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The Modification Mystery: Section 2-209 of the Uniform Commercial Code

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I. INTRODUCTION

For a quarter century or more, American courts have been interpreting and construing the Uniform Commercial Code (U.C.C.). Although in large measure the Code has been a considerable success, various problems have arisen, many of the most challenging and frustrating of which have developed in the application and construction of certain sections of Article 2. Courts have been notoriously unsuccessful, for example, in their elaborations of U.C.C. § 2-207, the “battle of the forms” section. Sec-
tion 2-209, captioned, "Modification, Rescission and Waiver," has proven equally mysterious. Recent judicial attempts to provide certainty and predictability with regard to future applications of U.C.C. § 2-209 have been counterproductive. The conventional scholarly wisdom concerning § 2-209 has left many questions unanswered, and other scholarship has suggested implausible theoretical constructs. In order to unravel the § 2-209 mystery and to provide a workable analysis of the section, it is important to reconsider the purposes of § 2-209 within the underlying purposes of Article 2 of the Code.


4. See, e.g., the majority and dissenting opinions in Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280 (7th Cir. 1986)(determining that contract orally modified by seller regarding delivery dates could not be enforced absent showing of reliance by buyer). For a discussion of Wisconsin Knife Works, see infra note 168-242 and accompanying text.


II. A FIRST GLANCE AT SECTION 2-209

How would the classical contracts lawyer view U.C.C. § 2-209? The first subsection makes contract modifications enforceable without consideration. By the time the drafters of the Code were ready to present a draft for enactment, the pre-existing duty rule of classical contract law was regarded by many as indefensible. Permitting the parties to a contract for the sale of goods to make modifications enforceable without the technical constraint of consideration is a clear illustration of the underlying philosophy of Article 2, which seeks to identify the factual bargain of the parties notwithstanding technical requirements that interfere with judicial recognition of that factual bargain. Thus, this change in contract law was hardly radical in the eyes of classical contracts lawyers, although some undoubtedly would have preferred more precision in the statutory language of subsection (1)

7. "An agreement modifying a contract within this Article needs no consideration to be binding." U.C.C. § 2-209(1) (1978).

8. One of the classic denunciations of the pre-existing duty rule is found in an opinion by Minnesota Justice Stone: "The [pre-existing duty] doctrine . . . is one of the relics of antique law which should have been discarded long ago. It is evidence of the former capacity of lawyers and judges to make the requirement of consideration an overworked shibboleth rather than a logical and just standard of actionability." Rye v. Philips, 203 Minn. 567, 569, 282 N.W. 459, 460 (1938).

9. Comment 1 to U.C.C. § 2-209 illustrates the anti-technical nature of Article 2 with respect to modifications: "This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments." U.C.C. § 2-209 comment 1 (1978).

10. For an analysis of the underlying philosophy of Article 2, see Murray, The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code, 21 WASHBURN L.J. 1 (1981). I suggest in this article and elsewhere that Article 2 is essentially concerned with identification of the factual bargain of the parties, their "agreement" as defined in U.C.C. § 1-201(3), to arrive at their "true understanding." See U.C.C. § 2-202 comment 2 (1978).

11. Illustrations of the anti-technical nature of Article 2 include U.C.C. § 2-204(3) (1978)(contract does not fail for indefiniteness notwithstanding absence of one or more terms, if parties intended to make contract and there is basis for appropriate remedy); U.C.C. § 2-206 comment 1 (1978)("[f]ormer technical rules as to acceptance . . . are rejected"); U.C.C. § 2-209(1) comment 1 (1978)("[t]his section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."). In keeping with Article 2 of the U.C.C., the United States Court of Appeals for the Fourth Circuit sought to reflect the reality of the marketplace and avoid "the overly legalistic interpretations which the Code seeks to abolish." Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 10 (4th Cir. 1971). The court also mentioned the urging of Karl Llewellyn that "overly simplistic and overly legalistic interpretation of a contract should be shunned." Id. at 11.
and its comments.\textsuperscript{12} The essential change in the pre-existing duty rule found relatively little resistance at the time it was proposed and inspires virtually no resistance today. It was an unremarkable but welcome change in monistic contract law.\textsuperscript{13}

Subsection (2) of § 2-209\textsuperscript{14} was much more controversial. If the parties included a clause in their original written contract precluding oral modifications (a "no oral modification" or NOM clause),\textsuperscript{15} the suggestion that any attempted oral modification would be inoperative because it would violate the parties' own writing requirement—their "private" statute of frauds—sounds almost trite. However, the common law of contracts was predicated upon a commitment to the principle that the parties to a contract should not be deterred from changing their minds.\textsuperscript{16}

\textsuperscript{12} In his analysis of § 2-209 for the New York Law Revision Commission, Professor Patterson had difficulty with the phrase, "contract within this Article" in § 2-209(1) since it had no established meaning in the Code. He was also quite dubious about the "good faith" standard in § 1-201(19) ("honesty in fact") or the merchant good faith standard in § 2-103(1)(b) (commercial reasonableness and honesty in fact) as "adequate" to dispose of the problem of extorted modifications. Though he found the good faith standard only in a comment (comment 2), Professor Patterson did not specifically suggest its inclusion in the statutory language. He noted that "agreement" was defined in § 1-201(3) as "bargain in fact" and, to him, that "needs consideration" (citing \textit{RESTATEMENT OF CONTRACTS} § 76 (1932)). Therefore, the language in § 2-209(1)—"agreement . . . needs no consideration"—"is apparently tautological." He had no difficulty, however, in concluding that § 2-209(1) rejects the pre-existing duty rule. Analysis of Professor Edwin W. Patterson, Columbia Law School, 1 N.Y. Law Rev. Commission, Study of the Uniform Commercial Code, 307-08 (1955).

\textsuperscript{13} The shortcomings of contract analysis in modern legal literature indicates that even today our understanding leaves much to be desired. The most serious of these shortcomings is the attempt to explain the whole law of contracts in terms of a few fundamental principles uniformly applicable throughout the whole field. . . . Such a monistic approach serves only to distort the real role which contract has played in the evolution of our society. It results in more or less lifeless abstractions and achieves at best a 'formal,' but not a 'substantive' rationality. F. KESSLER & M. SHARP, \textit{CONTRACTS CASES AND MATERIALS} 1 (1953).

\textsuperscript{14} "A signed agreement which excludes modifications 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." U.C.C. § 2-209(2) (1978).

\textsuperscript{15} A typical NOM clause might read as follows: "The parties to this agreement hereby agree and understand that this agreement may not be modified or rescinded except by an agreement evidenced by a writing, signed by these parties or by their duly authorized agents. Any modification that fails to meet this signed writing requirement shall be null and void."

\textsuperscript{16} See, e.g., 6 A. CORBIN, \textit{CORBIN ON CONTRACTS}, § 1295, at 206 & n.32 (1962). Professor Corbin states in his treatise that "[a]ny written contract . . . can be rescinded or varied at will by the oral agreement of the parties; and this is held to be true, except as otherwise provided by statute, even of a written agreement that the contract shall not be orally varied or rescinded." \textit{Id.} Judge Car-
Therefore, under the common law, NOM clauses were essentially inoperative. There were, however, statutory antecedents to § 2-209(2), the most significant of which was a New York enactment. The New York statute avoided certain analytical deficiencies inherent in other NOM statutes by expressly including oral "discharges" along with modifications. Since earlier drafts of § 2-209(2) had not included rescissions, the influence of the New York statute on § 2-209(2) cannot be gainsaid. A number of contracts scholars, led by Professor Corbin, were as displeased with § 2-209(2) as they had been with the New York and other statutory enactments requiring the enforceability of NOM clauses. Thus, while § 2-209(2) cannot be said to have been innovative, it was controversial.

dozo stated early this century in a New York case that: "Those who make a contract may unmake it. The clause which forbids a change, may be changed like any other." Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 387, 122 N.E. 378, 381 (1919). More recently Justice Musmanno of the Pennsylvania Supreme Court held that even [t]he most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof. . . . Even where the contract specifically states that no non-written modification will be recognized, the parties may yet alter their agreement by parol negotiation. The hand that pens a writing may not gag the mouths of the assenting parties. The pen may be more precise in permanently recording what is to be done, but it may not still the tongues which bespeak an improvement in or modification of what has been written.


18. If a statute merely provides that oral modifications are prohibited where the original contract was evidenced by a writing containing an NOM clause, the statute will not preclude an oral rescission, discharge or termination of the original contract. See, e.g., Cowin v. Salmon, 244 Ala. 285, 13 So. 2d 190 (1943)(written executory contract held capable of verbal modification or rescission unless statute requires such agreement to be in writing or agreement postpones its effect until writing is signed).

19. Drafts of § 2-209(2) and 2-209(4) prior to 1957 did not include rescissions. The recommendations of the Permanent Editorial Board in 1956 recommended the inclusion of rescissions in these two subsections. XVIII E. Kelly, Uniform Commercial Code Drafts 29-30 (1984).

20. Professor Patterson viewed § 2-209(2) as essentially a codification of the New York Personal Property Law § 33(c), first enacted in 1941. He stated that § 2-209(2) was "based on an earlier version" of this law that did not preclude oral discharges. That statute was amended twice and the last amendment in 1952 prohibited "terminations." See Statement of Professor Patterson before the N.Y. Law Revision Commission, supra note 12.

21. See 6 A. Corbin, supra note 16, § 1295, at 210-12. For Professor Corbin's view of these statutes, see infra note 121. For a further discussion of satisfaction of NOM requirements, see infra notes 116-38 and accompanying text.
Subsection (3) of § 2-209 is drafted in language that was used by many courts and scholars prior to the Code to identify a not uncommon situation. If the "contract as modified" is within the statute of frauds, the requirements of the statute of frauds would have to be met to permit enforcement of the modified contract. Conversely, an oral contract unenforceable because it could not be performed within one year from its making, for example, become enforceable "as modified" when an oral modification made the contract performable within a year. The concept was relatively straightforward. It was popularly distinguished from subsection (2) (the "private" statute of frauds) by those who called it the "public" statute of frauds modification provision. There is nothing in the drafting history of § 2-209(3) to suggest any departure from pre-Code concepts. In fact to some, subsection (3) appeared superfluous. The well-known "contract as modified" phrase was apparently deliberately taken by the drafters of § 2-209(3) from the earliest drafts of that subsection. Yet, there has been considerable difficulty in the subsection's interpretation and application by courts and scholars as subsequent discussion will reveal. Again, however, to the classical contracts lawyer, § 2-209(3) would not have appeared a dramatic departure.

The fourth subsection of § 2-209 appeared novel because of its apparent effect on § 2-209(2). To those who were less than pleased with the codification in § 2-209(2) of criticized enactments enforcing NOM clauses, subsection (4) opened a "big back door" offering welcome relief. The relief was not total, however, otherwise, subsection (4) would simply contradict subsections (2) and (3) which made oral modifications inoperative. If

22. "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." U.C.C. § 2-209(3) (1978).
24. See Professor Patterson's view of § 2-209(3), see supra note 12, at 643-44.
25. For example, that phraseology is found in the 1949 draft. See VI E. KELLY, supra note 19, at 77.
26. See Professor Patterson's view, supra note 12, at 643-44.
27. "Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver." U.C.C. § 2-209(4) (1978).
28. Professor Corbin, however, felt that § 2-209(4) was "consistent with the general law of contracts." 2 A. CORBIN, supra note 16, § 301, at 89 n.2.
29. See Professor Patterson's statement, supra note 12, at 644.
an attempt at modification not satisfying subsection (2) or (3) could operate as a waiver, one possible reading of (4) suggested a fatuous construction, i.e., subsections (2) and (3) require modifications and rescissions to be evidenced by writings and subsection (4) removes the writing requirement. Subsection (4) also raised additional interpretation issues at every turn. What is “an attempt at modification or rescission [that] does not satisfy the requirements of subsection (2) or (3)”? Whatever “it” is, “it can operate as waiver,” that is, it is not really a waiver, but can be given the operative effect of a waiver. Then, of course, we find ourselves in the morass of one of the more amorphous terms in our legal vocabulary—“waiver.” If an attempt at modification not satisfying subsection (2) or (3) can operate as a waiver, are we to assume that at times it “can” and at other times it “cannot”? 

Subsection (4) left much room for improvement and was destined to present numerous difficulties to courts and those scholars who were courageous enough to take it on.

Subsection (5) appeared to be a companion to subsection (4). Its terms, however, exacerbated the confusion. Assuming we know what “it” is that “operate[s] as a waiver,” if the waiver affects an executory portion of the contract, it may be retracted through reasonable notice that strict performance “of any term waived” will be required absent “material” reliance prior to the notification. At this point, the classical contracts lawyer may have been particularly disturbed. We are not even certain of what “it” is that can be “waived,” although we know that whatever “it” is, “it” occurs through “an attempt at modification or rescission” that “can operate as a waiver” under subsection (4). Our analytical juices suggest attempts at understanding “an attempt at modification [that] does not satisfy subsection (2) or (3)” because of the mysterious “it” that we must identify under subsection (4) if we are to have any hope of understanding subsection (5).

If a modification or rescission were evidence by a writing, it would satisfy the requirements of subsection (2) or (3). May we, therefore, conclude that a modification or rescission that does not

30. For a discussion of modifications as “waivers,” see infra notes 134-59 and accompanying text.

31. 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.

satisfy subsection (2) or (3) is necessarily an oral modification and that this oral modification can operate as a waiver? At least one reasonable interpretation of the language of § 2-209(3) precludes that analysis. Section 2-209(3) merely requires that § 2-201 (the statute of frauds section of the Code) be “satisfied if the contract as modified is within its provisions.” While a writing will make a modified contract within § 2-201 enforceable, § 2-201 expressly permits devices in lieu of a writing: reliance in a specially manufactured goods situation, admission of the contract in a party’s “pleading, testimony or otherwise in court,” and performance by either party, i.e., payment and acceptance or receipt and acceptance of the goods. Moreover, if the “party against whom enforcement is sought” is a merchant, a contract will be enforceable against that party even though he has signed no writing but has merely failed to object to a satisfactory memorandum sent by the other merchant-party within ten days from its receipt. Finally, notwithstanding the opening phrase of § 2-201 (“Except as otherwise provided in this section”), many courts have found a general reliance exception to the § 2-201 writing requirement. Thus, there are five ways in which the § 2-201 requirement may be satisfied beyond a writing signed by the party against whom enforcement is sought. To suggest, therefore, that the § 2-209(4) language, “an attempt at modification [that] does not satisfy the requirements of subsection . . . (3),” is only an oral modi-

32. For the full text of § 2-209(3), see supra note 22.
33. U.C.C. § 2-201(3)(a) (1978). This section specifically states:
if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller’s business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement.

Id.
34. Id. § 2-201(3)(b).
35. Id. § 2-201(3)(c).
36. Id. § 2-201(2).
37. Cases finding a general reliance satisfaction of U.C.C. § 2-201 include:


For a discussion of the reliance requirements, see infra notes 146-63 and accompanying text.
Modification again seems questionable at first glance. If, however, the drafting intention was to consider “attempts at modification” in § 2-209(4) only at the moment such modification agreements were made, the exceptions to the basic writing requirement of § 2-201 may not interfere with our notion that “attempts at modification” in subsection (4) are oral modifications, since the § 2-201 exceptions are post-formation exceptions. While this interpretation would permit all attempts at modification not satisfying subsection (3) to be oral modifications, it seems to fail because a post-formation satisfaction of § 2-201 is simply an adequate substitute for a writing fulfilling the evidentiary function of § 2-201. The “public” statute of frauds is not “waived” by such a substitute. It is “satisfied” through any of the statutory exceptions to the basic writing requirement.

Further disconcertion is supplied by the language of § 2-209(2) which rather blatantly states: “A signed writing which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded.” Does this language suggest that a “signed writing” is the exclusive manner of satisfying § 2-209(2), apart from the “waiver” in § 2-209(4)? If merchants executed a signed agreement with an NOM clause, would a confirmation of an oral modification be effective against the other merchant if he did not object within ten days of receipt? Would an admission of a modification in one’s pleadings, testi-

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38. See U.C.C. § 2-201(1) (1978). The basic writing requirement found in this subsection requires a writing to be signed by the party against whom enforcement is sought. Id.

39. For a discussion of these exceptions, see supra notes 33-36 and accompanying text. The four statutory exceptions in § 2-201 may be properly referred to as “exceptions” because of the opening phrase of that section: “Except as otherwise provided in this section.” The exceptions may be viewed as post-formation devices to satisfy the statute. For example, course of performance satisfies the statute in relation to specially manufactured goods; admissions and merchant’s confirmation also occur after formation, yet may satisfy the statute. The basic satisfaction device, i.e., a writing signed by the party to be charged under § 2-201(1), may either occur simultaneously with formation or be accomplished post-formation.

The judicially engrailed general reliance “exception” recognized by some courts may be viewed as a method of “defeating” the statute of frauds. See, e.g., Warder & Lee Elevator, Inc. v. Britten, 274 N.W. 2d 339 (Iowa 1979)(holding oral contract “within” statute of frauds taken “out” of statute due to reliance by promisee). However, general reliance may also be viewed as a satisfaction device, albeit judicially recognized as not having been displaced under U.C.C. § 1-103, which preserves undisplaced rules and principles, since the specially manufactured goods exception is, essentially, a narrow reliance method of satisfaction.

40. U.C.C. § 2-209(2) (1978). For the full text of this subsection, see supra note 14.
mony or otherwise in court permit enforcement of the modification notwithstanding the NOM clause? Would one of the other statutory or judicial exceptions to § 2-201 be effective to make a modification enforceable notwithstanding an NOM clause? Again, should one of those substitutes occur, would it then be appropriate to characterize the NOM clause as having been "waived"?

Finally, § 2-209(5) rears its puzzling head in permitting retraction of a waiver if notification of such retraction is received by the other party that "strict performance will be required of any term waived"41 absent reliance by the other party. We had wondered what "it" meant in § 2-209(4): "Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver."42 If an attempt at modification not satisfying subsection (2) or (3) is, arguably, only an oral modification, then "it" (the oral modification) operates as a waiver. But of what is it a waiver? Is it a waiver of the "public" statute of frauds with respect to § 2-209(3) modifications? If so, what is the "term" referred to in § 2-209(5) that a party may insist be strictly performed, absent reliance, despite a prior oral modification? Section § 2-209(5) speaks of waiving a "term," but the "public" statute of frauds is not a contract term. An NOM clause, however, is a term of the original contract. Does § 2-209(5) speak only to rejuvenating NOM clauses and not to recalling the "public" statute of frauds? If so, what happens to a waiver of the § 2-209(3) ("public" statute of frauds) requirement contemplated by § 2-209(4)? Can that requirement be reinstated by a retraction of its waiver?

Collectively, all of these individual puzzles have shrouded § 2-209 in a mysterious cloak and neither courts nor legal scholars have, to this point, succeeded in unraveling the mystery. There is a felt need for a workable analysis of § 2-209, and this article is designed to provide that analysis.

III. Consideration and the Statute of Frauds: The Holistic Analysis

We have seen that the first subsection of § 2-209 allows for the enforcement of good faith modifications without considera-

41. U.C.C. § 2-209(5) (1978) (emphasis added). For the full text of this subsection, see supra note 31.
tion. The remainder of the section deals with the requirement of a writing for a modification or rescission of a contract evidenced by a writing containing a “no oral modification” (NOM) clause; the requirement that the Article 2 statute of frauds be satisfied if the contract as modified is within that section; an enigmatic subsection giving “waiver” effect to oral modifications that violate earlier subsections and a final subsection that seems to allow retraction of an oral modification absent reliance. Why should a section containing four subsections dealing with the “public” or “private” statute of frauds begin with a subsection that abrogates the pre-existing duty rule if the modification is in

43. Though the “good faith” requirement is not found in the language of the subsection, comment 2 to § 2-209 states that “modifications made thereunder must meet the test of good faith imposed by this Act.” U.C.C. § 2-209 comment 2 (1978). The “good faith” obligation is found in U.C.C. § 1-203 but that section imposes an obligation of good faith in the performance or enforcement of “[e]very contract or duty within” the Code. U.C.C. § 1-203 (1978). It has been suggested that contract modifications are “more readily” thought of as coming within the formation stage of the contract rather than the performance or enforcement stages. If “good faith” is a substantive requirement, the comment cannot insert such a requirement since the comment can only serve as a restatement of what is contained in the section. Eisler, supra note 6, at 279 n.6. A further reading of comment 2 to § 2-209, however, suggests that the comment is focusing upon the performance stage of the original contract: “The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a ‘modification’ without legitimate commercial reason is ineffective as a violation of the duty of good faith.” U.C.C. § 2-209 comment 2 (1978). From the perspective of excusing performance of the unmodified contract, a bad faith modification will fail and the duty of performance under the original contract remains since there is an absence of good faith. In his analysis of § 2-209 for the New York Law Revision Commission, Professor Patterson suggests:

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


44. U.C.C. § 2-209(2) (1978). This subsection is often called the “private” statute of frauds requirement. For the full text of U.C.C. § 2-209(2), see supra note 14. For a discussion of the “private” statute of frauds see, supra notes 15-17 and accompanying text.

45. U.C.C. § 2-201 is incorporated in U.C.C. § 2-209(3) often called the “public” statute of frauds. For a discussion of the relation of U.C.C. § 2-201 to U.C.C. § 2-209(3), see supra notes 32-39 and accompanying text.

46. U.C.C. § 2-209(4) has been the most difficult subsection for courts and commentators. For a discussion of U.C.C. § 2-209(4), see supra notes 27-29 and accompanying text. For the text of U.C.C. § 2-209(4), see supra note 27.

47. U.C.C. § 2-209(5) has caused considerable consternation in conjunction with subsection (4). For the text of U.C.C. § 2-209(5), see supra note 31.
good faith? Why is it there? A conceptual framework presenting a holistic view of § 2-209 was probably inevitable. To some, there had to be a reason behind changing the pre-existing duty rule in a section of Article 2 that was dominantly concerned with the statute of frauds. This premise has produced a view of § 2-209 that suggests a return to a classic analysis of legal formalities such as the seal or other formalistic devices.48

Professor Lon Fuller long ago provided a splendid analysis of the three functions performed by formalistic devices: 1) the evidentiary function (evidence of the existence and terms of a contract); 2) the cautionary function (a check against inconsiderate action) and 3) a channeling function (the Fuller innovation: signaling the enforceability of the promise).49 If the drafters of § 2-209 decided to make good faith modifications enforceable under § 2-209(1), they were surrendering the three formal functions that consideration may be said to supply. By inserting a writing requirement in § 2-209(3), however, the holistic view suggests that the drafters intended to restore the evidentiary, cautionary and channeling functions through this requirement.50 Under this view, an unsupported modification, i.e., one not supported by consideration, must be evidenced by a writing to be enforceable because § 2-209(3) serves two functions. First, the requirement of the § 2-201 statute of frauds must be met. Second, even if it is met, subsection (3) provides "a formal basis for enforcement of the modification agreement."51 To illustrate this point, one commentator, Professor Eisler, provides an example of an unsupported oral modification that is admitted by the party against whom enforcement of the oral modification is sought in that party's pleadings, testimony or otherwise in court. Section 2-201(3) (b) permits satisfaction of the statute of frauds through such admissions.52 Since one reading of § 2-209(3) merely re-

48. This is the view suggested by Professor Eisler. See generally Eisler, supra note 6.
49. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 800-01 (1941). It is interesting to note that Professor Fuller relied upon a Llewellyn suggestion: "'In all legal systems the effort is to find definite marks which shall at once include the promises which ought to be enforceable, exclude those which ought not to be, and signalize those which will be.'" Id. at 801 n.5 (quoting Llewellyn, What Price Contract?, 40 YALE L. J. 704, 738 (1931)).
50. See Eisler, supra note 6, at 297.
51. Id. For the full text of § 2-209(3), see supra note 22.
52. See U.C.C. § 2-201(3)(b) (1978). This section specifically provides: A contract which does not satisfy the requirements of subsection (1) [the writing requirement] but which is valid in other respects is enforceable.
quires satisfaction of the § 2-201 statute of frauds "if the contract as modified is within its provisions," an admission of an oral modification in accordance with the requirements of § 2-201(3)(b) appears to satisfy § 2-209(3) because it clearly satisfies § 2-201. However, this is said to be incorrect because § 2-209(3) is more than a mere statute of frauds requirement:

Because the modification was not supported by consideration, a formal basis for enforcement of the modification agreement was necessary. The admission clearly performed the evidentiary function of a legal formality, but failed to fulfill the cautionary function, because at the time of the agreement there was nothing to apprise [b]uyer that his promise would be legally enforceable.\(^\text{53}\)

Presumably, the writing in this illustration would also fulfill the channeling function though it is not expressly mentioned. At another point, however, Professor Eisler is content to dispense with the cautionary and channeling functions if there is reliance on an otherwise unsupported oral modification. Though “reliance performs neither a channeling nor a cautionary function,” it will suffice to make an oral modification enforceable because “justice” requires such enforcement.\(^\text{54}\) Beyond this exception to the analysis, Professor Eisler finds another. While an unsupported oral modification will be unenforceable even if it is admitted, if a merchant party seeking to enforce such a modification has sent a confirmation of the modification and the other merchant party does not object within ten days of its receipt, the unsupported oral modification will be enforceable.\(^\text{55}\) The rationale is interesting: the confirmation is notification to the other party that the

\[^{\text{b}}\text{if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted. . . .}\]

\(^{\text{Id.}}\)

53. Eisler, \textit{supra} note 6, at 303.

54. \textit{Id.} at 298. Here, the author is referring to the typical concept of detrimental reliance found in § 2-209(5).

55. \textit{See} U.C.C. § 2-201(2) (1978). This subsection specifically states: Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) [writing requirement] against such party unless written notice of objection to its contents is given within 10 days after it is received.

\(^{\text{Id.}}\)
sender intends to rely on the oral modification and this should be
eough to warn the promisor that the agreement is legally en-
forceable. Professor Eisler suggests a case in support of this
view and the case, indeed, holds that a modification is enforcea-
ble through a § 2-201(2) confirmation. The opinion, however,
also suggests that any exception to the § 2-201 writing require-
ment would be effective to make an unsupported oral modification enforceable. Moreover, that opinion relies upon a case holding that an unsupported oral modification is clearly enforceable without a writing because the defendant failed to plead the
statute of frauds. Neither court perceived any function of § 2-
209(3) beyond the satisfaction of the § 2-201 statute of frauds in
the modified contract. Professor Eisler suggests that enforcement of an unsupported oral modification under the confirmation ex-
ception is based upon “an intent to rely” by the sender. Here,
she seems to be suggesting a sort of “anticipatory reliance.”
Since full-blown reliance does not serve the cautionary and channeling functions, it cannot be denied that anticipatory reliance fails to serve those functions. Moreover, unlike reliance which Professor Eisler believes serves the evidentiary function, anticipa-
tory reliance does not necessarily serve even that single function.

This analysis of § 2-209 becomes more curious at almost every turn. Another illustration confirms the curiosity. Buyer
and seller sign a writing evidencing a contract for the purchase
and sale of 100 items on credit at $10 per item. Seller agrees to
deliver on June 1. On May 1, the parties orally agree to a modifi-
cation by which seller agrees to deliver the goods on May 15 and
buyer promises to pay cash on delivery. Because this is a “sup-
ported” modification, it requires no writing. The parties have
changed the time of delivery and payment terms but the original
writing satisfies the § 2-209(3) incorporation of § 2-201 with re-
spect to the contract as modified because neither delivery nor
payment terms are required to be evidenced by a writing under
§ 2-201. If, however, the time of delivery were changed and that

56. Eisler, supra note 6, at 303.
57. See A & G Constr. Co. v. Reid Bros. Logging Co., 547 P.2d 1207 (Alaska 1976)(contractor obliged to pay increased rate for materials received and ac-
cepted subsequent to date of unsigned written modification of agreement).
58. Id. at 1215-16.
669 (1963); see also Bone Int'l, Inc. v. Johnson, 74 N.C. App. 703, 329 S.E.2d 714
(1985). For a discussion of Bone, see infra note 110.
60. Eisler, supra note 6, at 303 n.107.
modification, albeit in good faith, were not supported by consider-
eration, the modification would have to be evidenced by a writ-
ing—not because of § 2-201, but because § 2-209(3), *itself*,
requires a writing for an unsupported modification. This view is
confirmed by hypothetically changing the quantity term in a sup-
ported modification. If the original contract evidenced an ex-
change of 1000 widgets for $1000 and the parties orally agreed to
modify the terms to 1200 widgets for $1200, either a writing or
one of the other methods of satisfying § 2-201 would be neces-
sary, notwithstanding the presence of consideration in the modifi-
cation. Professor Eisler explains this result: “[T]he writing
requirement stems from § 2-201(1) (the statute of frauds), not
from § 2-209(3).”61 Thus, § 2-209(3) has a life or purpose of its
own apart from its incorporation of the § 2-201 requirement, i.e.,
the purpose of supplying a legal formality that would be missing if
there were no consideration supporting the modification.

There is not a scintilla of support in the drafting history of
§ 2-209 for the notion that § 2-209(3) was designed to require a
formalistic validation device62 for unsupported modifications and
to incorporate the requirements of § 2-201 for all modifications.
To the extent Professor Eisler reviews any of the drafting history,
that history is either rejected or ignored. The analysis of Profes-
sor Patterson in the 1955 New York Law Revision Commission
Report is expressly cast aside.63 Instead, Professor Eisler finds

61. *Id.* at 309 n.132.
62. Professor Eisler adopts the “validation device” terminology from J.
Murray, Jr., Murray on Contracts 124 (2d ed. 1974). See Eisler, *supra* note 6,
at 281 n.10.
63. *See* Eisler, *supra* note 6, at 295-96. Professor Eisler believes that
common-law analysis leads to anomalous results. Under the common
law, modifications of essential terms must be written accurately. Thus,
if subsection (3) follows the common law, as Professor Patterson stated,
then modifications under section 2-209(3) would have to be written be-
cause almost all terms are essential. Common-law analysis of the Stat-
ute of Frauds of section 2-201, however, would grant legal effect to oral
modifications because the only term that must be written under section
2-201 is the quantity term. Thus, comment 3, which requires modifica-
tion agreements to be written, yields the same result as at common law,
but a literal interpretation of subsection (3) uses a common-law analysis
to grant enforcement of oral modifications.

*Id.* at 296.

This analysis is predicated on the assumption that Professor Patterson and
others who would subscribe to Professor Patterson’s view that § 2-209(3) is con-
sistent with common-law analyses of oral modifications and the statute of frauds,
failed to understand, or at least remember, the differences between § 2-201 and
its pre-Code ancestor, section 4 of the Uniform Sales Act, which itself was based
on section 17 of the 1677 Statute of Frauds. There is no basis for this assump-
tion. Professor Eisler unwittingly views § 2-209(3) as if it had the effect of a
support in a classic article dealing with the concept of legislative intent which has nothing to do with the Code, much less Article 2. She attempts to find solace in comment 3 to § 2-209 which provides:

Subsections (2) and (3) are intended to protect against false allegations of oral modifications. "Modification or rescission" includes abandonment or other change by mutual consent, contrary to the decision in Green v. Doniger, 300 N.Y. 238, 90 N.E.2d 56 (1949); it does not include unilateral "termination" or "cancellation" as defined in Section 2-106.

The Statue of Frauds provisions of this Article are expressly applied to modifications by subsection (3). Under those provisions the "delivery and acceptance" test is limited to goods which have been accepted, that is, to the past. "Modification" for the future cannot therefore be conjured up by oral testimony if the price involved is $500.00 or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to the quantity of goods set forth in it there is safeguard against oral evidence.

Professor Eisler recognizes that the language of § 2-209(3) merely requires satisfaction of any one of the § 2-201 provisions if the contract as modified is within its provisions. However, the drafters intended subsection (3) "to protect against false allegations of oral modifications." To effectuate that purpose, comment 3 requires that "[m]odification’ for the future cannot therefore be conjured up by oral testimony if the price involved is $500 or more since such modification must be shown at least by an authenticated memo." Having abandoned the attempt to discover the intention of the Article 2 drafters, Professor Eisler

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64. Professor Eisler states, "An attempt to find a legislative 'intent' may prove to be fruitless beyond the 'intent' of the drafters." Eisler, supra note 6, at 295 n.72 (citing Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 870-84 (1930)).
66. Id.
67. Id.
finds an inconsistency between the language of § 2-209(3) and the comment. She illustrates the inconsistency with a hypothetical. A buyer and seller have a written contract for 100 items at $10 per item. Before the date of delivery, the parties agree to a good faith modification of the price term, increasing it to $12 per item. Since § 2-209(1) permits a good faith modification without consideration, if § 2-209(3) is satisfied, the modification is enforceable. Under the language of subsection (3), § 2-201 is satisfied. Professor Eisler, however, believes that comment 3 will not permit that result because the modification itself is not shown by “an authenticated memo” required by comment 3.68

This analysis is unsound. Professor Eisler reads comment 3 selectively. Section 2-209(3) was designed “to protect against false allegations of oral modifications” and this protection would prevent enforcement of an oral modification “conjured up by oral testimony.” The first sentence of the second paragraph of comment 3, however, restates the common understanding of the “contract as modified” language in § 2-209(3), i.e., “[t]he Statute of Frauds provisions of this Article are expressly applied to modifications under subsection (3).”69 Contrary to Professor Eisler’s analysis, “provisions” would include all of the provisions of § 2-201, and the comment could not be more certain in terms of the “express” application of such provisions to modifications. The remainder of the second paragraph of comment 3 deals with only one of the provisions of § 2-201, the “delivery and acceptance” test, and distinguishes the obvious situation in which the buyer, for example, has accepted goods in excess of the quantity evidenced by the original writing and there is oral testimony of an alleged modification of the quantity term. The enforceability of the contract would be limited to the quantity set forth in the original writing unless, again, one of the provisions of § 2-201, such as the “delivery and acceptance” provision, would permit enforcement of a contract with a greater quantity because that quantity had already been accepted. This distinction in the second paragraph of comment 3 is clearly illustrative of only one of the provisions of § 2-201 because the first sentence of that paragraph, again, insists that all § 2-201 provisions apply to § 2-209(3).70

Contrary to Professor Eisler’s analysis, therefore, there is no basis

68. See Eisler, supra note 6, at 287-88.
69. U.C.C. § 2-209 comment 3 (1978) (emphasis added). For the full text of comment 3, see supra text accompanying note 65.
70. See U.C.C. § 2-209 comment 3 (1978). For a discussion of the relevant provisions of § 2-201, see supra notes 32-38 and accompanying text.
for any finding of inconsistency between the language of § 2-209(3) and comment 3. Furthermore, it is obvious that a comment cannot prevail over the language of the statute. Early in her piece, Professor Eisler makes note of the subservience of Code comments. Yet, she insists that § 2-209(3) be interpreted in accordance with comment 3, notwithstanding her contention that the subsection and the comment are inconsistent.

Beyond the interpretation or construction of § 2-209(3) and its comment, it is important to consider the holistic assertion that, “[t]he writing requirement also performs the three functions of a legal formality”73 as a substitute for consideration. This notion was put to rest more than a quarter of a century ago by Professor Farnsworth:

Three possible functions [of a statute of frauds] are commonly suggested: (1) a cautionary, (2) a channeling, and (3) an evidentiary function. The first of these has as its goal the discouragement of bargains hastily entered upon and is well illustrated by the provision requiring a writing for a promise to pay the debt of another. While there may be some ground for the belief that the requirement of a writing in the case of a contract for sale of goods has a healthy in terrorem effect by encouraging buyers and sellers to keep written records, it is doubtful that this is one of its primary purposes, for it is generally held that the required memorandum need not have been made with the intent to be bound or even to make a memorandum, and even a repudiation may satisfy the statute. Any cautionary function is thus only incidental to the real ends of the statute. Nor is a principal end of the statute as to the sale of goods the channeling of transactions so as to make it easy to identify those agreements which are legally enforceable. This may be a substantial function of the statute as to sales of land, but the statute as to sales of goods may be satisfied not only by a memorandum but also by part payment or by receipt and

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71. See Eisler, supra note 6, at 279 n.6. Professor Eisler suggests the inclusion of “good faith” in U.C.C. § 2-209(1) because, if the good faith requirement is "substantive" and not already imposed under U.C.C. § 1-203 which seems to deal only with performance or enforcement as contrasted with formation, then “the good-faith requirement should have been enacted as part of subsection (1); otherwise, the comment does not have the force of law.” Id.

72. Id. at 296.

73. Id. at 297.
acceptance, and from the thousands of cases in which the parties have brought before the courts their controversies as to these requirements, the channel must indeed be a murky one.

If the cautionary and channeling effects are negligible, the justification of a Statute of Frauds as to the sale of goods must be today, just as it was in the time of its origin in 1677, its evidentiary function, the prevention of fraudulent claims. And on one point most would agree—that the statute is not intended to deny enforcement to agreements admittedly made but lacking in the required formalities.74

The holistic analysis does not suggest any basis for its assertion that a writing requirement fulfills the cautionary and channeling as well as the evidentiary functions with respect to the statute of frauds concerning contracts to sell goods. Moreover, by accepting two alternate satisfaction devices (reliance and merchants' confirmations) with the express recognition that neither device fulfills the cautionary or channeling functions while expressly rejecting the admission device because it does not serve these functions, the holistic analysis begins to disintegrate. When we add to this growing list of inconsistencies the fact that the analysis is predicated entirely upon a questionable interpretation of a comment to the section which should not control the statutory language, the disintegration appears complete. We must, however, return to the fundamental question of the original design of § 2-209 and wonder, again, whether the drafters contemplated a § 2-209 predicated upon the holistic analysis, i.e., should the dilution of the preexisting duty rule in § 2-209(1) be viewed as an integral part of the remainder of § 2-209, or did the drafters merely find a convenient place in Article 2 to deal with the preexisting duty question? To discover an answer to this threshold question, it is important to consider the origins of the section as early as 1941 when the drafters were intent upon revising the Uniform Sales Act.

The 1941 draft of the Revised Uniform Sales Act contained § 3-J, captioned "Offers to Modify," which was designed to ascertain that such offers be communicated in a fashion reasonably appropriate to reach the attention of an agent of the offeree who

would have the power to assent to such a modification. The "reasonably appropriate" communication was necessary to activate an earlier section, § 3-G, permitting acceptance of such an offer by silence. It was also necessary to activate a portion of § 4 (the statute of frauds) that would permit confirmation of an oral modification to be effective against a party who had not signed any writing if that party did not "dissent" from such confirmation within ten days. The comment to § 3-J dealing with offers to modify is revealing:

This section relates to the same subject-matter as one part of Section 4 [the statute of frauds], which latter should probably be modified, the whole material being treated here. If, moreover, the consideration aspects of modification are dealt with, that will mean an elaboration at this point in the Draft. 75

The comment reveals the intention of the drafters to deal with the oral modification problem apart from "the Consideration aspects of modification." 76 If the pre-existing duty rule were modified, that change would be inserted in this section. It is clear that the drafters of Article 2 confronted the question of the writing requirement for modifications regardless of the consideration question, and they did not envision an holistic analysis. Section 4 of the draft also reveals an intention to apply the exception of current § 2-201(2) ("between merchants a writing not objected to within ten days will be effective against the non-signer") 77 to oral modifications as well as confirmations of the original oral contract. The quoted comment to § 3-J clearly reveals some indecision as to where the question of modifications and the statute of frauds should be placed. The inclusion of the current § 2-201(2) exception with respect to modifications in the 1941 section dealing with the statute of frauds may be seen as supporting the view that the current § 2-209(3) should be construed as Professors Pat-

76. Id.
77. Id. The full text of § 2-201(2) provides:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

U.C.C. § 2-201(2) (1978).
terson, Corbin and many others have construed it, i.e., the simple requirement that the “contract as modified” must meet any § 2-201 requirement. That construction automatically incorporates all of the exceptions (or alternate satisfaction devices) under § 2-201 for oral modifications. Thus, there is no need to restate those exceptions separately in the modification section. In the subsequent drafting history of § 2-209, there is no indication of any contrary intention. Rather, § 2-209(3) is consistently treated as if it is a well-known concept that the drafters merely intended to codify. Again, Professor Patterson thought it may be superfluous. 78

IV. THE SCOPE AND APPLICATION OF SECTION 2-209(3)

A. Scope

Except for those who believe that § 2-209(3) has something to do with validation devices as well as the statute of frauds, the conventional wisdom concerning the scope of § 2-209(3) recognizes five possibilities: 1) if the original contract is within § 2-201, any modification must be evidenced by a writing; 2) a modification must be in writing if the added term brings it within § 2-201 for the first time; 3) a modification must be in writing if the modification, itself, is within § 2-201; 4) a modification changing the quantity term must be in writing; 5) some combination of the foregoing. 79 The language of § 2-209(3) cannot be understood absent a clear understanding of the effect of a modification agreement.

A modification agreement involves two analytically distinct operative effects: 1) the termination or rescission of the original contract and 2) the creation of a new contract. 80 The typical modification incorporates both effects simultaneously in an entire (indivisible) contract so that the resulting (second) contract contains part of the terms of the original contract and the new terms. 81 There has never been any question that “the new contract is

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78. For Professor Patterson’s view concerning the superfluousness of § 2-209(3), see supra note 12, at 643-44.
79. See J. White & R. Summers, supra note 5, § 1-5, at 42-43 (listing these possibilities); Hillman, supra note 5, at 359-60 (same). Professor Farnsworth is unimpressed with the possibilities suggested by the commentators. See A. Farnsworth, Contracts 977 n.23 (1982) (“The seemingly simple language of UCC 2-209(3) has been given a remarkable variety of interpretations.”).
80. See Patterson, supra note 12, at 643; 2 A. Corbin, supra note 16, § 303.
81. See Restatement (Second) of Contracts § 149 (1979).
viewed as a whole,” \(^{82}\) i.e., “the contract as modified.” Professor Corbin is particularly clear in his directive that: “The second agreement is within the statute if these two parts, taken together, make a contract that would be within the statute if it had been the only executory contract that the parties had made, otherwise not.” \(^{83}\) This clarification is very helpful in understanding the scope and application of § 2-209(3).

If our exclusive concern is the modified contract, i.e., if we treat that contract as the only one the parties had made, we can determine the application of § 2-201 to the modified contract simply by applying § 2-201 to it as if there were no prior contract. This interpretation is in accordance with considerable pre-Code case law and, as suggested earlier, there is no basis for assuming any intention to depart from pre-Code analyses of the “contract as modified.” Among the numerous cases supporting this analysis outside the Code, one finds an oral contract that could not be performed within one year from its making that was orally modified so that the contract as modified could be performed within one year from its making. The statute of frauds was inapplicable to the contract as modified; therefore, it was enforceable. \(^{84}\) Moreover, it would have made no difference if the original contract had been in writing and enforceable since the enforceability of the original contract is irrelevant. \(^{85}\) Again, we focus exclusively on the contract as modified and that focus provides a workable analysis of the scope of § 2-209(3). An oral modification is enforceable if it deals exclusively with a part of the original written contract that was not within the statute of frauds. If the written evidence of the original contract is sufficient to satisfy the statute of frauds with respect to the modified contract, pre-Code or extra-Code case law supports the view that the modification need not be evidenced by a writing. \(^{86}\) Similarly, if the statute could have been satisfied by statutory devices alternative to a writing with respect to the original contract, the same satisfaction devices

\(^{82}\) Id. at comment a (citing U.C.C. § 2-209(3) (1978)).

\(^{83}\) 2 A. Corbin, supra note 16, § 304, at 97 (emphasis added).

\(^{84}\) See Flowood Corp. v. Chain, 247 Miss. 443, 152 So. 2d 915 (1963).

\(^{85}\) See, e.g., Sherman, Clay & Co. v. Buffum & Pendleton, Inc., 91 Or. 352, 179 P. 241 (1919) (oral modification of two year lease not required to be evidenced by writing because the contract as modified was not within statute of frauds).

\(^{86}\) See 2 A. Corbin, supra note 16, § 304, at 100. Professor Corbin states: “Thus, where the statute expressly provides that the consideration need not be expressed in the writing, a change in the consideration can be effected orally.” Id.
were available for the modified contract. If § 2-209(3) does not change the pre-Code concept that the "contract as modified" must satisfy the statute of frauds, how has § 2-209(3) been applied?

B. Application

Notwithstanding the preceding analysis of pre-Code law, the conventional wisdom suggests that one possible interpretation of § 2-209(3) would require any modification to be evidenced by a writing, i.e., even one dealing with a term that § 2-201 would not require to be evidenced by a writing. Section 2-201 only requires "some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." While the text of the statute does not provide an elaboration of a "sufficient" writing, comment 1 is particularly helpful. There is a tendency to suggest that the only term which need be stated is the quantity term, and there is even an argument that a writing without any quantity

87. An oral modification of a contract for the sale of goods by the substitution of different or additional goods is within the statute if the contract as modified would have been within the statute if it had been the only contract made; but if there has been acceptance and receipt of goods or a part payment under the oral contract, it becomes fully operative and enforceable. Id. § 305, at 101.

88. See J. White & R. Summers, supra note 5, § 1-5, at 44.

89. U.C.C. § 2-201(1) (1978). The full text of this subsection provides:

Except as otherwise provided in this section, a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there has been some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized broker or agent. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

Id.

90. Comment 1 reads as follows:
The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

term may be effective. 91 Section 2-201, however, does require more than the quantity term. The parties must be identified (though, again, not necessarily as buyer or seller), the goods must be sufficiently identified, the writing must be signed and, of overriding importance, the writing must afford a basis for believing that the parties made a contract. 92 It is abundantly clear that the drafters of Article 2 viewed the new statute of frauds for the sale of goods as a major improvement over the technical statute of frauds it replaced because it did not permit technical limitations to intrude on the critical question of whether there was sufficient evidence that the parties had made a particular deal. 93 If terms such as consideration, delivery and others need not be in writing to evidence the original contract, why should modifications of such terms require a writing?

There is a dearth of analysis in the case law concerning the scope of § 2-209(3). Recall the five possible interpretations of subsection (3), 94 the first suggesting that any modification would have to be evidenced by a writing. One would be hard pressed to find case-law support for that proposition. The case that is invariably mentioned is a Pennsylvania lower court opinion which hardly suggests an extensive analysis of the question and which has met with some disapproval. 95 Other cases do not deal with

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91. See J. White & R. Summers, supra note 5, § 2-4, at 60 n.52 (citing Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784 (5th Cir. 1975)). Professors White and Summers suggest that all of the commentators who insist that the quantity term must be stated may be wrong, i.e., there is an alternative interpretation of U.C.C. § 2-201 suggesting that a quantity term is determinative only if the writing states such a term. See id.

92. See U.C.C. § 2-201(1) (1978). For the text of this subsection, see supra note 89.

93. Karl Llewellyn was particularly upset with the possibility that a party to a contract evidenced by a writing would admit the making of a contract, but then insist that the contract contained another term not evidenced by the writing that had been agreed upon. If that party was believed by the trier of fact, the contract was unenforceable because the writing failed to state that term. Llewellyn thought this was a "commercial outrage" and suggested that U.C.C. § 2-201 was highly preferable:

We turn to the exact opposite and say, as long as you are sure you have got a deal, go to the jury as you would in any other case, and we say the risk is very small. You can't be sued under the memo for more than the quantity stated, which puts a top limit on what you could be possibly with. . . .


94. For a discussion of five possible interpretations of § 2-209(3), see supra note 79 and accompanying text.

95. Asco Mining Co. v. Gross Contracting Co., 3 U.C.C. Rep. Serv. 293 (Pa. C.P. 1965) (Callaghan) (oral modification of extension of time for payment held within U.C.C. § 2-209(3)). Professors White and Summers indicate that the
the scope question and proceed to consider whether an alternative statute of frauds satisfaction device is evident or whether a "waiver" under § 2-209(4) has occurred. In *Double-E Sportswear Corp. v. Girard Trust Bank*, a written contract for the sale of a certain quantity of sweaters and shirts at $11.75 per dozen provided a power of cancellation for the seller if written notice of such cancellation was sent to the buyer prior to a certain date. The buyer alleged an oral modification of the cancellation term and the inclusion of a new agreement for sealed bids for the same goods as well as a promise by the seller that the buyer would receive the goods if no other bid was higher. Prior to the time for submission of buyer's sealed bid, the seller sold the goods to another. In dealing with the oral modification, the concentration was on a § 2-209(4) waiver and the possibility of buyer's reliance thereon. The court was careful enough to suggest that the oral modification was "theoretically" a statute of frauds question. If the parties had not included the power of cancellation in their original writing, would the writing have been sufficient to satisfy the § 2-201 requirements? The parties were named, the goods were described and the quantity was certain. The price term, though unnecessary in the writing, was stated, and the power of cancellation was also stated. The writing would have certainly afforded "a basis for believing that the offered oral evidence [rested] on a real transaction" even if the price and cancellation terms had not been included in the original writing. An oral modification of a term that was not an essential term of the writing does not violate § 2-201, i.e., the "contract as modified" is

"court flatly stated that this [time for payment extension] violated § 2-209(3). One of us does not concur." J. WHITE & R. SUMMERS, *supra* note 5, § 1-5, at 45 & n.57. The statement of the court was very "flat," indeed, because it did not elaborate the point at all. Moreover, the issue in the case was whether the trial judge erred in charging the jury that consideration was necessary to sustain an oral modification. See *Asco*, 3 U.C.C. Rep. Serv. at 294. On the motion for a new trial, the court held that the trial judge had erred. Id. at 295. It then proceeded to "comment" on the U.C.C. § 2-209(3) question because counsel had "touched upon" such questions and the case was to be retried. Id.

96. 488 F.2d 292 (3d Cir. 1973).
97. Id. at 293.
98. Id. at 293-94.
99. Id. at 294.
100. Id. at 296-98.
101. Id. at 296. The court stated that "[w]hat the bank seems to overlook is that while an oral modification of a written agreement may theoretically be precluded, the code does explicitly provide for an oral waiver of the operation of the Statute of Frauds." Id.
satisfied by such a writing with no change in the parties or the quantity term. The issue was simply not addressed in *Double-E Sportswear*.\(^{103}\) Another case, *Farmers Elevator Co. v. Anderson*,\(^{104}\) involved an oral agreement for the purchase and sale of wheat to be delivered in February, 1973.\(^{105}\) The defendant admitted that he made the original oral contract and his admission satisfied the statute of frauds under the judicial admission satisfaction device.\(^{106}\) The plaintiff also alleged an oral modification extending the delivery date.\(^{107}\) The court resorted to § 2-209(4) and course of performance evidence to find a basis for enforcing the modification since the defendant did not admit the modification.\(^{108}\) Since the modification dealt with the delivery date (a term not required to be evidenced by a writing under § 2-201), was the modification within § 2-201 *ab initio*? A judicial admission of an oral agreement need contain no terms beyond the frugal terms required to be in writing under § 2-201(1).\(^{109}\) Thus, treating the admission as if it were a writing containing the terms admitted, there would appear to be no need to consider the statute of frauds concerning a modification of a term not required to be evidenced in the original writing or admission under § 2-201. Again, the scope of § 2-201 was not discussed, though the court clearly interpreted § 2-209(3) as merely requiring satisfaction of § 2-201. Other cases reveal no discussion of this fundamental scope analysis.\(^{110}\) The most plausible explanation is that the

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103. A case outside the Code illustrates the clarity of judicial decisions concerning oral modifications of terms that are not included in the writing requirement under other sections of the statute of frauds. In *Childress v. C. W. Myers Trading Post*, an alleged oral modification of a contract to buy and sell real property with respect to changes in the color of tile, brick, and mortar, as well as an extension of time for completion of the building were not within the land section of the statute of frauds since such matters were not statutorily required to be evidenced by a writing. 247 N.C. 150, 154, 100 S.E.2d 391, 393 (1957).

104. 170 Mont. 175, 552 P.2d 63 (1976).

105. *Id.* at 176, 552 P.2d at 63-64.

106. See U.C.C. § 2-201(3)(b) (1978). For the text of this section, see supra note 52.

107. *Farmers Elevator*, 170 Mont. at 177, 552 P.2d at 64.

108. *Id.* at 179-81, 552 P.2d at 65-66.

109. See Kohlmeyer & Co. v. Bowen, 126 Ga. App. 700, 706-07, 192 S.E.2d 400, 405 (1972) (dealing with U.C.C. § 8-319 (sale of securities), a statute of frauds section virtually identical to U.C.C. § 2-201, which the court so held); see also Dangerfield v. Markel, 252 N.W.2d 184 (N.D. 1977) (adopting the Kohlmeyer analysis for U.C.C. §§ 2-201 and 2-209(3) purposes).

110. See, e.g., Bone Int'l, Inc. v. Johnson, 74 N.C. App. 703, 329 S.E.2d 714 (1985). The *Bone* case concerned the oral modification of a disclaimer of warranty clause in the original written contract. *Id.* at 715. The statute of frauds was not raised. *Id.* at 717. However, the court stated that, had it been raised,
scope issue was simply not raised.

The fundamental problem in judicial treatments of § 2-209(3) is that courts seem to feel that it sprung like Minerva from the brow of Jove requiring the most sophisticated analysis of a theretofore unheard of concept. Yet, all of the evidence clearly points to the wisdom of Professor Patterson’s view that § 2-209(3) may have been superfluous since it merely codified the rather extensive pre-Code case law concerning the “contract as modified.”112 Before launching an extensive analysis of any part of the Code, it is highly desirable to consider what preceded it. The world of commercial law did not begin with the Uniform Commercial Code.

This analysis of § 2-209(3) is further supported by several applications of the section that confidently apply § 2-201 satisfaction devices, other than a writing signed by the party to be charged, to modifications. The admission of an oral modification is seen as satisfying § 2-209(3) via § 2-201(3)(b).113 Confirmation

111. This is a paraphrase of Professor Grant Gilmore’s criticism of the inordinate respect given § 2-207 (the notorious “battle of the forms” section) of the Code by scholars and courts. See Letter from Professor Gilmore to Professor Robert Summers, reprinted in R. Speidel, R. Summers and J. White, Commercial and Consumer Law 54-55 (3d ed. 1981).

112. See Patterson, supra note 12, at 643-44.

tions of modifications not objected to within ten days from receipt satisfy § 2-209(3) via § 2-201(2). The special manufacture of goods will satisfy § 2-209 via the § 2-201(3)(a) exception. The curiosity is that no reticence is shown by courts in attempting to discover an alternate satisfaction device under § 2-201 for modifications, but they pay no attention to whether the contract as modified is within § 2-201, ab initio. If § 2-201 is the controlling section to discern whether an oral modification should be enforced through alternate satisfaction devices, the threshold inquiry should be whether the contract as modified is within § 2-201.

V. The Satisfaction of NOM Requirements: Section 2-209(2)

A no oral modification (NOM) clause is often found in the written evidence of the original contract. It is designed to protect against fraudulent or mistaken oral testimony concerning transactions subsequent to the written contract. The clause may simply indicate the parties’ understanding that any modification of the terms of the written contract must be evidenced by a writing, or it may also prohibit any oral “discharge,” “termination” or “rescission” of the written contract. Earlier drafts of § 2-209(2) dealt only with “modifications” and “waivers.” To avoid undermining pre-Code statutes making such clauses enforceable, later drafts added “rescissions.” Absent statutory


115. See S.C. Gray, Inc. v. Ford Motor Co., 92 Mich. App. 789, 286 N.W.2d 34 (1979)(applying § 2-201(3)(a) exception to no oral modification clause requiring any modification to be in writing pursuant to § 2-209(2)).

116. 6 A. CORBIN, supra note 16, § 1295, at 205.

Without invalidating this contract the Contractor may add to or reduce the work to be performed hereunder. No extra work or changes from plans and specifications under this contract will be recognized or paid for, unless agreed to in writing before the extra work is started or the changes made, in which written order shall be specified in detail the extra work or changes desired, the price to be paid or the amount to be deducted should said change decrease the amount to be paid hereunder.

Id. at 446-47, 136 A.2d at 83. Such clauses are frequently found in construction contracts to avoid oral “change orders.”

118. See, e.g., Proposed Final Draft No. 2 (Spring 1951).

119. See Patterson, supra note 12, at 643. Professor Patterson traces the his-
protection, NOM clauses were ineffective.120 The statutes were designed to make such clauses enforceable. Those who criticized the statute of frauds, however, were equally critical of the statutory predecessors of § 2-209(2).121 Notwithstanding that criticism, § 2-209(2) permits the parties to include an enforceable clause in their written agreement proscribing modification or rescission except by a signed writing.122

The first thought that may occur to any lawyer considering § 2-209 for the first time is that § 2-209(2) supports the conventional, pre-Code interpretation of § 2-209(3). Earlier, a construction of the New York statute. The last amendment of the statute in 1952 was designed to overcome the result in Green v. Doniger, 300 N.Y. 238, 90 N.E.2d 56 (1949). Green permitted the parties to abandon the written contract and proceed to make a new oral contract on different terms. By extending the statute to prohibit termination of the original written contract, oral terminations or "waivers" of the original contract became ineffective. Professor Patterson notes that a "modification" involves two steps: (a) the termination of the first (original written) contract, and (b) the making of a new, second contract containing some of the original terms and the new terms. Therefore, a clause merely precluding "modifications" would be ineffective unless it also precludes termination by oral agreement.

120. See 6 A. CORBIN, supra note 16, § 1295, at 206-08. Professor Corbin's treatise states that:

Any written contract, other than specialties not now being considered, can be rescinded or varied at will by the oral agreement of the parties; and this is held to be true, except as otherwise provided by statute, even of a written agreement that the contract shall not be orally varied or rescinded. Two contractors cannot by mutual agreement limit their power to control their legal relations by future mutual agreement. Nor can they in this manner prescribe new rules of evidence and procedure in the proof of facts and events.

Id. (footnote omitted); see also RESTATEMENT (SECOND) OF CONTRACTS § 148 comment b (1981) ("Uniform Commercial Code § 2-209(2), however, gives effect to a signed agreement which excludes modification 'or rescission' except by a signed writing. That provision, applicable to 'transactions in goods' (§ 2-102), by its terms negates the rule stated in this Section."); Universal Builders, Inc. v. Moon Motor Lodge, 430 Pa. 550, 244 A.2d 10 (1968) (nonsale of goods construction contract could be modified orally although it provided that it could only be modified in writing).

121. See 6 A. CORBIN, supra note 16, § 1295, at 212.

Like the statute of frauds, these statutes evidence the "yearning for certainty and repose," although as Holmes said "certainty is an illusion and repose is not the destiny of man." They operate against the innocent and the unwary as well as against those who might cheat and defraud; and they run counter increasingly to the practices of ordinary men in the making, modifying and performing of their agreements. Men increasingly rely upon the spoken word, given in person or by telephone; and it is the function of the courts to do justice in such cases. It no longer serves for the court to throw a plaintiff out of court saying, "It was your folly not to get his signature."

Id.

122. For the full text of § 2-209(2), see supra note 14.
tion of § 2-209(3) requiring any modification or rescission to satisfy the § 2-201 statute of frauds was criticized.\textsuperscript{123} If that construction were correct, § 2-209(2) would be a nullity since all modifications and rescissions would have to satisfy the requirements of § 2-201. Section 2-209(3), like pre-Code constructions of the statute of frauds requirements for modifications, however, imposes no writing requirement on oral variations or discharges unless the contract as modified is within the statute of frauds.\textsuperscript{124} Thus, parties who seek protection beyond that provided by the “public” statute of frauds—by requiring a writing for any modification or rescission—are permitted to create their own statute of frauds, their “private” statute of frauds, through a clause requiring such modifications or rescissions to be evidence by a signed writing. Since the common law did not enforce such clauses, § 2-209(2), again, follows pre-Code statutory devices in making such clauses enforceable. Section 2-209(2), therefore, like § 2-209(3), did not suggest any novel, much less radical, transformation of pre-Code contract law.\textsuperscript{125} If one of the parties had performed (“executed”) in accordance with the oral modification required to be evidenced by a writing in a jurisdiction enforcing such clauses, courts had no difficulty in enforcing the oral modification because of the reliance of the performing party.\textsuperscript{126} In a “public” statute of frauds context, performance of either an oral contract or an oral modification would serve the evidentiary function of the statute of frauds to the extent of the performance and such performance is evidence of reliance by the performing party. Should performance be sufficient to make an oral modification enforceable notwithstanding § 2-209(2)?

The literal language of § 2-209(2) does not admit of alternate satisfaction devices beyond a signed writing. Subsection (4), however, permits an oral modification to operate as a waiver and a comment insists that the waiver provision is designed, \textit{inter alia}, to

\begin{itemize}
  \item \textsuperscript{123} See \textit{supra} note 68-69 and accompanying text.
  \item \textsuperscript{124} See 6 A. \textsc{Corbin}, \textit{supra} note 16, § 1295, at 205.
  \item \textsuperscript{125} Professor \textsc{Corbin} predicted that § 2-209(4), permitting reliance on the oral modification to make it enforceable, would prevent § 2-209(2) “from causing very serious injustice.” 6 A. \textsc{Corbin}, \textit{supra} note 16, § 1295, at 211.
\end{itemize}
prevent NOM clauses “from limiting in other respects the legal effects of the parties' actual later conduct.” 127 There is nothing in the drafting history of § 2-209(2) to suggest any departure from pre-Code satisfactions of NOM clauses through performance/reliance. The question arises: should any satisfaction device that would meet the requirements of § 2-209(3), i.e., alternate satisfaction devices under § 2-201, also satisfy the requirements of § 2-209(2)? A relatively simple example will aid the exploration of this question.

Assume a contract for the sale of goods within the statute of frauds evidenced by a sufficient writing that also includes an NOM clause. Next, assume an oral modification of that contract within § 2-209(3), i.e., that must satisfy § 2-201 as well as the “private” statute of frauds the parties have imposed by their NOM clause. A sufficient memorandum of the oral modification would satisfy both the “public” and “private” statutes of frauds. Absent a writing signed by the party to be charged, if the parties were merchants, would a writing signed by A and received by B without objection for ten days beyond receipt satisfy the NOM clause as well as § 2-209(3)? The purpose of this satisfaction device under § 2-201(2) is to avoid the pre-Code possibility that the non-signer could speculate at the expense of the signer, i.e., to bind the signer and permit the non-signer to decide whether he wants the contract to be enforceable. To suggest that this device would satisfy § 2-209(3) but not § 2-209(2) would perpetuate the evil that § 2-201(2) was designed to avoid. Moreover, unlike the original § 2-201 situation where such a writing could be sent by a party who had no previous relation with the non-signer, the modification situation clearly evidences a contractual relationship between the parties via the original writing containing the NOM clause. Thus, an unanswered writing evidencing a modification of the contract should provide sufficient protection “against false allegations of oral modifications.” 128 If a sufficient confirmation of

128. U.C.C. § 2-209 comment 3. See In re Estate of Upchurch, 62 Tenn. App. 639, 466 S.W.2d 886 (1971). In Upchurch a seller's letter, even though subsequent to the formation of the contract, was held to be sufficient evidence of the modification notwithstanding an NOM clause. Id. at 892. But see Monroc, Inc. v. Jack E. Parson Constr. Co., 604 P.2d 901 (Utah 1979). In Monroc the defendant insisted upon a literal interpretation of U.C.C. § 2-209(2), i.e., that only a writing signed by the defendant would satisfy the NOM clause in the original writing. Id. at 904. The trial court held that a paragraph in the purchase order reading, “Claims for extras positively will not be allowed unless ordered in writing” was not, under these circumstances, an effective NOM clause. Id. at 904-05. The appellate court sustained that ruling. Id. at 905. The plaintiff had
an oral modification is effective to satisfy § 2-209(3), the same policy reasons supporting that satisfaction device should be effective to satisfy § 2-209(2). Similarly, if the defendant admits the modification in his pleadings, testimony or otherwise in court, why should such a party be permitted to preclude enforcement of the modification through an NOM clause any more than he would be permitted to rely upon a § 2-201 defense after admitting an oral modification? Such a holding would be the epitome of a technical defense undermining the factual bargain of the parties without the slightest possibility of a false allegation of modification.

If the parties perform an oral modification that violates their NOM clause, there has never been any doubt that the executed modification is enforceable. Yet, even where it is clear that the parties have modified their agreement without a writing, courts have found comfort in the waiver analysis. In *Gold Kist, Inc. v. Pillow* the soybean buyer formed several contracts with the seller at prices varying from $5.59 per bushel to $7.22 per bushel. The contracts contained NOM clauses and also stipulated that the delivery of the soybeans would be applied first to the contract with the earliest date until delivery of that contract was completed, and then to subsequent contracts in chronological order.

argued that a confirmation of the oral modification, sent by plaintiff, satisfied either U.C.C. § 2-209(2) or 2-209(3). *Id.* On the assumption that the clause was an effective NOM clause, the appellate court stated that it would have found another writing, signed by defendant, to be sufficient to satisfy the § 2-209(2) requirement, i.e., inferentially, the plaintiff’s confirmation would not have been sufficient. *See id.* at 906.

In a Seventh Circuit case the court stated that certain writings giving new delivery dates, sent by the seller to the buyer were insufficient writings since they did not purport to modify the contract and were not signed by the purchaser. *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1284-85 (7th Cir. 1986). Though new delivery dates were not expressly designated by the seller as a modification of the contract, the statute of frauds should be satisfied by sufficient evidence of the parties’ agreement. *Id.* at 1285. For a discussion of *Wisconsin Knife Works*, see *infra* notes 160-234 and accompanying text. *Cf. Rockland Indus. v. Frank Kasmir Assocs.*, 470 F. Supp. 1176 (N.D. Tex. 1979) (a sufficient confirmation need not expressly state that it is a confirmation.); *Reich v. Helen Harper, Inc.* 3 U.C.C. Rep. Serv. 1048 (N.Y. Civ. Ct. 1966) (disputatious confirmation held sufficient) (*cited in J. White & R. Summers, supra note 5, at 59*).

130. 582 S.W.2d 77 (Tenn. Ct. App. 1979).
131. *Id.* at 78.
132. *Id.*
133. *Id.*
The plaintiff-buyer alleged an oral modification prompted by the seller's request that his deliveries be applied to the later, higher-priced contracts because he needed the money. The buyer agreed and paid the higher prices on earlier deliveries. The defendant then refused to perform the remaining contract calling for lower prices. The court stated that it would be "repulsive" to permit a party to request a change in terms of payment and then to escape liability because the other party had, in good faith, granted the request. The conduct of the defendant in this case cries out for an application of the waiver/estoppel analysis. Yet, the fact that the plaintiff made and defendant accepted payments in excess of the terms of the writing suggests reliable course of performance evidence which could be viewed as an alternate satisfaction device making the oral modification enforceable.

In summary, there is no justification for a refusal to recognize any alternate satisfaction device under § 2-201 with respect to NOM clauses if the purpose of § 2-209(2) is kept in mind. Any of those devices provides a reliable basis for enforcing an oral modification notwithstanding an NOM clause.

VI. Modifications Become Waivers

It is vitally important to consider the language of § 2-209(4): "Although an attempt at modification . . . does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver." In this part of the article, we seek to discover the true meaning of the infamous it.

There are too many meanings attached to the term "waiver." Such an assertion is often followed by the commonly accepted definition, "a voluntary relinquishment of a known right." This common definition is, however, misleading. It

134. Id. at 78-79.
135. Id. at 79.
136. Id.
137. Id. at 80.
138. For a discussion of the waiver/estoppel analysis, see infra note 139-67 and accompanying text.
139. Meanings of the term were the subject of study in the early part of this century. See J. Ewart, WAIVER DISTRIBUTED AMONG THE DEPARTMENTS: ELECTION, ESTOPPEL, CONTRACT, RELEASE (1917). Professor Corbin states that the term "has been given various definitions; the fact is that it is used under many varying circumstances." 3A A. Corbin, supra note 16, § 752, at 478.
140. See, e.g., Van Der Broeke v. Bellanca Aircraft Corp., 576 F.2d 582 (5th Cir. 1978); Farmers Elevator Co. of Reserve v. Anderson, 170 Mont. 175, 552
is because it implies that one can be said to terminate or discharge a right by "waiving" it. It is possible to relinquish a known right voluntarily in numerous ways including a gratuitous termination. Such a relinquishment, however, is not a waiver even though the correlative duty is discharged. It would have been highly desirable to restrict the use of "waiver" to those situations in which it clearly applies, i.e., the elimination of a condition (express, implied or constructive) to the duty to which it is attached. First-year law students learn that where conditions are present, they must occur to activate the duty which lies dormant until the condition occurs. A party may choose to perform a duty even though a condition has not occurred. A performance that must precede the performance of the other party is a constructive condition precedent to that performance. A duty of a party to sell goods may not be activated until a certain payment is made by a certain date. For example, the original contract may have included a buyer's duty of pre-payment by a certain date. The failure of the buyer to make the payment on time is a breach of the buyer's duty created by his promise to make the payment by that date, but it is also the failure of a constructive condition because the same event is a promise and a condition or, as it is often called, a promissory condition. The failure to make the pre-payment on time may or may not be a material breach discharging the duty of the seller. It is, however, a constructive condition precedent to the seller's duty and its non-occurrence fails to activate that duty.

Even though the seller's duty has not been activated, the seller may still decide to perform; the seller may ignore the fact that his duty has not been activated. If, prior to the pre-payment date, the seller informs the buyer that the buyer need not make the precedent payment on time, the condition to the seller's duty may be eliminated by this unilateral announcement. It is important to emphasize the character of this announcement—it is not an agreement; rather, it is a promise or representation by the seller that the seller will not insist upon the performance of the

P.2d 63 (1976); Clark v. West, 193 N.Y. 349, 86 N.E. 1 (1908), aff'd, 201 N.Y. 569, 95 N.E. 1125 (1911).

141. The definition is misleading because it suggests that one can simply "waive" a right unilaterally as contrasted with waiving a condition to a duty, and it is also misleading in that it may suggest that the promisor must "know" the legal effect of his promise as contrasted with his simply knowing the essential facts. See Restatement (Second) of Contracts § 84 comment b (1981).

142. Id.
pre-payment duty that constitutes the occurrence of a constructive condition precedent to activate his duty. Just as a promise may be enforceable without consideration, if the seller's promise or representation concerning the condition caused the buyer to change his position in reasonable reliance that he need not make the pre-payment on time, the seller will be precluded from asserting the failure of the constructive condition as a justification for his failure to perform. We will say that the seller is "estopped" from asserting the failure of the condition and we might add that the condition has been "waived." As in other detrimental reliance situations, however, neither the conclusory term "waiver" nor the similarly conclusory term "estoppel" explains the holding. Rather, it is the justifiable reliance by the prospective buyer that eliminates the condition to the seller's duty. It is possible for the seller to reinstate such a condition prior to the time for its occurrence by reasonable notice to the buyer that the seller will insist upon the original pre-payment on time. If there has been no reliance on the "waiver" that would make performance of the pre-payment condition burdensome to the buyer, the condition may be reinstated or, as it may be commonly suggested, the waiver may be withdrawn or revoked. The operation of "waiver" and "estoppel" have an existence separate and apart from the "public" statute of frauds or the parties' "private" statute of frauds created by NOM clauses in their original contracts.143

If the parties had agreed to change the precedent payment date and the seller received consideration for this modification, there would be no question concerning the validity of this substitute agreement. It is still possible to characterize this modification as a "waiver" but there would be no possibility of retraction of the waiver since consideration supports the promise to forego

143. 2 A. Corbin, supra note 16, § 310, at 113-15. Professor Corbin states:

Where some performance by the plaintiff . . . is a condition precedent, and the failure of the plaintiff to render such performance is caused by the defendant and not by the plaintiff's own inability, the failure to perform that condition is not a good defense in a suit upon the contract. This would be so in the cases of contracts not within the statute of frauds; and it is equally so of contracts that are in writing and are required to be so by the statute. Waiver of conditions and estoppel to assert them are subjects that are fully considered in dealing with contracts quite independently of the statute of frauds; and it is not necessary to discuss either "waiver" or "estoppel" at this point. It is only necessary to insist that there is nothing in the statute of frauds to prevent them from being fully operative in the usual way.

Id. (footnotes omitted). Professor Corbin believed the U.C.C. § 2-209 simply incorporated the principles of waiver/estoppel. See id. § 310, at 112 n.53.
the condition. It is possible to have a modification that operates as a waiver. If there were no consideration for the promise to forego the condition, but the promisee reasonably relied, again, the waiver would be irrevocable because of the reliance. The curiosity of this analysis when applied to § 2-209, however, is the fact that a modification needs no consideration or other validation device to be binding under § 2-209(1). It may, therefore, seem appropriate to suggest that § 2-209 modifications that operate as waivers need no validation device to make them enforceable. Neither consideration nor reliance is essential if the modification/waiver occurred in good faith. While this construction may be compatible with § 2-209(4)—which permits oral modifications violating subsections (2) and (3) to operate as waivers—it is irreconcilable with § 2-209(5) that permits reinstatement of waived terms absent reliance. We are left with a mystery: if § 2-209(1) removes any consideration or reliance requirement, why should a term (condition) that was eliminated by our oral modification/waiver be subject to reinstatement absent reliance?

Our solution to this mystery begins with the distinction between modifications and waivers. Section 2-209(1) eliminates the need for a validation device to make a modification agreement enforceable. This section, however, does not eliminate the need for consideration or reliance to make a waiver irrevocable. Yet, this may only appear to create another riddle. If the same event needs no validation device when it is characterized as a modification but does require a validation device when characterized as a waiver, why not simply enforce it as a modification agreement where there is no validation device and ignore the fact that it also operates as a waiver? The question scarcely survives its statement. The absence of a validation device will not preclude enforcement of a modification. The statute of frauds or an NOM clause, however, will preclude the enforcement of a modification that does not satisfy those requirements. If our modification is so precluded, as a modification, it is unenforceable. However, an unenforceable modification (“an attempt at modification [that] does not satisfy the requirements of subsection (2) or (3”), “can operate as a waiver.”144 It is not a waiver. It is an oral modification that fails to satisfy the requirements of the NOM clause or § 2-201. So characterized, it will not be enforceable. It can, however, operate as a waiver if it meets the requirements of a waiver although it was

144. See U.C.C. § 2-209(4) (1978). For the full text of this subsection, see supra note 27.
created by an agreement and is not the voluntary action of the obligor, alone. Once we leave the land of modifications, we are no longer immune from the requirement of a validation device to support the voluntary act of surrendering a condition to the activation of one's duty. Waivers are not irrevocable absent a validation device unless the time for the occurrence of the condition has passed and the term waived is not a material part of the agreed exchange.\textsuperscript{145} There is nothing in Article 2 or elsewhere in the Code that suggests any change in the pre-Code or extra-Code law governing waivers, including waivers arising from modification agreements. The concept is not used in any strange or novel fashion. Comment 4 to § 2-209 suggests the basic notion of the drafters to avoid any interference with that pre-Code law so as to give "legal effect [to] the parties' later conduct." The simple concept may be stated as follows: even though the parties have not satisfied their own NOM clause or the "public" statute of frauds, their oral modification may be viewed as a waiver of a term of the original contract that may be reinstated unless reliance would prevent such reinstatement.

It is important to emphasize that this analysis is not designed to allow for the enforcement of the unenforceable oral modification by playing characterization games. A modification will not be enforced under the guise of "waiver." Nor will the oral modification be enforced as a substitute agreement when it violates either the "public" statute of frauds or the parties' NOM clause. The oral modification, however, though not enforceable as an executory oral modification, may provide evidence giving rise to reasonable reliance by one party, thereby estopping the other party from insisting upon the enforcement of an original contract term which should not be enforced as a condition to the duty of the estopped party. The rationale is based exclusively on reliance: to permit the enforcement of the original contract term would be unjust in view of the other party's change of position. The clearest example of this kind of situation would occur where there has been some delay in performance caused by the other party. If a buyer requests a seller to delay shipment of the goods and the seller thereby delays delivery, it would be horrendous to permit the buyer to defend an action by the seller on the original contract.

\textsuperscript{145} See \textit{Restatement (Second) of Contracts} § 84 (1981). Section 84 of the \textit{Restatement (Second)} deals with waiver in terms of the elimination of conditions. If a waiver of a condition occurs prior to the time for its occurrence, absent consideration or reliance it may be reinstated if notice is given and there is a reasonable time for the conditioning event to occur. \textit{Id.}
tract on the basis of a failed tender to deliver in accordance with the precise time of delivery. Absent evidence that the seller could not have delivered at the original time, the situation screams for the elimination of the original time of delivery term.146 Suppose, however, the parties not only agreed upon a delay in delivery, but also agreed orally to a change in the goods to be delivered or to a different quantity of goods to be delivered. The pre-Code concept of waiver would not permit the enforcement of the oral modification concerning the substitution of different goods or a quantity change though, again, the waiver of the delivery term through the reliance of the seller should have been recognized.147 If § 2-209(4) and (5) are nothing more than codifications of the pre-Code concept of waiver/estoppel, there is no possibility of enforcing an otherwise unenforceable oral modification simply by calling it a “waiver” under § 2-209(4) which has been made irrevocable by reliance under § 2-209(5). The delineation between an unenforceable oral modification and a waiver is suggested in an earlier comment to § 2-209:

Subsection (5) allows retraction of a waiver with reference to the future, subject always to the qualification of reasonable notice and other avoidance of injustice. To limit this estoppel phase to its proper purpose, this Article gives preference in any case of doubt to the “waiver” construction as against that of unauthenticated “modification.”148

It is more than likely that this comment was designed to overcome the kinds of cases that Professor Corbin had criticized—cases that failed to recognize the possibility of a waiver/estoppel arising from an otherwise unenforceable oral modification.149

146. See Gold Kist, 582 S.W.2d at 77. For a discussion of Gold Kist, see supra notes 130-37 and accompanying text.

147. But see Clark v. Fey, 121 N.Y. 470, 24 N.E. 703 (1890). In Clark, an oral modification at the buyer's request provided for a delay in delivery and the substitution of other goods. The court refused to permit the seller to recover on the contract because of his delay in tender. Id. at 474-75, 24 N.E. 703-04. Professor Corbin is critical of this case and points out that the delay in delivery was caused by the buyer who should be “estopped” to rely on the original contract delivery term. He does, however, agree with the Clark court's refusal to enforce the oral modification for the substitution of different goods since that new contract has nothing to do with waiving a term of the original agreement because of the reliance of the seller. 2 A. Corbin, supra note 16, § 310, at 118-19 & n.67.

148. Comment 5 to the 1949 Draft of Uniform Commercial Code as found in VI E. Kelly, supra note 19, at 79. For the full text of § 2-209, see supra note 31.

149. For a discussion of Professor Corbin's critique, see supra note 141.
The comment, however, does not suggest any expansion of the normal operation of “waiver.” Professor Corbin viewed the 1950 draft of § 2-209 as nothing more than a codification of the pre-Code waiver/estoppel analysis and Professor Patterson’s elaboration suggests no change from conventional views of waiver/estoppel. His initial remark concerning § 2-209(4) has often been quoted: “This subsection opens the big back door on subsection (3).” This may have suggested to some that a § 2-209(4) waiver would be a powerful device to circumvent the requirement of written modifications. The analysis following this opening statement, however, clearly reveals nothing more than the typical waiver/estoppel analysis with a discussion of a New York case and a commendation of the concurring opinion.

Why did Professor Patterson think this was such a “big back door?” Since he was committed to the view that § 2-209(3) merely required satisfaction of § 2-201 if the contract as modified were within § 2-201, it is difficult to conceive of a situation where the traditional waiver/estoppel concept would assist a party to overcome the § 2-201 statute of frauds requirement. If a time of delivery term is changed through an oral modification and the seller relies upon that change, is the waiver/estoppel device critically important to achieve a just result? Consider the Restatement (Second) of Contracts in its illustration governed by the Code:

A and B contract in writing that A will sell specific goods to B for $1,000, delivery to be made in 30 days and payment in 60 days. Ten days later B orally requests that delivery be delayed until 45 days, and A so delays in reliance on the request. The delay is not a breach of A’s duty and does not excuse B from performing.
This illustration follows a comment which expressly refers to § 2-209(4) permitting an "unenforceable modification [to] operate as a waiver." The language suggests that the Restatement (Second) manifests no doubt that "an attempt at modification not satisfying Subsection (2) or (3)" is simply an oral modification that is unenforceable because it violates either § 2-209(2) or (3). But, how does an oral modification changing the date of delivery violate § 2-209(3)? The "contract as modified" is the same contract except for the change in the delivery date. Since there is no requirement that a sufficient memorandum include the time of delivery, the modification changing the delivery date should not be said to violate § 2-209(3). Moreover, if the modification were made in good faith, it is enforceable without consideration or other validation device. The entire waiver/estoppel mechanism is unnecessary under § 2-209(4) and (5) since the sine qua non for the activation of § 2-209(4) and (5) is an oral modification that is unenforceable because of the "public" or "private" statute of frauds. The Restatement (Second) illustration does not indicate the inclusion of an NOM clause in the original writing. The illustration must, therefore, refer exclusively to the "public" statute of frauds (§ 2-201) incorporated in § 2-209(3) as the violated subsection activating § 2-209(4) and (5). With respect to oral modifications concerning delivery or any other terms that are not within § 2-201, there should be no statute of frauds problem for the waiver device to overcome. The Restatement (Second) is very

156. See id. at comment b.
157. Nevertheless, courts apply §§ 2-209(4) and (5) with no conscious appreciation for the requirements of § 2-209(3) that may not need circumvention. See, e.g., In re Humboldt Fir, Inc., 426 F. Supp. 292 (N.D. Cal. 1977) (Indian tribe's intention to grant one-year extension of contract for sale of timber held to constitute waiver of debtor's breach for failing to perform within one-year extension), aff'd, 625 F.2d 330 (9th Cir. 1980). In an Illinois Supreme Court case, the court discussed neither U.C.C. § 2-201 nor § 2-209 in finding an oral extension of the delivery date to be enforceable. Franklin Grain & Supply Co. v. Ingram, 44 Ill. App. 3d 740, 358 N.E.2d 922 (1976). If this had been a § 2-209(3) situation, since the goods were delivered and accepted, satisfaction of any alleged "public" statute of frauds problem would have been found through the delivery and acceptance of goods satisfaction device of U.C.C. § 2-201(3)(c).

The Minnesota Supreme Court granted the space of a footnote indicating that an oral modification extending the time for performance would violate U.C.C. § 2-209(3) since the "contract as modified" would be within U.C.C. § 2-201. Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc., 265 N.W.2d 655, 661-62 n.8 (Minn. 1978). That aspect of the opinion should be disapproved.

In a Montana case the court found a U.C.C. § 2-209(4) waiver through course of performance where the buyer could not take the grain because of a severe shortage of boxcars in the Spring of 1973. Farmers Elevator, 170 Mont. at 175, 552 P.2d at 63 (1973). In another boxcar shortage case the court held that even an effective waiver of the time for delivery under the original contract does
clear concerning the proper interpretation of § 2-209(3); it adheres to the “contract as modified” interpretation suggested earlier in this article.158 In the quoted illustration, the drafters of that portion of the Restatement (Second) appear to have forgotten the scope of § 2-201 of the Code and proceed to make the same mistake unwittingly made by the courts—the matter is not consciously considered. While the waiver device is unnecessary in this illustration, it could be beneficial to overcome a § 2-209(2) NOM clause that requires any modification to be evidence by a writing.159

To overcome the consternation created by § 2-209(4) and (5), it is particularly important to emphasize their very narrow application. These subsections become operative only if the oral modification fails to meet the requirements of the “public” or “private” statute of frauds. If the “contract as modified” requirement under § 2-209(3) or an NOM requirement under § 2-209(2) will be satisfied by any of the satisfaction devices in § 2-201 as suggested earlier, the number of unenforceable oral modifications is substantially reduced. If the judicially engrafted general reliance device160 is added to the stated satisfaction devices in

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158. See Restatement (Second) of Contracts § 149 (1981).

159. One of the more interesting applications of U.C.C. § 2-209(4) occurred in an Alabama case where one of the issues involved an alleged oral modification of the price from 31 to 32 cents per pound. See West-Point Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154 (M.D. Ala. 1974). The court found a waiver under § 2-209(4) of the original price term because the plaintiff, in pleading a 32 cents per pound contract, had “waived” the original price term. Id. at 156. A more desirable analysis would have been the use of U.C.C. § 2-201(3)(a), i.e., the admission satisfaction device, and the application of that device to a U.C.C. § 2-209(2) (NOM) situation. The court was enforcing an oral modification through the waiver device of U.C.C. § 2-209(4). The plaintiff’s admission of a 32 cents per pound price in the pleadings should be sufficient to enforce the modification because of the admission and not because of any purported waiver.

Of even more curiosity is a Georgia case in which the court refused to permit course of performance evidence to operate as a waiver with respect to late payments in the face of a multipurpose clause that attempted to operate as a merger clause, an NOM clause and an anti-waiver clause. Trust Co. of Ga. v. Montgomery, 136 Ga. App. 742, 222 S.E.2d 196 (1975). The court’s emphasis on U.C.C. § 2-208(2), creating a hierarchy of express terms, course of performance, prior course of dealing and trade usage, displays a significant failure to consider U.C.C. § 2-208(3), which permits a course of performance to operate as a waiver or modification of the express terms of the contract. See U.C.C. § 2-208 (1978).

160. The phrase “general reliance device” is used to differentiate a detrimental reliance (promissory estoppel) satisfaction device from the narrow or specific reliance exception concerning specially manufactured goods in § 2-201(3)(a). The general reliance device is not found in § 2-201 and it is plausible
§§ 2-201, 2-209(2), and 2-209(3), modifications will be enforceable upon a showing of such reliance. Subsections 2-209(4) and (5) would never apply to such modifications, since they would satisfy the requirements of §§ 2-209(2) and (3). It must be remembered that the general reliance device was not expressly part of § 2-201, and the opening phrase of § 2-201\textsuperscript{161} presents a formidable obstacle to the inclusion of such a device, notwithstanding the growing body of case law applying a general reliance exception.\textsuperscript{162} If that device had been part of § 2-201, the need for a restatement of the pre-Code waiver analysis would have been reduced or, perhaps, eliminated. If any oral modification will satisfy the NOM or statute of frauds requirements through reliance, the only theoretical use of the waiver concept would occur where the time for performance of a condition in the original contract had already expired when the waiver occurred, thus making reinstatement impossible. Since the waiver concept in § 2-209(4) and (5) is predicated upon a modification and the conduct of the parties with respect to that modification, a "waiver after breach" as it is sometimes called, would invariably involve reliance. Thus, assuming the addition of a general reliance satisfaction device to § 2-201, the possibility of a waiver under § 2-209(4) and (5) becomes academic. The practical elimination of § 2-209(4) and (5) argues against the inclusion of a general reliance satisfaction device in § 2-201 as a matter of statutory construction. Yet, that argument and others suggesting no application of reliance or promissory estoppel in § 2-201 situations are beginning to resemble quixotic efforts. Once detrimental reliance is permitted to satisfy the statute of frauds, there should be no question concerning the applicability of reliance to oral modifications, whether there is a § 2-209(2) or (3) requirement, since either would be satisfied through such reliance.

Even without the general reliance addition to the § 2-201 satisfaction devices, another peculiarity is inspired by § 2-209(5).

\textsuperscript{161} "Except as otherwise provided in this section." U.C.C. § 2-201 (1978).

\textsuperscript{162} See Warder & Lee Elevator v. Britten, 274 N.W.2d 339 (Iowa 1979)(majority and dissenting opinions); see also cases cited supra at note 36.
The literal terms of that subsection suggest an oral modification (operating as a waiver) that is withdrawn by due notice to the other party that strict performance of any term waived will be required before reliance by the other party. A written notice withdrawing a modification, however, may satisfy the requirements of § 2-209(2) or (3) by containing the elements of a sufficient memorandum, notwithstanding an intention to revoke the modification. An oral notice, if admitted in pleadings, testimony or otherwise in court, may constitute a § 2-201(3)(b) admission of the modification, thereby meeting the requirements of § 2-209(2) or (3) and eliminating any need to pursue a waiver characterization. Indeed, if the writing or admission satisfied subsection (2) or (3), it would be impossible to activate § 2-209(4), since that subsection applies exclusively to modifications that do not satisfy these requirements. The operation of § 2-209(5), therefore, necessarily requires a notice of strict performance of the original terms with no sufficient written evidence of the oral modification or court admission that those terms had been orally modified.

The foregoing analysis permits a solution of the mysterious “it” in § 2-209(4)—“Although an attempt at modification . . . does not satisfy the requirements of subsection (2) or (3), it can operate as a waiver.” “It” refers to an oral modification that does not satisfy any of the requirements of § 2-201. We also solve the question arising from the language, “can operate as a waiver.” An unenforceable oral modification that is not accompanied by reliance cannot operate as a waiver. Only an oral modification with reliance can operate as a waiver. This may suggest agreement with those who argue that a § 2-209(4) oral modification cannot operate as a waiver without reliance and it is, therefore, essential to plead reliance to come within § 2-209(4). As is often the case, however, Professor Corbin provides the necessary illumination:

In a good many cases dealing with this question, the courts content themselves with saying that the written contract cannot be modified by oral agreement, without considering whether or not there was any basis for an estoppel. If the attempt was to enforce the new oral

163. For the full text of § 2-209(5), see supra note 32.
agreement as a purely executory contract and it was itself within the statute, the decision against enforcement is correct. If the attempt was to enforce the written contract by a person who had not himself performed a condition thereof, the decision against him is correct unless the other party can be justly regarded as having caused the plaintiff's non-performance of the condition. But to refuse a remedy by merely denying the possibility of an oral variation is very unsafe, although the cases that do this can often be justified on the ground that there was in fact no basis for an estoppel. . . . 166

This analysis provides a justification for the structure of § 2-209(4) and (5). Section 2-209(4) suggests the possibility of an enforceable oral modification as a waiver though the modification does not meet the requirements of § 2-209(2) or (3): such an oral modification can operate as a waiver. Section 2-209(5) permits retraction of that waiver absent reliance creating an estoppel. 167 Thus, § 2-209(4) reflects the careful Corbin approach in permitting an oral modification or “variation” that does not meet “public” or “private” statute of frauds requirements to be operative under the waiver construction. In the absence of reliance, § 2-209(5) then permits that oral modification, characterized as a waiver, to be withdrawn. Again, however, if the process of withdrawing the waiver produces satisfaction of the statute of frauds, though the waiver is withdrawn, the modification becomes enforceable as a modification through such satisfaction. At that point, any discussion of waivers or withdrawal of waivers is moot since we no longer have a modification that fails to meet the requirements of § 2-209(2) or (3).

VII. A Judicial Analysis

A case that threatens to become well-known in the § 2-209(4) area is Wisconsin Knife Works v. National Metal Crafters, 168 a relatively recent product of the United States Court of Appeals for the Seventh Circuit. Therein, former Professor and now Judge Posner

166. 2 A. CORBIN, supra note 16, § 310, at 116.
167. An earlier draft of § 2-209(5) may emphasize this point more clearly: “Unless reliance on it has made retraction unjust a waiver which affects an executory portion of the contract may be retracted by receipt of reasonable notice that strict performance will be required by any term waived.” 1949 Draft as found in VI E. KELLY, supra note 19, at 77.
168. 781 F.2d 1280 (7th Cir. 1986).
MODIFICATION MYSTERY

returned to his academic ways in providing a pedagogical look at § 2-209. Not to be outdone, his colleague and another former academic lawyer, Judge Easterbrook, provided a scintillating dissent. It is important to consider these recent judicial utterances as illustrative of current judicial thought concerning § 2-209.

The Wisconsin Knife Works (Wisconsin) required spade bit blanks for its manufacturing process. Wisconsin entered into negotiations with National Metal Crafters (National), a spade bit blank supplier. These negotiations led to the issuance of purchase orders by Wisconsin which contained a not uncommon preamble to a list of “conditions of purchase”: “Acceptance of this Order, either by acknowledgment or performance, constitutes an unqualified agreement to the following.” The first “condition of purchase” following this statement was an NOM clause: “No modification of this contract, shall be binding upon Buyer [Wisconsin] unless made in writing and signed by Buyer’s authorized representative. Buyer shall have the right to make changes in the Order by a notice, in writing, to Seller.” Six purchase orders were sent by Wisconsin, all containing the foregoing clause. The first and second purchase orders were acknowledged by letters from National which said, “Please accept this as our acknowledgment covering the above subject order.” A list of delivery dates followed. As there were no delivery dates in the purchase orders, Wisconsin simply accepted National’s dates. National did not respond in writing to the last four purchase orders which, like the previous orders, contained no delivery dates. National supplied the dates orally and Wisconsin completed the blanks in the purchase orders with those dates. Delivery was due in October and November, 1981, but National

169. For a discussion of Judge Posner’s opinion, see infra notes 192-214 and accompanying text.
170. For a discussion of Judge Easterbrook’s dissent, see infra notes 216 & 224-42 and accompanying text.
171. The majority opinion describes a “spade bit blank” as “a chunk of metal.” 781 F.2d at 1283.
172. Id.
173. Id.
174. For a discussion of the effect of NOM clauses, see supra notes 116-38 and accompanying text.
175. Id.
176. Id.
177. Id.
178. Id.
179. Id.
did not meet those deadlines.\textsuperscript{180} Wisconsin did not immediately treat the contract as breached; in fact, it issued additional purchase orders on July 1, 1982 (later rescinded).\textsuperscript{181} By December of that year, National was producing spade bit blanks in adequate quantities but it was, of course, more than a year behind schedule.\textsuperscript{182} On January 13, 1983, National received notice from Wisconsin that the contract was terminated.\textsuperscript{183} At that time, 144,000 of the more than 281,000 blanks ordered by Wisconsin in the six purchase orders had been delivered.\textsuperscript{184} Wisconsin brought an action charging that National had breached the contract by delaying deliveries.\textsuperscript{185} National claimed that the delivery dates had not been intended as firm.\textsuperscript{186} National also counterclaimed for breach of an alleged oral promise by Wisconsin to pay the expenses of maintaining machinery used by National to perform the contract.\textsuperscript{187}

The trial court held that there was a contract but left to the jury the question of any modification of the contract and whether any such modified contract had been broken.\textsuperscript{188} The jury found that the contract had been modified and not breached.\textsuperscript{189} The court entered judgment dismissing Wisconsin's action and awarding National $30,000 on its counterclaim.\textsuperscript{190} Wisconsin appealed but the appeal papers did not discuss the counterclaim. Judge Posner's majority opinion\textsuperscript{191} states the "principal issue" as "the effect of the provision in the purchase orders that forbids the con-

\begin{enumerate}
\item[180.] \textit{Id.}
\item[181.] \textit{Id.}
\item[182.] \textit{Id.} National was supplying Wisconsin with spade bit blanks under the original purchase orders, although it was more than a year after the delivery dates in those orders. \textit{Id.}
\item[183.] \textit{Id.}
\item[184.] \textit{Id.}
\item[185.] \textit{Id.} Wisconsin contended that acceptance of the six purchase orders formed the contract containing terms of delivery. \textit{Id.}
\item[186.] \textit{Id.}
\item[187.] \textit{Id.} These damages were later stipulated at $30,000. \textit{Id.}
\item[188.] \textit{Id.} The trial judge sent the modification issue to the jury on the theory that the contract could be modified orally or by conduct as well as by a signed writing. National had presented evidence that after accepting late deliveries, Wisconsin had cancelled the remaining orders, not because of delays in delivery, but because it could not produce spade bits at a price acceptable to Black & Decker, of which Wisconsin is a division. \textit{Id.} at 1284.
\item[189.] \textit{Id.} at 1283.
\item[190.] \textit{Id.} Since the appeal papers filed by Wisconsin did not discuss the counterclaim, the effects of that issue were left for resolve on remand. \textit{Id.}
\item[191.] The three-Judge panel was composed of Judge Posner, Chief Judge Cummings and Judge Easterbrook; Judge Easterbrook dissented.
\end{enumerate}
tract to be modified other than by a writing signed by an authorized representative of the buyer.” 192

There is an early warning in the Posner analysis that this opinion will not be restricted to § 2-209(2) when he parenthetically cautions the reader that “several other subsections of § 2-209 are relevant to the appeal” and, therefore, “we have printed the entire section as an Appendix to this opinion.” 193 This tour de force begins with an assertion that the meaning of § 2-209(2) “is not crystalline and there is little pertinent case law.” 194 We are then treated to a curious dissertation on the meaning of “signed” in § 2-209(2) and contract formation between Wisconsin and National. 195 Another part of the fact situation is then supplied: Wisconsin modified the specifications. Judge Posner suggests that this was clearly permitted by a part of the NOM clause, which provided that: “Buyer shall have the right to make changes in the Order by a notice, in writing, to Seller.” 196 He rejects National’s

192. 781 F.2d at 1283-84.
193. Id. at 1284. The Appendix appears at 1289-90.
194. 781 F.2d at 1284.
195. After suggesting that “one might think” that National would have been required to sign a writing containing the NOM clause, the “proviso” in § 2-209(2) (“but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party”) “becomes unclear.” Judge Posner suggests that this proviso “contemplates that between merchants, no separate signature by the party sought to be bound by the requirement is necessary.” He then suggests “a possible reconciliation,” i.e., a separate signing or initialing of the clause as well as signing the document evidencing the contract containing the clause. However, “it doesn’t matter” in this situation, between merchants. Since National signed acknowledgments of the first two purchase orders, National suggested acquiescence to the same terms in subsequent purchase orders. The subsequent purchase orders (those after one and two) were accepted by performance—National “beginning the manufacture of the spade bit blanks called for by the orders. See U.C.C. § 2-207(3).” 781 F.2d at 1284.

It is particularly difficult to understand the citation to the infamous “battle of the forms” section of the Code, § 2-207(3), which allows for a contract by conduct where the exchanged writings of the parties do not form a contract. The section of Article 2 of the Code that permits a performance acceptance such as the one suggested by Judge Posner is § 2-206. It is impossible to tell whether there was one contract or a series of contracts since Judge Posner at one point refers to “the contract” while he later refers to the “contracts” formed by individual purchase orders being accepted by performance. See id. at 1283-84. Moreover, if the latter is the correct analysis notwithstanding the citation of an inapplicable section of Article 2, National had delivered only 144,000 of more than 281,000 ordered blanks by January 13, 1983, while the last of the six purchase orders was placed on September 10, 1981. Quaere: when were the goods ordered in purchase orders three through six accepted by National’s commencement of performance? This part of the opinion by Judge Posner is intellectually untidy.

196. Id. at 1283-84.
argument that this written modification by Wisconsin satisfies § 2-209(2), because such modifications have nothing to do with § 2-209(2): they are made pursuant to the portions of the clause just quoted and have nothing to do with delivery dates.¹⁹⁷ This is an interesting interpretation of the contract because it would permit the buyer, unilaterally, to change specifications but still insist upon original delivery dates. Would the extent of the change in specifications make no difference even if a reasonable supplier could not possibly meet the original delivery dates? The fact that the buyer’s right to change specifications is found in a clause that is otherwise an NOM clause does not move Judge Posner to suggest even the possibility that the clauses could be interpreted so as to permit the buyer a reasonable extension of time to comply with the buyer’s changes in specifications.

Another factual surprise occurs. National supplied “pert charts” to Wisconsin which showed new target dates for delivery¹⁹⁸ (quaere: were these new dates supplied after the specification modification?). Judge Posner was unmoved by this evidence. These charts “do not purport to modify the contract and were not signed by Wisconsin Knife Works.”¹⁹⁹ Yet, Wisconsin never supplied dates with respect to any part of this transaction. The original dates were supplied by National, and Wisconsin filled the blanks of the purchase orders according to National’s dates.²⁰⁰ As to the last four of the six purchase orders, National delivered those dates orally and Wisconsin acquiesced.²⁰¹ All of those dates became critical to Judge Posner; they were the contract dates.²⁰² But National sent new dates in writing. Judge Posner’s first suggestion that these “new target dates for delivery do not purport to modify the contract”²⁰³ is more than puzzling. If National notified Wisconsin of new delivery dates, what is it that National was attempting to do other than modifying the contract to the extent that there had been earlier, firm delivery dates? Does Judge Posner here suggest that only a formal offer of modification will satisfy the writing requirement under § 2-209(2)? There is

¹⁹⁷. Id. at 1274. Judge Posner notes that, “in any event” the delivery dates of the contract were not modified. Id.
¹⁹⁸. Id.
¹⁹⁹. Id. at 1284-85.
²⁰⁰. Id. at 1283.
²⁰¹. Id.
²⁰². Id. at 1284. Judge Posner suggests that National cannot complain that delivery dates were not on the purchase orders when it received them; “it was given carte blanche to set those dates.” Id.
²⁰³. Id. at 1284-85.
no such requirement in § 2-209, since it would be antithetical to §§ 2-209, 2-201 and all of Article 2 which attempts to effectuate the factual bargain of the parties and eschews technical constraints.\footnote{204}

Judge Posner's second reason for refusing to consider the "pert charts" as sufficient evidence of modifications is that they "were not signed by Wisconsin Knife Works."\footnote{205} Again, Judge Posner is hoisted on his own analysis: if National supplied all of the dates and Wisconsin simply penciled them in, would such a course of dealing between the parties suggest that National supply any modified dates and expect to hear any objections from Wisconsin? National was the sole and exclusive supplier of dates in this relationship. Wisconsin did not object. The Posner reaction to this National argument raises the question of whether a writing sent by one merchant to confirm a modification would be effective to satisfy § 2-209(2). Judge Posner's insistence that Wisconsin must sign such a writing is awkward in light of his prior analysis permitting National to be bound to the terms of four purchase orders which National had not signed and to which it had not sent any signed acknowledgments.\footnote{207} National was bound to the terms of those purchase orders because it had sent signed acknowledgments to the first two purchase orders and was deemed to have recognized the implications of unwritten assent to purchase orders three through six.\footnote{208} That analysis is compatible with the factual bargain of the parties. On the other hand, the insistence that Wisconsin had not signed the "pert charts" and could not, therefore, have been bound for that reason alone, is a mechanical or technical argument that finds no support in § 2-209 or the underlying philosophy of Article 2.

Judge Posner recognizes that even though he finds no satisfaction of § 2-209(2), a waiver under § 2-209(4) is possible.\footnote{209} The trial judge's instruction, though failing to use the term, "waiver," suggested the possibility of a modification through the parties' course of performance.\footnote{210} This instruction compelled

\footnote{204. For a discussion of the anti-technical nature of Article 2's attempt to identify the factual bargain of the parties, see supra notes 10 & 11.}
\footnote{205. 781 F.2d at 1285.}
\footnote{206. See U.C.C. § 1-205(1) & (3) (1978).}
\footnote{207. 781 F.2d at 1284. For a discussion of Judge Posner's analysis, see supra note 195.}
\footnote{208. 781 F.2d at 1284.}
\footnote{209. Id. at 1285.}
\footnote{210. Id.}
Judge Posner to pursue a complete analysis of the "background" of § 2-209 so as to reconcile §§ 2-209(2) and (4).\textsuperscript{211} If § 2-209(4) means that any oral modification can operate as a waiver, Posner believes that § 2-209(2) is superfluous and we have been returned to the common law which ignored NOM clauses. National was not attempting to impose any new term on Wisconsin; rather it sought to be excused from the original delivery dates through the oral modification—a classic use of "waiver."\textsuperscript{212} Posner is unimpressed with this distinction.

Whether the party claiming modification is seeking to impose an onerous new term on the other party or to wriggle out of an onerous term that the original contract imposed on it is a distinction without a difference . . . . Whether called modification or waiver, what National is seeking to do is to nullify a key term other than by a signed writing.\textsuperscript{213}

How then does § 2-209(4) qualify the strict requirement of an NOM clause under § 2-209(2)? Judge Posner has no doubt: "[I]f an attempted modification is effective as a waiver only if there is reliance, then both sections 2-209(2) and 2-209(4) can be given effect."\textsuperscript{214} Judge Posner falls into the error that Professor Corbin so carefully warned against: "[T]o refuse a remedy by merely denying the possibility of an oral variation [absent reliance] is very unsafe."\textsuperscript{215}

The Easterbrook dissent uncovers the obvious flaw in this analysis:

Under the majority’s reading, however,. . . [n]o waiver is effective without detrimental reliance. It is as if the majority has eliminated § 2-209(4) from the UCC and rewritten § 2-209(5) to begin: "A party who has made [an ineffectual attempt at modification] affecting [any] portion of the contract may retract. . . .\textsuperscript{216}

\textsuperscript{211} Id.

\textsuperscript{212} Id. at 1286. For a discussion of modification as waivers, see supra note 139-68 and accompanying text.

\textsuperscript{213} 781 F.2d at 1286.

\textsuperscript{214} Id. at 1287. The scholarly support Judge Posner suggests for their view is effectively criticized by Judge Easterbrook in his dissenting opinion. See id. at 1290 (Easterbrook, J., dissenting) (arguing that waiver is not meant to depend on reliance).

\textsuperscript{215} 2 A. CORBIN, supra note 16, § 310, at 116.

\textsuperscript{216} 781 F.2d at 1291 (Easterbrook, J., dissenting).
As suggested earlier, it is possible to provide meaning to subsections (4) and (5) by emphasizing the purpose of (4), which was to codify common law concepts of waiver by emphasizing the fact that an unenforceable oral modification can provide the basis for an effective waiver. Then, however, subsection (5) will insist that the waiver is revocable absent reliance or, to use the common-law language, the party who promised not to insist upon a condition, will be estopped from asserting that condition. Judge Posner appears not to understand the difference between waiver (estoppel) and modifications that provide a basis for discovering a waiver. Yet, if waivers affecting executory portions of the contract will not be revocable absent reliance, the Posner conclusion, with that qualification, is acceptable.

Continuing his analysis of § 2-209, Judge Posner considered the suggestion that his interpretation of § 2-209(4) is inconsistent with § 2-209(5) as suggested by the dissent. To achieve symmetry with that subsection, Judge Posner contends that subsection (5) is the generic waiver section of Article 2 if not the entire Code. Subsection (5), according to this analysis, "is not limited to attempted modifications invalid under subsection (2) or (3); it applies, for example, to an express written and signed waiver, provided only that the contract is still executory." As an example, Judge Posner suggests that a buyer might send the seller a written waiver and revoke it the next day before the seller has relied, and § 2-209(5) would permit that retraction. Such a waiver would, of course, have nothing to do with unenforceable modifications. Quaere: would the written waiver operate as a modification, thereby satisfying the writing requirement under § 2-209? Judge Posner does not deal with this possibility. He is content to suggest that subsection (4) qualifies subsection (2); but subsection (5) does not qualify subsection (2). The dissent, however, reminds Judge Posner that a signed writing satisfies § 2-209.

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217. For a discussion of waiver under § 2-209(4), see supra notes 139-62 and accompanying text.

218. For a discussion of the effect of § 2-209(5), see supra notes 146-167 and accompanying text.

219. 781 F.2d at 1287.

220. Id.

221. Id.

222. Id.

223. Id. (suggesting that "waiver" means same things in (4) and (5), but "effect of an attempted modification as a waiver under (4) depends in part on (2), which (4) (but not (5)) qualifies."
209(2) without the need of the "waiver" device.\textsuperscript{224} We can only guess that Judge Posner might reply that a writing evidencing a waiver is not a writing evidencing a modification. The Easterbrook dissent, however, is very sound in suggesting that Judge Posner has § 2-209(4) and (5) twisted: "This distinction implies that subsection (4) applies to a subset of the subjects of subsection (5). Things are the other way around. Subsection (4) says that an attempt at modification may be a 'waiver,' and subsection (5) qualifies the effectiveness of 'waivers' in the absence of reliance."\textsuperscript{225} Judge Easterbrook cites comment 4 as support for his view of the relationship between subsections (4) and (5).\textsuperscript{226} Because there was no mention of reliance in the instruction to the jury, the majority found a new trial necessary though it recognized that there was evidence of reliance in the record. Because of the erroneous construction of § 2-209(4), however, such reliance was not the focus of the case.\textsuperscript{227}

In the dissent, beyond those disagreements with the Posner analysis already noted, Judge Easterbrook suggests his own construction of § 2-209(4).\textsuperscript{228} He insists that § 2-209(4) can operate without a showing of reliance,\textsuperscript{229} and he illustrates this operation by a "characterization" of the dealings between Wisconsin and National that he regards as the preferable characterization based on the jury's finding that the parties \textit{had} modified their contract.\textsuperscript{230} The modification permitted National additional time to perform and National took more time.\textsuperscript{231} On January 13, 1983, when Wisconsin chose to wait no longer, Judge Easterbrook suggests that Wisconsin could then have withdrawn the waiver as to the executory portion of the contract, unless National could have shown reliance that would have estopped Wisconsin.\textsuperscript{232} Wisconsin would then have an action for breach of the executory portion of the contract, but it would be estopped from claiming breach

\textsuperscript{224} Id. at 1291 (Easterbrook, J., dissenting).
\textsuperscript{225} Id.
\textsuperscript{226} Id. at 1292. Comment 4 to § 2-209 reads as follows: "Subsection (4) is intended, despite the provisions of subsections (2) and (3), to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' actual later conduct. The effect of such conduct is further regulated in subsection (5)." U.C.C. § 2-209 comment 4 (1978).
\textsuperscript{227} 781 F.2d at 1288.
\textsuperscript{228} Id. at 1291-92 (Easterbrook, J., dissenting).
\textsuperscript{229} Id. at 1292 (Easterbrook, J., dissenting).
\textsuperscript{230} Id. at 1292-93 (Easterbrook, J., dissenting).
\textsuperscript{231} Id. at 1293 (Easterbrook, J., dissenting).
\textsuperscript{232} Id.
because of any delay in delivery by National. 233 This analysis is certainly in keeping with the traditional analysis of waiver which § 2-209(4) and (5) presumably sought to codify. Again, it is a classic illustration of the utility of waiver in pre-Code cases. Judge Esterbrook furthers the analysis by rejecting a suggestion that § 2-209(4) could be effective in making a substitute agreement between the parties enforceable, under the guise of "waiver." 234 Such a change in the relationship "would be thoroughgoing reshaping of the obligations which could not occur unless reflected in a 'signed writing.'" 235 He is not, however, impressed with the "pert chart" argument, i.e., if Wisconsin had orally agreed to the new dates on the pert chart, Judge Easterbrook would not permit enforcement of that agreement because that would not be a "signed writing" evidencing a modification. 236 However, because he has not necessarily considered the possibility of the pert chart as a confirmation of an oral agreement extending the dates, we simply cannot tell whether Judge Easterbrook would permit a § 2-201(2) confirmation between merchants to satisfy § 2-209(2) against the non-signing party. It is abundantly clear, however, that the pert chart would not be an effective § 2-209(2) writing because it was not signed by Wisconsin. 237

VIII. SUMMARY AND CONCLUSIONS

Perhaps the most intriguing question concerning judicial and scholarly interpretations and constructions of § 2-209 is why there is so little concern for pre-Code concepts that were virtually identical to the concepts found in subsections (2) through (5). The irony is that the big change, the modification of the pre-existing duty rule, 238 has demonstrated few problems. The § 2-209 conundrums begin after § 2-209(1), and a clear understanding of the predecessors to § 2-209(2) through (5) would have prevented the occurrence of much of the current § 2-209 mystery. Cer-

233. Id.
234. Id. (analysis based on National's suggestion that "purchase orders never were the 'real' contract.").
235. Id.
236. Id.
237. 781 F.2d at 1285. For the full text of § 2-209(2), see supra note 14.
238. It should be remembered that § 2-209(1) does not emasculate the pre-existing duty rule; it simply makes it inoperative in good faith modifications. An extorted or bad faith modification would fall prey to the pre-existing duty rule. For further discussion of the pre-existing duty rule, see supra note 8-13 and accompanying text.
tainly, Professor Patterson’s views should not have been ignored. Judge Easterbrook’s dissenting opinion in Wisconsin Knife provides the preferable judicial analysis to the present time and he found assistance in the work of Professor Corbin. Unfortunately, even that opinion cites only one section of Corbin; it may have found another section even more beneficial.

The following summary of the preferable construction of § 2-209 may prove helpful.

Section 2-209(1) has worked quite well. The courts display little difficulty in its application.

Section 2-209(2) permits the parties to restrict their future course of action in modifying their contract. The typical NOM clause requires any modification to be evidenced by a writing. There is, however, no reason to preclude the use of any of the satisfaction devices in § 2-201 to satisfy an NOM requirement. Consistency with §§ 2-201 and 2-209(3) as well as the underlying philosophy of Article 2, with its emphasis upon the removal of technical constraints, should permit any of the § 2-201 satisfaction devices to meet the evidentiary function that § 2-209(2) requires. If the jurisdiction has added a general reliance satisfaction device to § 2-201, that device should also be available to satisfy § 2-209(2) requirements. Where that device is available, the use of a § 2-209(4) waiver/estoppel to overcome the § 2-209(2) requirement will be severely limited.

Section 2-209(3) should receive the traditional interpretation so forcefully urged by Corbin and others: treat the “contract as modified” as the only contract. If there is an original writing that contains the essential terms of the contract as modified, i.e., identification of the parties, subject matter, quantity (including requirement and output contracts) and the general requirement that the writing evidence a real transaction, the writing should be effective even though it contains other terms such as price, time of delivery, or other non-essential memorandum terms that have

239. For a discussion of Professor Patterson’s views, see supra note 12.
240. See 781 F.2d at 1290 (Easterbrook, J., dissenting).
241. Id.
242. Id. (citing 6 A. CORBIN, supra note 16, § 1295 at 211-12).
243. See 2 A. CORBIN, supra note 16, § 310.
244. For a more complete discussion of the application of § 2-209(1), see supra notes 7-13 and accompanying text.
245. For a more complete discussion of the application of § 2-209(2), see supra notes 116-138 and accompanying text.
been orally modified. The recognition of the scope of § 2-209(3) as limited to "the contract as modified," will eliminate a number of situations as candidates for the application of waiver/estoppel under § 2-209(4) and (5). If the general reliance satisfaction device is added to the stated devices in § 2-201 (again, depending upon the judicial recognition of that device), it is difficult to conceive of a § 2-209(4) waiver operating to relieve an unenforceable modification under § 2-209(3).246

Section 2-209(4) should be limited to the traditional waiver/estoppel situations. If a party pleads an oral modification, however, he should have an opportunity to prove that a condition to the duty of the other party was eliminated through the oral modification. Typically, such evidence will prove reliance, but § 2-209(4) does permit waivers of conditions to executed portions of the contract.247

Section 2-209(5) permits the waiving party to retract the waiver by reasonable and timely notice. If such notice satisfies the memorandum requirement of either § 2-209(2) or (3), however, § 2-209(4) and (5) are inapplicable because the writing requirement has been satisfied. Should the process of withdrawing the waiver involve any other satisfaction device under § 2-201 (including, where appropriate, the judicially engrafted general reliance device), the requirements of § 2-209(2) or (3) should be deemed satisfied and § 2-209(4) and (5) should be considered inapplicable.248

Notwithstanding the developing case law in § 2-209, many of these questions, including the critical questions of scope, have not been addressed by the courts. The future of § 2-209 need not be mysterious or uncertain. If we continue to believe that we are dealing with radical departures from pre-Code law, however, the tendency to create holistic analyses or curious waiver devices from isolated subsections will continue. Article 2 has suffered enough. It deserves more effective judicial and scholarly thought.

246. For a more complete discussion of the application of § 2-209(3), see supra notes 79-115 and accompanying text.
247. For a more complete discussion of the application of § 2-209(4), see supra notes 139-167 and accompanying text.
248. For a more complete discussion of the application of § 2-209(5), see supra notes 148-167 and accompanying text.