

Memorandum 74-22

Subject: Study 47 - Oral Modification of Written Contract (Civil Code § 1698)

Attached to this memorandum are two copies of a staff draft of a tentative recommendation concerning oral modification of written contracts governed by the Civil Code. Please make your editorial changes on one copy and give it to the staff at the next meeting. The tentative recommendation concerning oral modification of written contracts governed by Commercial Code Section 2209 has been sent out for comment. At the last meeting, the Commission directed the staff to reconsider the previous recommendation conforming the Civil Code rule to Section 2209 of the Commercial Code.

The attached recommendation does not attempt to make any new law; rather the approach is to more clearly state the existing statutory rule and to codify its case-law exceptions.

An additional question needs further discussion:

Should oral modification of written contracts be taken out of the Statute of Frauds (Civil Code Section 1624)? The recommendation makes clear that modifications of written contracts need not satisfy the statute. (See discussion on p.3 of the recommendation.) Research reveals no case where an oral modification, valid under Section 1698, was declared void under the Statute of Frauds. The recommendation codifies this result.

Respectfully submitted,

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

CIVIL CODE SECTION 1698

ORAL MODIFICATION OF A WRITTEN CONTRACT

May 1974

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments should be sent to the Commission not later than August 1, 1974.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

TENTATIVE RECOMMENDATION

relating to

CIVIL CODE SECTION 1698

Oral Modification of a Written Contract

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.

California statutes offer inadequate guidance to the parties who attempt to orally modify a written contract. 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."¹ 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.² These exceptions include the following:

1. An oral agreement which has been executed by only one of the parties may be held to satisfy the rule.³

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1. It has been suggested that this provision results 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 Corbin, Contracts § 301 (1950); 15 Williston, Contracts § 1828 (3d ed. 1972).
 2. See cases cited in Timbie, Modification of Written Contracts in California, 23 Hastings L.J. 1549 (1972), and 1 B. Witkin, Summary of California Law Contracts §§ 715-719 at 600-604 (8th ed. 1973).
 3. See D.L. Godbey & Sons Construction Co. v. Deane, 39 Cal.2d 429, 246 p.2d 946 (1952). See also Timbie, Modification of Written Contracts in California, 23 Hastings L.J. 1549, 1560-1561 (1972).

2. The parties may extinguish the written contract by an oral novation and substitute a new oral agreement.⁴

3. The parties may rescind the written contract by an oral agreement, thereby satisfying the terms of Section 1698.⁵

4. An oral modification may be upheld as a waiver of a condition of the written contract.⁶

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

6. An oral agreement may be held to be an independent collateral contract, making Section 1698 inapplicable.⁸

The effect of these exceptions has been largely to emasculate the rule and make the statutory language deceptive at best. The vagueness and complexity of the rule and its exceptions have invited litigation.

The Law Revision Commission accordingly recommends that Section 1698 should be replaced by a new section that would state clearly rules concerning modification of written contracts.⁹ Specifically, the new section should provide:

(1) 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

4. See *Pearsall v. Henry*, 153 Cal. 314, 95 P. 154 (1908).

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

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

7. See *Wade v. Markwell & Co.*, 118 Cal. App.2d 410, 258 P.2d 497 (1953).

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

9. The recommended section would not affect Civil Code Section 1697 (modification of oral contracts) and Commercial Code Section 2209 (modification of contracts for the sale of goods). In March 1974, the Commission distributed a Tentative Recommendation Relating to Oral Modification of a Written Contract--Commercial Code Section 2209.

by 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,¹⁰

(2) A modification of a written contract is enforceable where a party has relied on the modification to his detriment. This would codify the rule in Wade v. Markwell & Co.¹¹

(3) The Statute of Frauds (Civil Code Section 1624) does not prevent enforcement of a written contract which is modified pursuant to the above statutory rules. This provision would avoid needless litigation of the Statute of Frauds issue since, in almost all cases where oral modification would be allowed, the Statute of Frauds would be either satisfied¹² or inapplicable.¹³

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10. 39 Cal.2d 429, 246 P.2d 946 (1952). See also Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal.3d 665, ___ P.2d ___, ___ Cal. Rptr. ___ (1974).
11. 118 Cal. App.2d 410, 420-421, 258 P.2d 497, 502-503 (1953).
12. Where a written contract is modified by a written contract, the requirement of the Statute of Frauds (Civil Code Section 1624) that certain contracts be "in writing and subscribed by the party to be charged or by his agent" would be satisfied.
13. Where an oral modification is fully performed by both parties, the Statute of Frauds is inapplicable. See Bonaccorso v. Kaplan, 218 Cal. App.2d 63, 32 Cal. Rptr 69 (1963). Where one party has performed, the part performance doctrine (applicable historically to transfers of interest in real property) may take the contract out of the Statute of Frauds. See Trout v. Ogilvie, 41 Cal. App.167, 182 P. 333 (1919)(transfer of real property interest); MacMorris Sales Corp. v. Kozak, 263 Cal. App.2d 430, 69 Cal. Rptr. 719 (1968)(agreement not to be performed within one year); Estate of Rivolo, 194 Cal. App.2d 773, 15 Cal. Rptr. 268 (1961) (contract to adopt). The doctrine of equitable estoppel will prevent the defendant from setting up the bar of the Statute of Frauds where the plaintiff has changed his position in reliance on the oral agreement to his detriment. See Monarco v. Lo Greco, 35 Cal.2d 621, 220 P.2d 737 (1950). See generally 1 B. Witkin, Summary of California Law Contracts §§ 246-260 at 213-226 (8th ed. 1973).

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

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:

Technical amendment (heading for Chapter 3)

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. The word "alteration" in Section 1697 is amended to read "modification" to conform with Section 1698. See Recommendation Relating to Civil Code Section 1698--Oral Modification of a Written Contract, 12 Cal. L. Revision Comm'n Reports ____ (1974).

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 both parties.

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

(d) Although an attempt to modify a contract in writing does not satisfy the requirements of subdivision (a), (b), or (c), the agreement modifying the contract in writing may be enforced to the extent that failure to enforce the agreement would be unjust in view of a material change in position in reliance on the agreement by the party seeking enforcement of the modification.

(e) The Statute of Frauds does not prevent enforcement of a contract in writing as modified pursuant to this section.

Comment. Section 1698 provides for the manner of modifying written contracts. See Recommendation Relating to Civil Code Section 1698--Oral Modification of a Written Contract, 12 Cal. L. Revision Comm'n Reports ____ (1974). Subdivisions (a) and (b) continue the substance of former Section 1698. Subdivision (c) codifies the rule in D.L. Godbey & Sons Construction 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, ___ P.2d ___, ___ Cal. Rptr. ___ (1974). Subdivision (d) protects the party who has materially changed his position in reliance on the agreement and is based on the rule in Wade v. Markwell & Co., 118 Cal. App.2d 410, 420-421, 258 P.2d 497, 502-503 (1953). Subdivision (e) makes clear that the Statute of Frauds is inapplicable to contracts as modified pursuant to Section 1698. Section 1698 does not affect related principles of law. E.g., 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, ___ - ___ (1942)(oral independent collateral contract).