> Since all modification agreements are subject to the Uniform Commercial Code's requirement of "good faith," UCC section 2—209 will not allow enforcement of a gratuitous modification procured by economic coercion or when no valid business reason exists for the modification.<sup>97</sup> In addition, the good faith standard means that an agreement procured in bad faith will not be rendered enforceable by the presence of "a mere technical consideration."<sup>98</sup> The abolition of the pre-existing duty rule, despite its reliance on the nebulous good faith standard, has engendered almost no litigation in the fifty-one jurisdictions that have enacted the code.<sup>99</sup>

Subsection 2 purports to bar oral modification or rescission of a written contract containing a valid private Statute of Frauds provision. In effect, the parties can choose whether modification or a written contract will be governed by the common law, as liberalized by the abolition of the pre-existing duty rule, or by a rule analogous to California's section 1698. Although the bar of subsection 2 is expressed in unqualified terms, its scope is limited by subsections 4 and 5, which permit a modification not meeting the requirements of subsection 2 to operate as a waiver. The concept of a waiver appears to be an inappropriate characterization of most forms of oral modification other than an agreement to extend time for performance, accept reduced performance, or forgive a condition precedent. However, the official comments to section 2—209 make clear that subsections 4 and 5 can be applied to enforce any form of executed oral modification:

Subsection (4) is intended . . . to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' later conduct. The effect of such conduct as a waiver is further regulated in subsection (5).<sup>100</sup>

Thus, to the extent that the parties have performed an oral modification, it is enforceable as a waiver effected by their conduct. To the extent that the modification is executory, it constitutes a waiver but is revocable by either party unless the other party has materially changed his position in reliance on the oral modification.

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96. UNIFORM COMMERCIAL CODE § 2-209, Comments 1 & 2. See also W. HAWKLAND, SALES AND BULK SALES 11-14 (1958).

97. UNIFORM COMMERCIAL CODE § 2-209, Comment 2.

98. *Id.*

99. California enacted section 2-209(1) without revision. See CAL. COMM. CODE § 2209(1) (West 1964).

100. UNIFORM COMMERCIAL CODE § 2-209, Comment 4.

The waiver and estoppel limitations on UCC section 2—209 have almost exactly the same effect as the *Julian-Stoltenberg* and *Godbey* limitations on section 1698.<sup>101</sup> If the oral modification is not supported by consideration, it constitutes an enforceable waiver to the extent that it is executed by the conduct of the promisor. To the extent that the modification is executory, it is revocable by the promisor and, therefore, unenforceable. If the modification is supported by consideration, it is clearly enforceable as a mutual waiver if both parties have performed. If only one party has performed, the modification will be enforceable as an irrevocable waiver if “retraction would be unjust in view of a material change in position in reliance on the waiver.”<sup>102</sup> The only reported case interpreting this language held that referable performance by one party can constitute sufficient reliance:

A written agreement which provides that it cannot be modified except by a writing signed by both parties to the agreement can be changed by a course of actual performance. Part performance which is said to be taken in consequence of an oral understanding which modifies one of the terms of the agreement will not be construed to so modify unless it is unequivocally referable to such new understanding.<sup>103</sup>

### California Commercial Code Section 2209

When California enacted the Uniform Commercial Code, it rejected the private Statute of Frauds provision of UCC section 2—209 and substituted a rule similar to section 1698.<sup>104</sup> This change was first suggested by the California State Bar Committee on the Commercial Code, whose report simply stated:

It is the opinion of the subcommittee [examining Article 1 of the UCC] that [section 2—209] is improper under the existing state of law in California that it should be modified as respects [subsection 2] so that this section would read in the same manner as the present Civil Code Section 1698 . . . .<sup>105</sup>

In a study commissioned by the Senate Fact Finding Committee on the Judiciary to analyze suggested changes from the official draft of

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

102. UNIFORM COMMERCIAL CODE § 2-209(5).

103. *All-Year Golf, Inc. v. Products Investors Corp.*, 34 App. Div. 2d 246, 250, 310 N.Y.S.2d 881, 885 (1970).

104. Cal. Stat. 1963, ch. 819, at 1862.

105. State Bar of California, *Interim Report of the Comm. on the Commercial Code*, in CALIFORNIA SENATE FACT FINDING COMM. ON THE JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE 340 (1961).

the Uniform Commercial Code, Professors Harold Marsh, Jr., and William Warren approved in substance the State Bar Committee's recommendation. However, instead of replacing subsection 2 of section 2—209 with the exact language of section 1698, they recommended a modified version of section 1698 which expressly overruled the *Godbey* exception and required full performance by both parties as a prerequisite to the enforcement of an oral alteration.<sup>106</sup> The legislature subsequently enacted the version of subsection 2 recommended by Professors Marsh and Warren:

(1) An agreement modifying a contract within this division needs no consideration to be binding.

(2) A written contract within this division may only be modified by a written agreement or an oral agreement fully executed by both parties.

(3) The requirements of the statute of frauds section of this division (Section 2201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subdivision (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.<sup>107</sup>

The California version adopts subsection (1) of the official text abolishing the pre-existing duty rule. Since section 1698 allows enforcement of gratuitous oral or written modifications and both section 1698 and subdivision 2 of section 2209 invalidate executory gratuitous oral alterations, subdivision 1 of section 2209 changes California law only with respect to executory gratuitous written modifications.

Subdivision 2 alters California law in its rejection of the *Godbey* rule. Marsh and Warren gave only a cryptic and conclusory justification for replacing the UCC private Statute of Frauds provision with the California rule:

California has long had the requirement that written contracts be modified only by another writing or by an executed oral agreement. Although this rule has been disapproved by some of the leading scholars, it has a defensible basis: that

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106. Marsh & Warren, *Report on Proposed Amendments to the Uniform Commercial Code*, in CALIFORNIA SENATE FACT FINDING COMM. ON THE JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE 436 (1961).

107. CAL. COMM. CODE § 2209 (West Supp. 1961).

parties claiming modification of a contract must be able to prove the change by something other than parol.<sup>108</sup>

In recommending the rejection of the *Godbey* rule, they apparently misconceived both the origin of and the justification for the exception:

[T]he unwarranted decision which held that "executed" may mean executed on only one side, according to the original terms of the agreement, should be corrected. *Godbey & Sons v. Deane*. . . . This type of "execution" obviously furnishes no reliable evidence that the modification was actually agreed upon.<sup>109</sup>

The implication in this statement that *Godbey* constituted a break with prior law or a change in the outcome of cases is simply wrong. *Godbey* merely announced explicitly a rule that had been applied consistently by California courts either directly, by stating a result without explanation, or indirectly, by constructing or expanding mitigating exceptions to section 1698.<sup>110</sup> Section 2209(2) does not overrule a single "unwarranted decision"; it attempts to create a far stricter rule than has ever been applied in California.

By referring only to the evidentiary policy behind section 1698 in their criticism of *Godbey*, Marsh and Warren overlooked the competing policy considerations that prompted the courts to limit the scope of section 1698. No doubt full performance by both parties is normally more reliable evidence of the existence and terms of an oral modification than is performance by only one party. On the other hand, referable performance by one party is some evidence of a modification, and it also normally constitutes a reliance interest that would be sacrificed if the agreement were held unenforceable. California courts have been properly reluctant to condone such an inequitable result in the name of certainty of contract or evidentiary clarity when a party has entered into and relied on a bargained exchange without knowledge of its invalidity.

Experience under section 1698, which has been the law in California for almost 100 years, demonstrates that, despite a statute barring oral modification, the parties to private contracts will continue to enter into and perform in reliance on oral agreements to modify written contracts. If the law is to avoid injustice, rules such as section 1698 and section 2209 must be subject to sufficiently flexible limitations or exceptions to avoid becoming instruments of fraud and unjust enrichment. Ironically, although the California Advisory Committee on the

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108. Marsh & Warren, *supra* note 106, at 453.

109. *Id.*

110. See text accompanying notes 53-83 *supra*.

Uniform Commercial Code recommended that *Godbey* be rejected, it recommended retention of subsections 4 and 5 of section 2—209, which constitute a mitigating exception substantially similar to the *Godbey* rule.<sup>111</sup> California appellate courts have not yet had occasion to interpret the scope of the waiver and estoppel exceptions to section 2209, but, in light of their past construction of section 1698 and consistent with the interpretation given those exceptions in other jurisdictions that have adopted the Uniform Commercial Code's private Statute of Frauds rule, they will probably apply them liberally to make an oral modification enforceable to the extent that a party has rendered referable performance or otherwise relied.

### **Conclusions and Recommendations**

#### **Necessary Limitations on a Rule Invalidating Oral Modification of Written Contracts**

The purpose of the California rule barring oral modification and the Uniform Commercial Code's private Statute of Frauds provision is to promote certainty in contractual relations. The California rule applies to all written contracts while the UCC rule applies only when invoked by the parties. But the policies justifying a refusal to enforce an oral modification, as well as those calling for enforcement in certain classes of cases, apply equally to both statutory techniques. Both rules protect a party to a written contract against a fraudulent allegation of an oral modification. Both tend to induce the parties to a written contract to put their modification agreements in writing, thus increasing the formality of the modification procedure, making the parties more aware that they will be bound by the agreement, and reducing the potential for disputes over the existence and terms of the agreement. Finally, both rules tend to make the work of the courts easier and more efficient. To the extent that parties put their modifications in a signed writing, the incidence of litigation over the existence and terms of such agreements is reduced and the fact-finding process is simplified in the event of litigation. By making executory oral modifications invalid *per se*, the rule relieves the courts of the necessity to resolve the parties' conflicting oral claims.

Unfortunately, experience in every jurisdiction that has enacted a statute barring oral modification of written contracts demonstrates that, no matter how explicit the statutory prohibition, private parties

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111. See text accompanying notes 100-02 *supra*.

will continue to make and rely on such oral agreements. Once the parties have attempted to modify their contract orally, much of the justification for refusing enforcement collapses, and other policy considerations arise calling for enforcement. First, when the rule has failed to induce the parties to commit their agreement to writing, the policy of making the parties aware of the implications of their actions and reducing uncertainty, ambiguity, and disagreement as to the terms of the agreement become meaningless. Second, the danger of a fraudulent allegation of an oral modification is counterbalanced by the danger that, under a strict rule invalidating oral modification, a party will fraudulently induce performance by making an oral agreement he knows to be invalid, then avoid his reciprocal performance by asserting the rule against oral modification. Third, even in the absence of fraud, refusal to enforce an oral agreement on which one party has relied can result in an unjust loss of reliance to that party or a windfall to the other. Finally, a rule invalidating the oral modification conflicts with the general policy of enforcing bargained exchanges between private parties.

Once an oral modification has been made, the only justifications remaining for the rule barring enforcement are (1) that invalidating the agreement relieves a court of the necessity to resolve the parol claims of the parties and determine the issues of the existence and terms of the agreement and (2) that penalizing a party who entered such an agreement without knowledge of its invalidity will deter others from making oral modifications in the future. These policies are not frivolous, but they are not sufficiently compelling to justify a blanket rule. When neither party has rendered referable performance or otherwise changed his position in reliance on an oral modification, refusal to enforce it will result only in a loss of the parties' expectancy under the agreement and will restore their rights and duties under the original contract; it will not result in a loss of reliance by one party or a windfall to the other. In addition, since there is no referable performance, the sole evidence of the oral agreement will normally be the conflicting, self-serving parol claims of the parties. In such a case, the interest of the judicial system in inducing the certainty and formality of written agreements and in avoiding litigation over the existence and terms of parol agreements justifies rejection of the common law rule in favor of the California rule.

When both parties have performed an oral modification, on the other hand, it is equally clear that a rule invalidating the oral agree-

ment and allowing enforcement of the original written contract would be senseless. The danger of fraud is negligible since the party seeking to avoid the agreement has demonstrated his assent to the modification through his conduct. The evidentiary problem in proving the existence and terms of the agreement is minimized since the parties' performance provides a means of evaluating their parol claims. In addition, judicial economy and efficiency are clearly not served by allowing a party to instigate a lawsuit in order to undo the executed agreement and restore the rights and duties of the parties under the original written contract. Both the California rule and the UCC rule properly validate oral modifications to the extent that they are performed by both parties.

When only one party has rendered performance inconsistent with the original written contract and referable to an alleged oral modification, a strict rule invalidating oral modification results in an inequitable loss of reliance to the party seeking to enforce the agreement. Were it plausible to assume that most private parties would be aware of the rule and would be induced to commit their modifications to writing, such results could be justified as a necessary cost of a desirable rule promoting certainty in contractual relations and reducing the incidence and complexity of litigation. Nevertheless, the many cases that have arisen under both the California rule and the New York rule in which a party has relied on an oral agreement apparently barred by the relevant statute demonstrate that many people—because they are unaware of the statute, because they do not consider the legal enforceability of their agreements at the time they are made, or because they feel that an insistence on a formal writing connotes distrust—are not induced by the statutory prohibition to put their modifications in writing.

A rule barring oral modification is simply unrealistic unless it is limited to avoid creating injustice when a party has relied on an oral modification and to prevent the rule from becoming an instrument of fraud when invoked by a knowledgeable party against a party who was unaware of it. Absent such a limitation, the rule is not only unsound, it is unenforceable. A court, faced with a case in which it believes that the parties agreed to an oral modification which was subsequently relied on by one party, will find some means of avoiding the application of the rule. In California, courts employed a variety of techniques to enforce such agreements until their *sub rosa* rule was made explicit in *Godbey*. In New York, the courts have applied the

estoppel doctrine and developed the “unequivocally referable” test to achieve the same result. Even the Uniform Commercial Code, which attempts to ensure that the parties are aware of the necessity for a writing by limiting the rule to cases in which they include such a provision in their written contract, recognizes the fact that some parties will make and rely on oral modifications and makes such agreements enforceable as waivers to the extent that a party has performed or otherwise relied.

A rule barring oral modifications, whether it applies to all written contracts or only to written contracts expressly invoking a private Statute of Frauds, is justified on policy grounds to the extent that it invalidates alleged executory oral agreements that have not been performed by one or both parties. Either rule must, however, be expressly limited so that it does not invalidate oral modifications that have been performed or otherwise relied on by a party. UCC section 2—209 contains such a limitation, but it is misleading and subject to misinterpretation because it characterizes an agreement made enforceable by the conduct of one or both parties as a “waiver,” which is an inappropriate description of many forms of agreements that should be directly enforceable due to referable performance. The *Godbey* rule, which characterizes such agreements as “executed” and therefore directly enforceable under the terms of the statute, is a clearer and more appropriate limitation on either form of statute barring oral modification. Whatever rule is applied in California, the *Godbey* limitation should be expressly incorporated into the statute.

Express incorporation of the *Godbey* exception is particularly important in California Commercial Code Section 2209. Subdivisions 4 and 5 of that statute will probably be interpreted to arrive at a result similar to *Godbey*, but the express rejection of *Godbey* in the comments to section 2209 and the misleading characterization of oral modifications made enforceable by reliance as “waivers” may inhibit the evolution of such a rule or, at the very least, mislead private parties as to their legal rights when one party has relied on an oral modification.

#### **Comparison of the California Rule with the UCC Rule and the Common Law**

The California rule, as limited by the *Godbey* exception, invalidates only two subsets of oral modifications of written contracts. First, gratuitous oral modifications are unenforceable insofar as they



have not been performed by the promisor. This result comports with the common law rule invalidating all forms of executory gifts and is supported by sound policy. It avoids the danger of a fraudulent allegation of a gratuitous modification, avoids the necessity to litigate the existence and terms of such an agreement when it can be proven only by the parol claims of the parties, and yet avoids upsetting such agreements when their existence is proved by the conduct of the promisor in executing the agreement. In the rare case in which the promisee has changed his position in reliance on the gratuitous promise, the doctrine of promissory estoppel is sufficient to avoid an unjust result.

Second, oral modifications supported by consideration cannot be enforced by a party who has not rendered performance referable to the oral agreement. This result is a departure from the common law, but it, too, is supported by sound policy. When a party has not rendered performance inconsistent with the terms of the written contract, refusal to enforce the oral agreement will not result in a loss of reliance. If a party has changed his position in reliance on such an agreement other than by performing, the doctrine of estoppel is available to protect his reliance interest. Normally all a party has to lose in such a case is his expectancy under the oral agreement, and refusal to enforce the wholly executory oral modification simply restores the rights and duties of the parties under the original written contract. The infringement on the freedom of contract resulting from such a rule is a small price to pay to avoid the uncertainty to the parties and the cost to the courts entailed in permitting a party to a written contract to litigate the existence and terms of an executory oral modification that can be proven only by resolving the conflicting parol claims of the parties. In addition, refusal to enforce wholly executory oral modifications supported by consideration greatly reduces the danger of fraudulent allegations of oral modification. So long as a party must perform pursuant to an alleged oral modification before it is potentially enforceable, he must take a substantial risk in attempting to enforce a fraudulent agreement: If he fails to convince the fact-finder of the existence of the agreement, the defrauding party will lose the value of his allegedly referable performance. If such modifications are potentially enforceable without referable performance, as they are under the common law, the risk to the defrauding party is reduced and the temptation to invent such modifications is increased.

The Uniform Commercial Code's private Statute of Frauds rule, which has not been adopted in California, applies only when invoked by the parties in the original written contract, but it is subject to sub-

stantially the same limitations as the more general California rule. It invalidates the same two subsets of the oral modifications to which it applies that are invalidated by the California rule: gratuitous oral modifications not rendered a "waiver" by the performance of the promisor and oral modifications supported by consideration not rendered an irrevocable "waiver" through the reliance of a party who has performed. The Uniform Commercial Code's technique of tying the invalidity of oral modifications to the parties' express invocation of the private Statute of Frauds thus does not lead to substantially greater certainty in contractual relations than does the more general California rule. By requiring that the bar on oral modifications be included in the contract and, in some cases, be separately signed, the UCC rule may tend to make more parties to written contracts aware of the desirability of committing modifications to writing, but this effect is not likely to be substantial. Many cases have arisen in both New York and California in which parties to a written contract that requires modifications to be made in writing have nonetheless made oral modification agreements, and the requirement that a nonmerchant separately sign the private Statute of Frauds provision in a form contract provided by a merchant will have an effect only to the extent that the non-merchant reads the boilerplate that he is signing and remembers it later when the contract is modified.

The principle difference between the California rule and the UCC rule is that, if the written contract does not invoke the private Statute of Frauds, the Uniform Commercial Code does not invalidate gratuitous oral modifications not executed by the promisor and oral modifications supported by consideration not performed by either party. But, as was demonstrated in the prior discussion of the California rule, refusal to enforce such wholly executory oral modifications is justifiable on policy grounds irrespective of the intent of the parties. Invalidating such agreements does not result in a loss of reliance to one party or a windfall to the other; litigation over such agreements entails the resolution of the conflicting parol claims of the parties; and enforcement of such agreements increases the danger of fraudulent allegations of oral modifications.

The California rule, which invalidates such wholly executory oral modifications in all cases, is, therefore, preferable to both the UCC rule, which invalidates such agreements only when the private Statute of Frauds was validly invoked in the original contract, and the common law rule, which allows enforcement of such agreements in all

cases. California should, therefore, retain in substance its general prohibition against enforcement of executory oral modifications of written contracts embodied in both section 1698 of the Civil Code and section 2209 of the Commercial Code.

### **Resolution of the Inconsistencies Between Section 1698 and Section 2209**

As has been shown, California has two similar statutes governing modification of written contracts. Commercial Code section 2209 governs written contracts involving "transactions in goods,"<sup>112</sup> and Civil Code section 1698 governs all other written contracts. The statutes are inconsistent in two respects. First, the two statutes are subject to different formulations of the mitigating rule allowing enforcement of oral modifications supported by consideration and performed on one side. Section 1698 is limited by the *Godbey* rule, while section 2209 expressly precludes the *Godbey* interpretation but is similarly limited by the waiver and estoppel provisions taken from the Uniform Commercial Code. Second, section 2209 adopted the UCC's provision abolishing the pre-existing duty rule and, therefore, allows enforcement of executory gratuitous written modifications which are not enforceable under section 1698. Since no characteristic of contracts involving or not involving a "transaction in goods" justifies a difference in the outcome of cases under section 1698 and section 2209, clarity and simplicity call for a resolution of these inconsistencies between the two statutes.

As was shown above, the *Godbey* rule is the clearer and more appropriate formulation of the limitation on the rule barring executory oral modification. It should be expressly incorporated in the text of both section 1698 and subdivision 2 of section 2209; subdivisions 4 and 5 of section 2209 should be repealed.

The sole remaining inconsistency between the two California statutes is the applicability of the pre-existing duty rule to executory written modifications. No strong policy militates for the retention or abolition of the rule in such cases. As was noted by the official comments to the Uniform Commercial Code and by commentators dis-

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112. " 'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty . . . ." CAL. COMM. CODE § 2105(1) (West 1964). See also *id.* § 2107.

cussing the code, there are often sound business reasons for agreeing to a gratuitous modification of a written contract. In such a case, if the parties have eliminated evidentiary problems by putting the agreement in writing, the interests of certainty in contractual relations would be served by enforcing the modification. The principal danger involved in enforcing such agreements is that the promissor might have been induced to agree by means of a "holdup"—a refusal to perform a contractual duty unless the other party agrees to a gratuitous modification—or through some other form of economic coercion. This danger can be avoided by making economic coercion a defense to enforcement of a modification. New York, for example, has abolished the pre-existing duty rule for written modifications, and the New York courts have created an exception to the statute by finding a lack of consent to the agreement, irrespective of the signed writing, when the agreement was procured by "economic duress."<sup>113</sup> Similarly, the Uniform Commercial Code avoids enforcing modifications procured by economic coercion by requiring that all offers and agreements be made in "good faith."<sup>114</sup> Accordingly, the substance of section 2209(1), which abolishes the pre-existing duty rule, should be retained, and a similar provision should be included in section 1698.

These changes—codifications of the *Godbey* rule in both section 1698 and section 2209 and abolition of the pre-existing duty rule with respect to written modifications under section 1698—would insure that the rules governing modification of contracts in the Commercial Code would be consistent with those in the Civil Code. One further change in form, rather than substance, would make the Civil Code and Commercial Code statutes identical. Commercial Code section 2209 governs modification of oral, as well as written, contracts: Subdivision 1 validates gratuitous modifications of oral contracts and subdivision 3 requires that all modification agreements comply with the requirement of the Statute of Frauds. Thus any agreement not barred by the Statute of Frauds—whether written or oral, executed or executory, and whether or not supported by consideration—is enforceable to modify an oral contract. The Civil Code arrives at the same result through a separate statute, section 1697, which provides that: "A contract not in writing may be altered in any respect by the consent of the parties, in writing, without new consideration . . . ."<sup>115</sup> As applied to

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113. See *The Mechanics of Parol Modification*, *supra* note 101.

114. See text accompanying notes 97-98 *supra*.

115. CAL. CIV. CODE § 1697 (West 1954).

oral modifications, this statute is limited by the Statute of Frauds.<sup>116</sup> The Civil Code and Commercial Code provisions could be made identical either by breaking section 2209 into two statutes, one governing modification of oral contracts and one governing modification of written contracts, or by amalgamating sections 1697 and 1698 into a single statute. Since clarity and certainty are served by expressly noting that the requirements of the Statute of Frauds must be satisfied by any modification of an oral or written contract if the contract, as modified, falls within its provisions, a single statute governing modification of both oral and written contracts would be more concise.

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116. See CAL. CIV. CODE § 1624 (West 1954).

**APPENDIX**  
*PROPOSED LEGISLATION*

Section 1. Section 1698 of the Civil Code is amended to read:

**§ 1698. Alteration of contracts**

(1) Except as provided by this section, a contract may be altered in any respect by the consent of the parties without new consideration.

(2) An agreement altering any executory portion of a written contract is unenforceable unless the agreement is in writing and signed by the party against whom enforcement is sought except to the extent that the party seeking enforcement of the alteration has rendered performance, referable to the agreement, not required by the terms of the written contract.

(3) The requirements of the statute of frauds section of this division (Section 1624) must be complied with if the contract as altered is within its provisions.

Section 2. Section 2209 of the Commercial Code is amended to read:

**§ 2209. Modification**

(1) Except as provided in this section, a contract within this article may be modified in any respect by the consent of the parties, without new consideration.

(2) An agreement modifying any executory portion of a written contract is enforceable unless it is in writing and signed by the party against whom enforcement is sought except to the extent that the party seeking enforcement of the modification has rendered performance, referable to the agreement, not required by the terms of the written contract.

(3) The requirements of the statute of frauds section of this division (Section 2201) must be complied with if the contract as modified is within its terms.

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