

June 1963

Sales--Uniform Commercial Code--Consideration for Modification of a Contract

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Recommended Citation

Thomas E. McHugh, *Sales--Uniform Commercial Code--Consideration for Modification of a Contract*, 65 W. Va. L. Rev. (1963).

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how far they will go in extending coverage beyond that of Section 2-318. The maxim of statutory construction which requires that which is not expressly included to be excluded should not be followed in this instance as it was the intent of the legislature (through the draftsmen of the Commercial Code) to leave the door open for each court to make its own policy determination. UNIFORM COMMERCIAL CODE § 2-318, comment 3.

Earl Moss Curry, Jr.

**Sales—Uniform Commercial Code—Consideration for
Modification of a Contract**

D, a Massachusetts corporation, sold an airplane to *P*, a Connecticut resident. Prior to the due date of the first payment the airplane developed engine trouble. To alleviate *P*'s financial burden as a result of the installation of a new engine, *D*, through its officers, orally agreed to a modification of the contract. For the first year the payments would be 100 dollars per month rather than 200 dollars per month. Approximately four months later, *D*'s president requested a return to the higher payments. *P* refused to comply and *D* repossessed the airplane. Decree awarded *P* damages. *Held*, affirmed. MASS. ANN. LAWS ch. 106, § 2-209(1) (Supp. 1958), UNIFORM COMMERCIAL CODE § 2-209 (1), provides that "an agreement modifying a contract within this Article needs no consideration to be binding." *Skinner v. Tober Foreign Motors, Inc.*, 187 N.E.2d 669 (Mass. 1963).

The principal case represents only one of the changes of contract law in sales under the Uniform Commercial Code. With the enactment of the Code in West Virginia a new approach must be taken to transactions in goods. The general law relative to contracts supplements the provisions of the code unless displaced by particular provisions. UNIFORM COMMERCIAL CODE § 1-103.

Prior West Virginia law required consideration for modification of a contract. *Thomas v. Mott*, 74 W. Va. 493, 82 S.E. 325 (1914), set forth the principle that "no promise is good in law unless there is a legal consideration in return for it." It is not valuable consideration to do that which one is legally bound to do because the promisor receives nothing more than he is already entitled to. See, *Bischoff*

v. Francesa, 133 W. Va. 474, 56 S.E.2d 865 (1949); *O'Farrell, Adm'r v. Virginia Pub. Serv. Co.*, 115 W. Va. 502, 177 S.E. 304 (1934); *Vance v. Ellison*, 76 W. Va. 592, 85 S.E. 766 (1915).

It has been held in West Virginia that a settlement of controverted matters under an existing contract is sufficient consideration for a new contract. *Producers Coal Co. v. Mifflin Coal Mining Co.*, 82 W. Va. 311, 95 S.E. 948 (1918). A written contract may be modified by a subsequent oral contract. *Corns-Thomas Eng'r & Constr. Co. v. County Court of McDowell County*, 92 W. Va. 368, 115 S.E. 462 (1922).

The West Virginia position on consideration and modification echoed many authorities in the field of contract law. RESTATEMENT, CONTRACTS § 76 (1932), provides that a pre-existing duty is not sufficient consideration, unless it is the subject of an honest and reasonable dispute. For a discussion of this proposition of law see 1 WILLISTON, CONTRACTS § 130, 130A (3rd ed. 1957). For a collection of West Virginia cases see W. VA. ANNOT., RESTATEMENT, CONTRACTS § 76 (1938).

1 CORBIN, CONTRACTS § 171 (1950) criticizes the rigidity with which some courts apply the pre-existing duty doctrine. It is suggested that the moral and economic elements in those cases that involve the rule be weighed by the court. The fact of pre-existing legal duty should not be, in itself, the controlling element.

The drafters of the Uniform Commercial Code were aware of the criticism of the pre-existing duty rule and the need to rid commercial sales law of unnecessary technicalities. There has been an attempt to give effect to the intention of the parties to modify, yet exclude those modifications made in bad faith. Section 2-209(1) does not require consideration for an agreement modifying a contract within the sales article. However, UNIFORM COMMERCIAL CODE § 1-203 imposes an obligation of "good faith" in the enforcement or performance of contracts within the Act. Section 2-103(b) defines "good faith" in the case of a merchant as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Section 2-209, comment 2 states that a modification made in bad faith, could not be supported by a mere technical consideration. See, HAWKLAND, SALES AND BULK SALES 12 (1958).

Section 2-209 (2) and (3) were written to protect against false allegation of oral modifications. Subsection (2) allows the parties to make their own Statute of Frauds as to any future modification of

the contract. Subsection (3) provides for the application of Uniform Commercial Code § 2-201 regardless of any agreement between the parties. Section 2-201, in effect, requires a writing as to the quantity of the goods when the price is 500 dollars or more. This provides some measure of safety against oral evidence, if the contract as modified would be within the Statute of Frauds. Lorensen, *The Uniform Commercial Code Sales Article Compared With West Virginia Law*, 64 W. VA. L. REV. 32, 58 (1961).

In the instant case, D could have effectively made use of the requirement that the modification be in writing. In Massachusetts, however, the Statute of Frauds is lost if it is not pleaded.

Section 2-209 (4) allows, by waiver, legal effect to be given to the parties actual later conduct, regardless of a clause excluding subsequent oral modification. UNIFORM COMMERCIAL CODE § 2-209, comment 4.

Section 2-209 (5) provides that the waiver in subsection (4) which affects an executory portion of the contract may be retracted by "reasonable notification. . . unless the retraction would be unjust in view of a material change of position in reliance on the waiver."

This section, as a unit, appears to protect those parties whose transactions are governed by the Sales Article. The rejection of the necessity for consideration coupled with the added requirements of "good faith" and the Statute of Frauds, in certain cases, should provide a safe, yet workable, solution. As a counseling point, HAWKLAND, *SALES AND BULK SALES* 14 (1958), cautions the drafters of contracts to exclude modifications except by a signed writing.

Thomas Edward McHugh

Trespass—Liability for Unintentional, Non-negligent Entry

P brought an action of trespass on the case under the old procedure against *D*, a Virginia corporation. The action arose out of an accident between *D*'s truck and an automobile. The driver of the automobile negligently drove or skidded across the highway and into *D*'s truck. The truck cut to the right to avoid the automobile, and, after impact, it traveled some 90 feet before striking and demolishing *P*'s house. Trial court rendered a judgment for *P*, which *D* appealed. *Held*, affirmed. Jury questions were presented as to