December 1961

The Uniform Commercial Code Sales Article Compared with West Virginia Law Part I

Willard D. Lorensen
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Commercial Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol64/iss1/4

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
The Uniform Commercial Code Sales Article Compared With West Virginia Law*

WILLARD D. LORENSEN**

The adoption of the Uniform Commercial Code in West Virginia would provide for the first time in the history of this state a general legislative venture into the field of sales law. Court-made common law is the present source of sales law, and typical of the common law, a very uneven pattern is found. Precedents pile up at certain points while numerous other questions float in an absolute void of authority. The major portion of this study, composed of a section by section analysis of the sales article, contrasts time and again the thoroughness and detail of the Code against the generality and inconclusiveness of the present law.

The major impact of the adoption of the Code sales article then is quite simple to state: Its adoption would increase immeasurably the certainty and precision of the law of sales in this state.

And the Code poses this certainty and precision in fairly usable form. Its organization is intelligent and easy to follow. Section titles are adequate to draw the reader's attention to pertinent provisions. Cross references are liberally employed and should protect anyone, willing to make a reasonable effort at understanding the Code, from the embarrassing oversight of pertinent related provisions.

Some generalizations about the sales article may prove helpful in providing an introduction. Here are some of the more important changes that the Code would make:

First, it abandons the title concept in favor of what may be called a "transaction concept" for resolving many sales problems—e.g., allocating risk of loss, bringing an action for price, etc. In other words, Code provisions deal directly with most of these problems rather than indirectly through a determination of who has "title."

* This is the first of a series of studies of the Uniform Commercial Code and existing West Virginia law. See, Introduction to the Uniform Commercial Code, supra at 28. All references are to the official edition of 1958. It will be cited throughout in the footnotes as U.C.C.

** Associate Professor of Law, West Virginia University.

[32]
Second, a statute of frauds relating to the sale of goods involving more than 500 dollars is included. The Code is a uniform law and follows the vast majority of states in providing for a limitation on the enforceability of oral agreements. This provision is carefully drawn and though contrary to the existing policy of West Virginia it is doubtful that any significant upheaval would occur in this era of duplicate forms and tax-accounting record-keeping requirements.

Third, warranty law would be materially clarified and the protection afforded to buyers from merchant sellers would be expanded. The "sealed container" exception would be abolished, but a seller of a sealed container would receive in turn similar warranty rights against his supplier.

Fourth, some contract rules would be relaxed in so far as they pertain to the sale of goods. For example, the parole evidence rule is narrowed and the rule requiring an acceptance to be identical to an offer is overhauled.

Fifth, the application of some rules would vary depending upon the parties involved. This means that businessmen (called "merchants" in the Code) are held to more businesslike standards than non-businessmen in certain instances. For example, a businessman who has received a confirmatory memorandum of an oral agreement and has failed to object to its terms promptly may find that the memorandum, though unsigned, will be enforced against him as an exception to the statute of frauds provision. And a merchant may make a binding offer without supporting consideration where certain formalities are met, though a non-merchant could not so bind himself.

Other changes would flow from the adoption of the Code. Many of these are difficult to describe concisely because the present state of the law is frequently difficult to state with both brevity and preciseness. Assaying the quality and character of these changes depends upon a determination of the present state of the law and at many of the finite points of the Code sales article, the corresponding West Virginia law may be the subject of much honest debate.

What follows is an attempt to assess briefly after each Code provision just how that provision would affect existing law. The Code provisions are set in bold face and the editorial remarks on each is set in regular type. References to comments in the footnotes
are to the official comments accompanying the Code provisions and not to the remarks of this writer.

Section 2-101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code-Sales.

West Virginia never adopted the Uniform Sales Act which is displaced by the sales article of the Code. The Uniform Sales Act was to a large extent a codification of common law and paralleled in many respects the English Sale of Goods Act. The Sales Act was a codification of common law, it was on occasion referred to by the West Virginia Supreme Court of Appeals.\(^1\) Needless to say, the necessity to resort to case law makes present research into sales law in West Virginia a painstaking and time consuming task.

Section 2-102. Scope; Certain Security and Other Transactions Excluded From This Article.

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

West Virginia has recognized that a transaction which appears to be a sale absolute on its face may in fact be a security transaction, reaching this result by analogy to real property law and the deed absolute intended as a mortgage.\(^2\) No provisions in the present West Virginia Code have been found which would fall within the “specified classes of buyers” proviso at the conclusion of the present Code.

---

\(^1\) E.g. Hill & Gain v. Montgomery Ward & Co., 121 W. Va. 554, 4 S.E. 2d 793 (1939). (In a case in which the court decided that no true warranty was given, the court stated that the prior rule in West Virginia that the giving of an express warranty negatives all implied warranties, save the warranty of title, was abandoned. In so doing, the court apparently considered the position of the Uniform Sales Act as persuasive as to what the common law ought to be.)

section. Particular distinctions have been made from general law analogous to this situation, but not in the area of the sales of goods.³

Section 2-103. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires
   (a) "Buyer" means a person who buys or contracts to buy goods.
   (b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
   (c) "Receipt" of goods means taking physical possession of them.
   (d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this article or to specified Parts thereof, and the sections in which they appear are [omitted]:

There is no specific change in West Virginia law that can be attributed to this particular provision. The primary definitions of the section, along with many others incorporated by reference through subsections (2), (3) and (4) not set out above, are included as a part of the Code's general concern for precision in the use of language. Buyer is defined in subsection (1) in a manner somewhat narrower than in section 76 of the Uniform Sales Act. There buyer included "any legal successor in interest of" the original buyer. A literal reading of this provision could have led to the conclusion that a sub-purchaser was technically a buyer and thus in privity with a prior seller—an interpretation which was not widely indulged in needless to say. The Code definition of buyer is more limited, and problems of privity are dealt with directly according to the transaction and not by definitional accident. Good faith as pertains to merchants here clearly includes a combination of standards, honesty in fact plus observance of reasonable commercial standards.

³ E.g. W. Va. Code, art. 33, ch. 6, § 4 (Michie 1955). This provision allows a minor to make a binding contract for the purchase of certain forms of insurance, abrogating the general disability of a minor to bind himself by contract.
The definition of receipt is included to make clear where the term is used in the sales article that receipt is not always the result of delivery. There can be delivery and yet no "receipt" of the goods. The various incidents of a delivery are dealt with throughout the Code.

Section 2-104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency".

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices of goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2-707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

One of the unique features of the Code sales article finds its genesis in this provision. At various points, the Code develops rules which apply different standards to merchant as opposed to non-merchant buyers and sellers. These varying standards may be found in provisions relating to the formation of contracts, relative to cer-

4 See, U.C.C. § 2-201 (2) (statute of frauds exception, applicable to merchants only, where merchant receives a memorandum and fails to object to the terms stated therein within a stated period); § 2-205 (firm offer provision, signed writing without consideration creates an irrevocable offer under certain circumstances, but is applicable only to merchants); § 2-207 (special provisions relating to inclusion of additional terms to contract where included in acceptance where the transaction is between merchants); §2-209 (special rules established as to limitations on modifications of contracts).
tain duties connected with the performance of sales contracts and in regard to implied warranties. There is no such clearly defined distinction presently made under West Virginia law, though there are occasions where the fact that one of the parties to the transaction was a merchant has doubtless had a significant bearing upon the court's determination of what standards are to be applied. For example, an early West Virginia case stated the following rule, clearly couched in terms of a special rule applying to merchants:

"Where one merchant sends goods to another and at the same time sends invoices of such goods, and the goods and invoices are received by the merchant, to whom they are sent, whether he ordered the goods or not, in law he will be regarded as purchaser, unless within a reasonable time he returns the goods or notifies the sender, that he will not accept them." 7

This rule has been applied in numerous subsequent cases, always involving transactions between merchants. The general proposition that one is considered a buyer where he fails to return the goods or notify the sender of his non-acceptance has been stated in general terms in some of these later cases, apparently not limiting its applicability to merchant buyers. While there is no case on point, it seems doubtful that a duty of return or notification would be imposed upon a non-merchant who received goods not ordered from the sender.

Section 2-105. Definitions: "Transferability"; "Goods"; "Future Goods"; "Lot"; "Commercial Unit."

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid,

---

5 See, U.C.C. § 2-603 (special obligations placed upon merchant buyer who has rightfully rejected goods); § 2-605 (provision permits merchant seller to demand written specification of defects upon which rejection is based where buyer also is a merchant).

6 See, U.C.C. § 2-314 (implied warranty of merchantability applies only where seller is a "merchant with respect to goods of that kind").


investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

The definition of "goods" is important as it describes the kinds of transactions to which the provisions of the Code apply. The Code changes a number of basic contract rules and consequently the rule which will apply in a given case, if the Code is adopted, will be determined by whether a sale of goods is involved or some other kinds of contractual obligation undertaken. The Code definition hinges principally upon moveability.10 Specially manufac-

10 Fickeisen v. Wheeling Elec. Co., 67 W. Va. 335, 67 S.E. 788 (1910) characterized the transmission of electric power into a buyer's lines as a sale with delivery at the connecting points between the lines of the seller and the buyer, and with title and consequently risk of injury passing at that point. The Code does not specifically deal with the question of whether the sale of a public service commodity such as water or natural gas involves a sale of goods. There seems to be no reason, however, why they could not be treated as such.
tured goods, machines specially designed for a particular plant, draperies made to order for a given home or office, would involve the sale of goods under the Code provision. Investment securities and things in action are specifically excluded from the sales article of the Code as they are covered separately under article 8. Also excluded is "money in which the price is to be paid." Conversely, a sale of money as a commodity and when it is not used as a medium of exchange—e.g. a sale of a valuable coin collection—would be a sale and subject to the provisions of the Code.  

Specifically included within the term "goods" are the unborn young of animals and growing crops. In this respect the Code adopts in unambiguous fashion the old common law concept of "potential possession" which permitted a present sale of things which were potentially within the possession of the seller. The common law concept of potential possession, recognized in West Virginia, was limited on grounds of public policy—a man should not be permitted to sell so much of his future that he entered a kind of peonage. This same limitation is brought about by the Code by its requirement of "existence" and "identification" to pass an interest in goods, as opposed to creating a contract to sell goods in the future. Identification of goods is controlled by section 2-501 and places definite limits on the ability to make a present sale of goods not yet in actual possession of the seller.  

It should be noted that the Code abandons the use of the term "industrial" crops, recognizing that "fruit, perennial hay, nursery

---

12 "Money" generally was excluded from the definition of goods under the Uniform Sales Act § 76. Several New York cases have held that ordinary rules of sales law apply where currency is sold as a commodity. See, Richard v. American Union Bank, 253 N.Y. 166, 170 N.E. 532 (1930); Zimmerman v. R. & H. Chemical Co., 240 N.Y. 501, 148 N.E. 659 (1925).  
13 See Williston, Sales § 66b (rev. ed. 1948) [hereinafter cited as Williston, Sales].  
14 Wiant v. Hayes, 38 W. Va. 681, 18 S.E. 807 (1893). The court stated in syllabus 2, "Personal property, to be the subject of sale, must have an existence, but a potential existence is sufficient."  
15 Vold, Sales § 45 (2d ed. 1959).  
16 U.C.C. § 2-501 provides that identification may be made at any time and in any manner explicitly agreed upon by the parties and establishes general rules as to identification where there is no such explicit identification. Crops, under these general rules, are identified when planted or they become "growing crops" (the latter provision covers perennial crops) and the unborn young of animals are identified when conceived.
stock and the like" should be brought within the concept of present goods.


(1) In this Article unless the context otherwise requires “contract” and “agreement” are limited to those relating to the present or future sale of goods. “Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. A “sale” consists in the passing of title from the seller to the buyer for a price (Section 2-401). A “present sale” means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are “conforming” or conform to the contract when they are in accordance with the obligations under the contract.

(3) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On “termination” all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

No significant change in existing law can be attributed directly to this provision which serves mainly to fill out the general aim of the Code to provide a self-sufficient statement of the law of sales. Subsection (1) hints at the sales article’s disconcern with title by noting that “contract for sale” includes both a present sale—now called an “executed sale”—and a contract to sell goods at a future time—now called an “executory sale.” Whether a sale is executed or executory can have substantial significance under present law because a good bit of sales law is based on title, and once title

17 See U.C.C. § 2-105, Comment 1.
passes, a sale is “executed.” Legal rights and relationship in regard to the goods are dealt with directly by Code provisions and not by reference to the distinction between executed or executory sales in most cases.

Section 2-107. Goods to be Severed From Realty: Recording.

(1) A contract for the sale of timber, minerals or the like or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

Section 2-107 treats generally of the twilight zone between realty and personalty. Subsection (1) deals with sales of standing timber, minerals, structures and the like and subsection (2) provides different rules for growing crops and “fixtures.” Subsection (3) deals with problems of recording.

Subsection (1) provides that sales of standing timber, minerals and the like are sales of goods where the seller is to sever such commodities from the land. But there is no sale, or actual passage of property interest, in such goods until they are severed. Thus deals for standing timber and such items remain as transactions involving interests in realty where the buyer is to sever. This accords with present West Virginia law.
Since Fluharty v. Mills, West Virginia has characterized sales of standing timber as sales of interest in realty in those cases in which the buyer is to sever. Sales of timber where the seller is to sever have been dealt with as sales of goods without any overt concern that such a deal too might involve an interest in realty. Likewise, the sale of coal and other minerals in place to another who will remove have been treated as sales of interest in realty, while sales of goods when produced or severed by the seller have been treated as sales of goods.

On the other hand growing crops and "fixtures" are treated as goods irrespective of whether the buyer or seller is to sever, by the terms of subsection (2). The term "fixture" is not employed in the section and is "avoided because of the diverse definitions of this term," according to the official comments. What is normally thought of as a fixture is included within the phrase "other things attached to realty and capable of severance without material harm thereto."

Subsection (3) generally provides that contracts for sale of such items as are covered by the provision may be recorded "as a document transferring an interest in land." What effect the filing of a contract relating to the sale of crops would have in West Virginia is an open question presently. In connection with this provision, it should be noted that security interests, such as mortgages of growing crops, are covered by article 9 where the definition of "goods" is somewhat different from that of the sales article.

Section 2-201. Formal Requirements; Statute of Frauds.

(1) 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 is 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.

19 E.g. Ohio Valley Bending Co. v. Pickens, 74 W. Va. 303, 81 S.E. 1041 (1914).
20 DONLEY, COAL, OIL & GAS IN WEST VIRGINIA AND VIRGINIA, § 27 (1951).
21 E.g. Fayette-Kanawha Coal Co. v. Lake & Export Coal Corp., 91 W. Va. 132, 112 S.E. 222 (1922) (sale of entire output of mine, seller to sever).
22 See U.C.C. § 2-107, Comment 3.
or by his authorized agent or broker. 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.

(2) 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 ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) 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; or

(b) 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; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

West Virginia has never had a statute of frauds relating to sales, thus this provision adds something entirely new to the law of this state. The only statute of frauds provision which has played any role in the West Virginia law of sales in the past has been the provision relating to contracts not to be performed within one year—and this provision has been narrowly construed.

23 About ten other states have no statute of frauds relating to contracts for the sale of goods.


25 See, e.g., Wood & Brooks Co. v. D. E. Hewitt Lumber Co., 89 W. Va. 254, 109 S.E. 242 (1921). (The court held that a contract which could be performed within one year was not within the statute though plaintiff buyer acquiesced in delays that extended period of performance well beyond one year before breach occurred.)
As pointed out by the official comments\(^{26}\) all that the writing need contain to meet the Code requirements are (1) evidence of a sale of goods; (2) the “signature”\(^{27}\) of the party against whom enforcement is sought; and (3) a quantity.

Three other points should be noted about the Code provision. First, a confirmatory memoranda of an oral deal between merchants will substitute for a signed memorandum where this memorandum has come to the attention of the person against whom enforcement is sought and that person fails to object to its contents. Failure to object to such a memorandum by an ordinary consumer would not bind such a person.\(^{28}\) The West Virginia Supreme Court has noted on occasion in deals between merchants that failure to object to such writings on the part of the merchant may be convincing proof of his assent to the terms stated in such writing.\(^{29}\)

Second, the “part performance” exception to enforcement of an oral contract otherwise within the statute of frauds is limited. The part performance doctrine under present application of the statute of frauds permits, for example, the delivery and acceptance of a small quantity of goods to open the door to proof of an oral contract for a much larger quantity.\(^{30}\) Under the Code provisions, subsection (3) (c), enforcement of the oral contract would be permitted only to the extent of the performance made and the contract would remain unenforceable as to parts not performed.

---

\(^{26}\) See U.C.C. § 2-201, Comment 1.

\(^{27}\) “Signed” is defined in the general article of the Code, U.C.C. § 1-201 (39) which states “‘Signed’ includes any symbol executed or adopted by a party with present intention to authenticate a writing.”

\(^{28}\) This is one of several points at which the Code makes a distinction between deals between merchants and deals in which one of the parties involved is not a merchant.

\(^{29}\) See Tide Water Oil Sales Corp. v. Jarvis Oil Co. 114 W. Va. 493, 172 S.E. 522 (1933) and Braude & McDonnell v. Isadore Cohen Co. 87 W. Va. 763, 106 S.E. 52 (1921). In the Tide Water case, involving a dispute over a modification of a contract, the trial court held the failure of the merchant buyer to object to a merchant seller’s letter confirming a telephone conversation regarding contract modification barred him from claiming a different agreement was made in the telephone conversation than was reflected in the letter. This ruling was reversed, however, because payments made by the buyer shortly after the telephone conversation showed the buyer manifested promptly his different understanding of the orally modified agreement. The Supreme Court ruled, thus, that a jury question was raised.

The Braude & McDonnell case relied heavily on the failure-to-object principle to justify its holding that a bill of sale absolute on its face could not be shown to be a sale or return agreement by parole. This is of course more directly a parole evidence question, discussed in more detail in remarks on U.C.C. §§ 2-202 and 2-326, infra.

Third, subsection (3) (b) permits enforcement of an oral contract where such contract is admitted in "pleading, testimony or otherwise in court" by the party against whom enforcement is sought. Thus a party cannot admit the existence of the contract and deny its enforcement because it is not in writing. It should be noted in connection with this provision that under the West Virginia Rules of Civil Procedure, the statute of frauds must be pleaded affirmatively as a defense. The person who honestly contests the existence of the oral contract would not be placed in the dilemma of having to tacitly admit the contract by affirmatively pleading its unenforceability. Rule 8(e) of the West Virginia Rules of Civil Procedure permits alternative pleadings and thus a party may deny in the alternative the existence of the contract and its enforceability under the statute of frauds provision.31

Section 2-202. Final Written Expression: Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

This provision would relax in general the application of the parole evidence rule to contracts involving the sale of goods. This change may be considered in two aspects, following the mechanical division of the Code provision. First, the Code provision expressly authorizes the use of custom of the trade, and the like, under subsection (1) (a), to explain terms reduced to writing. Second, the Code narrows the limitations of the parole evidence rule upon showing additional consistent terms which were a part of the bargain but were not reduced to writing.

The provisions of subsection (1) (b) makes a definite change in the broad statement of the rule admitting evidence of course of

dealing and the like to explain and supplement a written contract. There are several flat statements by the West Virginia Supreme Court that such evidence is admissible only where the contract is ambiguous. This approach is definitely rejected in the Code which pointedly omits any determination of "ambiguity" as a condition to the admission of such evidence. The actual results of some West Virginia cases seem to be very much in harmony with the tenets of the Code, general statements to the contrary notwithstanding. For example in Raleigh Lumber Co. v. William A. Wilson & Son, the court held, over objections based on the parole evidence rule, that evidence of usage of trade was admissible in a sale of lumber to a lumber wholesaler. The contract called for a given quantity of lumber, listed maximum and minimum sizes, but gave no limits as to the amount of lumber of any one size. The buyer refused the first shipment under the contract because it was almost wholly short lengths and narrow widths and was successful in its rejection because in sales of lumber at wholesale, usage of the trade demanded the greater portion of the lumber to be in long lengths and wide widths. And again in Hall Mining Co. v. Consolidated Fuel Co., the West Virginia Supreme Court pointedly referred to usage of trade in order to determine that a clause was ambiguous and thus subject to the principle of "practical construction." Rejecting the appellee's argument that the contract was clear and unequivocal, the court said:

"While the clause relied upon said the agent should pay not less than $1.10 net per net ton for each and every ton of coal shipped, it must be read in connection with all the others, and also in the light of the facts disclosed, showing the situation of the parties, their purpose, the nature of the business to which the contract relates and the usual method of conducting it." 33

Note that the court here employed usage of trade and course of performance to show that there was an ambiguity in order to justify the use of these same sources of understanding to clarify that am-

33 69 W. Va. 598, 72 S.E. 651 (1911).
34 69 W. Va. 47, 70 S.E. 857 (1911).
35 Id. at 50, 70 S.E. at 658.
biguity.36 Such disposition of cases can hardly be reconciled with the broad statements of the ambiguity rule.

A more explicit change in West Virginia law results from a combination of the language of the main portion of the section and that of subsection (1)(b). The official comment to the section begins with a statement that the provision "definitely rejects . . . any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all matters agreed upon; . . ."37 It should be noted that the provision states only that terms included in the written memorandum may not be contradicted by parol evidence. Expressly authorized is the admission of evidence of "consistent additional terms" unless the court finds that the writing was intended as "complete and exclusive." It seems clear that the results of several past West Virginia decisions would have been different had this provision been applicable at the time they were rendered. The problem has recurred most frequently in cases where the buyer sought to establish an oral warranty on the part of the seller where some written memorandum had been made which was silent on the question of warranties. The policy is well established in West Virginia that evidence of such oral warranty is not admissible where the written memorandum contains other substantial terms of the sale.38 For example, in Griffen v. Runnion.39

36 See, Hardman Lumber Co. v. Keystone Mfg. Co., 86 W. Va. 404, 103 S.E. 282 (1920). In this case, judgment was reversed because the trial court limited the defendant's cross-examination of the plaintiff as to his knowledge and understanding of usage of the trade and as to past understandings of similar written agreements of sale between the parties. The dispute involved whether the "per foot" price of crating material referred to board feet or surface measurement.

37 Note the following from O'Farrell v. Virginia Public Service Co., 115 W. Va. 502, 505, 177 S.E. 304, 305 (1934): "If a contract seems complete on its face, 'the presumption is that it contains the whole of the agreement, and this presumption generally is conclusive.' Braude & McDonnell, Inc. v. Isadore Cohen Co., 87 W. Va. 763, 106 S.E. 52. This Court went even further in Jones v. Kessler, 98 W. Va. 1, 126 S.E. 344, saying that the presumption was conclusive. . ." See also the rather extended discussion of the parol evidence rule in Hartman v. Windsor Hotel Co., 136 W. Va. 681, 68 S.E.2d 746 (1951) and the unhappy basis for the resolution of the perplexing problem of whether the contract there involved was "ambiguous."

38 Appalachian Power Co. v. Tate, 80 W. Va. 428, 111 S.E. 150 (1922) (sale of a refrigerator); Griffen v. Runnion, 74 W. Va. 641, 82 S.E. 686 (1914) (sale of a stallion); Erie City Iron Works v. Miller Supply Co., 68 W. Va. 519, 70 S.E. 125 (1911) (sale of a machine); Watkins v. Angotti, 65 W. Va. 193, 63 S.E. 969 (1909) (sale of machinery). Compare, Gyanadotte Coal Co. v. Virginian Elec. & Mach. Works, 94 W. Va. 300, 118 S.E. 512 (1923). (Court seemingly infers that sellers oral refusal to warrant could be shown to negate the existence of even implied warranties where subsequent written memorandum was silent on the question of warranties.)

39 74 W. Va. 641, 82 S.E. 686 (1914).
a group of buyers purchased a stallion which was, according to the seller's own admission, orally warranted as a virile animal. But the court refused to give credence to the oral warranty because a memorandum had been drawn identifying the seller, the buyers, the subject matter of the sale, and relating the price and terms of payment. Several other cases have arisen involving similar fact situations and reaching similar results.\(^{40}\) While the policy of admitting or excluding parole evidence of additional terms cannot be stated with exactitude because it must apply to limitless varieties of writings, it seems clear that the Code provision would make a substantial change in direction. Present West Virginia policy starts with the proposition that if the written memorandum includes sufficient terms to indicate a sale, additional terms may not be shown. The Code provision approaches this problem from the opposite direction and admits additional terms unless the memorandum not only evidences a sale, but also is in fact the "final and exclusive" statement of terms.

Can the person furnishing the contract form gain the advantage of the present broad application of the parole evidence rule by including a clause in the contract which states that it contains all the terms and agreements? To this, there is no pat answer. In areas which appear to have been most troublesome, the Code provides rather direct solutions. In other areas, a good bit of discretion is placed directly in the hands of the courts.

First as to the recurring sources of difficulty. The disclaimer of warranties or their exclusion by omission from the contract coupled with a parole evidence clause in the contract is limited by Code section 2-316. Briefly, the provision makes it difficult to "surprise" a buyer with an unbargained limitation upon warranties. The second trouble spot is the oral agreement to the "or return" feature in a contract of sale or return in which only the sale aspect has been evidenced in a writing. West Virginia has adopted the rule that a writing evidencing a sale absolute on its face cannot be shown by parole to have been a sale or return agreement.\(^{41}\) The Code reaches the same result by a combination of the present section, 2-202, and a later provision dealing with sale or return, section 2-326, which provides that the "or return" portion of the agreement contradicts a written agreement of sale and would thus not be admissible under the parole evidence section.

\(^{40}\) See note 36, supra.

In remaining areas, it should be noted that the Code expressly gives courts authority to refuse enforcement to "unconscionable" provisions. See the remarks in relation to this provision, section 2-302.

Section 2-203. Seals Inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

West Virginia retains to some degree the common law rules regarding seals as they affect sales transaction, and thus the complete abolition of the law of sealed instruments as regards the sale of goods would work a change in the law of this state. The period of limitations, the defenses which could be raised and the question of consideration are the points at which the effect of the seal is most often considered. As to the period of limitations, West Virginia has made no distinction between contracts in writing under seal and not under seal. The period for both has been the same, ten years. As to defenses which might be raised to an action on a sealed contract, a West Virginia statutory provision has permitted, by a limited set-off provision, certain defenses to law actions which under older common law were cognizable only at equity. Nonetheless, one West Virginia case said that "want of consideration" would not be allowed as a defense in an action at law upon a sealed instrument. It appears then, that in West Virginia it is still possible to make a binding or irrevocable offer without consideration being given if it is given in writing under seal.

44 W. Va. Code, ch. 56, art. 5, § 5 (Michie 1955). Fisher v. Burdett, 21 W. Va. 626 (1883) held that the statute, while applying to "contracts" generally, included parole contracts and contracts under seal.
45 Williamson v. Cline, 40 W. Va. 194, 205 S.E. 917 (1895). The court held that the set-off provision, see note 44, supra, admitted the defense of "failure of consideration" in a law action upon a sealed instrument, but did not affect the common law rule that "want of consideration" could not be raised as a defense at law to an action on a sealed contract. Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S.E. 923 (1899) ruled that want of consideration would be a defense to an action seeking equitable relief upon a sealed instrument.
The adoption of the Code in West Virginia would make it clear that defenses to contract actions involving the sale of goods would not be affected by the contract being under seal, and the power to make a binding or "firm" offer would not hinge upon the use of the seal. It should be noted that the Code does provide that a merchant may make a "firm" offer—one that is irrevocable for a period of time even though no consideration is given—under section 2-205.

Section 2-204. Formation in General.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Generally, this section would not materially alter the law of West Virginia. Some language can be found which indicates a different approach, e.g. "If anything remains to be done to make a contract, if all the terms have not been mutually agreed upon, no contract arises between the parties . . ."\(^{46}\) But, in other instances the court has pointed to the ease with which contractual obligations may be made.\(^{47}\)

The provision was inserted basically to insure a liberal approach to finding the existence of a contract where the sale of goods

\(^{46}\) Parks v. Morris, Layfield & Co., 63 W. Va. 51, 53, 59 S.E. 753, 754 (1907). Plaintiff attempted to establish, by his own equivocal testimony, an oral contract for the sale of standing timber, and the court ruled, concluding in the language quoted in the text, that no such contract was established. The court further ruled that plaintiff's action in assumpsit was improper since his title to the land from which the timber was cut was in question.

Ohio Valley Bending Co. v. Pickens, 74 W. Va. 303, 81 S.E. 1041 (1914) could be construed as contrary to the provision. There buyer sued to recover cash advanced on certain timber to be cut and delivered by the seller. The seller defended claiming he had been damaged in a greater sum by the buyer's failure to accept the timber cut. The court held that the jury could have found that no contract was ever consummated though it appears that "conduct by both parties" recognized the existence of the contract.


---

Lorensen: The Uniform Commercial Code Sales Article Compared with West Virg
is concerned because, it was felt, commercial practice recognizes very informal dealings under many circumstances. Other provisions of the Code, e.g. section 2-305 dealing with an open price term, elaborate upon the general principle of this provision.

Section 2-205. Firm Offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

This provision would reverse the existing West Virginia law. While it may be possible today to create a "firm" or "binding" offer by use of a sealed writing,\(^{48}\) any other offer may be revoked at any time prior to acceptance.\(^{49}\) Note that the Code section provides that only merchants may bind themselves by a written, signed offer and it also guards against inadvertent creation of firm offers by requiring separate signing of such a provision where it is included in a form furnished by the offeree.

Section 2-206. Offer and Acceptance in Formation of Contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) An order or other offer to buy goods for prompt or current shipment shall be construed as inviting accept-

\(^{48}\) See, Section 2-203 and remarks.

\(^{49}\) Allen v. Simmons, 97 W. Va. 318, 125 S.E. 86 (1924). (Syllabus 2. "... Prior to [unconditional] acceptance the buyer is at liberty to withdraw his offer." This was an offer in writing by a merchant.) Morgan-Gardner Elec. Co. v. Beelick Knob Coal Co. 91 W. Va. 347, 112 S.E. 587 (1922).

https://researchrepository.wvu.edu/wvlr/vol64/iss1/4
ance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

In the main there could be no change in West Virginia law resulting from this provision.

Subsection (1) (a) changes slightly the approach to the question of whether a particular means of communicating an acceptance was authorized under the circumstances. The official comments to the section note that "former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptances, etc., are rejected." West Virginia apparently has never adopted any unnecessarily technical approach to this problem. Oral acceptances of written offers have been held adequate. The standard rule is usually couched in terms of what means of acceptance were authorized by the nature of the communication of the offer and the surrounding circumstances. The Code provision puts no peculiar emphasis upon the means of communicating the offer but this remains, of course, as one of the significant elements bearing upon the reasonableness of the means used to communicate the acceptance.

Subsection (1) (b) resolves one little trick problem not evidenced in any West Virginia case and affirms a general principle which has been previously recognized in this state. The general principle is that an order for goods authorizes acceptance by the

50 U.C.C. § 2-206, Comment 1.
shipment of the goods. The trick comes when the seller ships non-conforming goods in response to the offer of purchase. If these goods are accepted by the buyer, he has technically accepted a counter-offer. If he rejects the goods, as he of course has the right to do, he may find himself without any recourse against the seller, as the seller can claim no contract was ever consummated because his acceptance did not conform to the buyer’s offer. The Code would shift the tactical advantage here somewhat. Unless the seller shipping non-conforming goods notifies the buyer that they are being shipped “for accommodation only” he is held to have accepted the buyers offer by his shipment. Thus, if the goods are accepted by the buyer, they are accepted on his original terms, rather than upon the counter-offer terms of the seller, and the buyer has an advantage in negotiating an adjustment for the non-conformity of the goods. If the seller notifies of the “accommodation” shipment, the buyer is given earlier notice that he may expect substituted performance or must search elsewhere for the desired goods.

Subsection (2) places a duty on an offeree who may accept by performance of promptly notifying the offeror of his acceptance. The start of performance under such circumstances usually bars the offeror from revoking his offer, but the mere beginning of performance does not constitute an acceptance binding the offeree to complete his performance. Thus the offeree is given an unfair advantage in such circumstances in that he may bind the offeror without binding himself and “play the market” in the meantime. The requirement that notice be given to the offeror substantially shortens the period where the offeree has such a lop-sided advantage.

Section 2-207. Additional Terms in Acceptance or Confirmation. (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or dif-

---

53 Magruder v. Hagen-Ratcliff & Co., 131 W. Va. 679, 50 S.E.2d 488 (1948) (sales contest, acceptance by performance); Wood & Brooks Co. v. D. E. Hewitt Lumber Co., 89 W. Va. 254, 109 S.E. 242 (1921) (lumber seller held bound to supply 500,000 board feet of lumber though apparently seller never promised to ship this amount but did ship some lumber in response to buyer’s offer to take that amount); Ladies Tailoring Co. v. Brown, 76 W. Va. 723, 86 S.E. 767 (1915) (merchant buyer’s counter-offer held accepted by shipment of goods in response to such).

54 The buyer may be further burdened here because the Code places upon him certain duties as regards rightfully rejected goods. See, Section 2-603 and remarks.

55 Restatement, Contracts § 45 (1932).
ferent from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for additions to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

West Virginia has adopted the traditional view that an acceptance is ineffective if it alters or adds to the terms of the offer.\textsuperscript{66} The proposed Code section would change this view to meet the rather frustrating battle of forms which recurs in modern business practice. The battle of forms occurs for example when a buyer offers to purchase certain goods on an order form of his own, and acceptance is returned upon a form prepared by the seller. Though the buyer and seller may then proceed with performance where the essential terms of price, delivery, quantity, etc., are agreed upon, there may in fact never have been a contract consummated under

\textsuperscript{66} Allen v. Simmons, 97 W. Va. 318, 125 S.E. 86 (1924); Morgan-Gardner Elec. Co. v. Beelick Knob Coal Co., 91 W. Va. 347, 112 S.E. 587 (1922); Compare, Virginia Iron, Coal & Coke Co. v. Lake & Export Coal Co., 93 W. Va. 155, 116 S.E. 145 (1923). (Seller's offer to buyer was accepted and when seller confirmed receipt of buyer's acceptance, seller requested buyer to obtain transportation permits to move sold coal from mines; Held: defendant buyer could not defend on basis that seller's demand that buyer obtain transportation permits added new conditions to the contract as sale was F.O.B. mines and it was impliedly buyer's task to arrange transportation.) See, MICHE JURIS, CONTRACTS § 22; Note, 36 W. VA. L. Q. 303 (1930).
present law, because of conflict or variances between the offer and
the acceptance.

Subsection (1) provides that in most situations an acceptance
or confirmation will create a binding contract even though addi-
tional terms are included in the acceptance or confirmation. Sub-
section (2) then proceeds to set up rules to determine which addi-
tional terms become a part of the contract and which do not.

The West Virginia case of Allen v. Simmons,57 illustrates how
the law would be changed at this point by the adoption of the Code.
In the Allen case, a West Virginia merchant signed an order for
feed solicited by a salesman of an out-state seller. The order
was subject to confirmation by the salesman’s principal. When con-
firmed, the seller added to the written order or offer by stating that
the seller’s performance would be excused by strikes, car shortages
or other causes beyond seller’s control and that Board of Trade
weights would be final as to the determination of the amount shipped
under the contract. After this confirmation, the merchant revoked
his order because he had decided to go out of business. The mer-
chant was successful in his defense against the seller’s action for his
refusal to accept the goods because, the court held, he had revoked
before there had been an unequivocal acceptance of his offer. There
was nothing to show that the merchant objected to or was prejudiced
by the terms added by the seller at the time of its confirmation of
the merchant’s offer to buy. Under the Code provision, a binding
contract would have been created by the seller’s acceptance. Whe-
ther the added terms would have become a part of the contract
would be determined by subsection (2). Thus, the added terms
would have become a part of the contract unless (1) the merchant’s
offer expressly was limited to unconditional acceptance of his offer;
(2) the added terms materially altered the offer; or (3) the mer-
chant objected to such added terms within a reasonable time after
notice of them was received.58

The addition of the terms involved in the Allen case would not
“materially alter” the offer under the Code.59 The official comments

57 97 W. Va. 318, 125 S.E. 86 (1924).
58 There was some dispute in the Allen case as to whether the confirm-
ation by the seller had ever been communicated to the buyer. The court held
that this was immaterial in that the terms added by the seller made the
acceptance ineffective and thus permitted the buyer to revoke his offer even
if the confirmation or acceptance had been communicated to the buyer.
59 The court in the Allen case hinted it might have reached the same
conclusion upon proper evidence, viz., it was stated that the added terms
could not be held “immaterial” absent evidence showing trade custom that
such were usual terms of sale.
to the Code note that section 2-615 excuses performance because of a failure of presupposed conditions and that some enlargement of such excuses by means of added terms of acceptance does not "materially alter" the terms of the offer.\textsuperscript{60} Material alterations are those which would cause "surprise or hardship" if incorporated, according to the comments.\textsuperscript{61}

Section 2-208. Course of Performance or Practical Construction.

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade shall be construed whenever reasonable as consistent with each other, but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

Basically, this section would make no change in West Virginia law, though broad language running contrary to the policy of the provision is readily available in decisions of the West Virginia Supreme Court. For example in Salisbury v. Brooks, the court said:

"Resort to [course of performance as a] . . . mode of ascertaining what a writing was intended to accomplish or express is allowed only where its meaning is doubtful or its terms ambiguous, and not otherwise. The writing speaks its own meaning when there is no ambiguity or uncertainty."\textsuperscript{62}

\textsuperscript{60} See, Virginia, Iron, Coal & Coke Co. v. Lake & Export Coal Co., note 56, \textit{supra}.

\textsuperscript{61} See, Morgan-Gardner Elec. Co. v. Beelick Knob Coal Co., note 56, \textit{supra} (change of date of delivery from "as soon as possible" to a date about six months hence, oral understanding with seller's agent that "as soon as possible" meant within two or three weeks).

\textsuperscript{62} 81 W. Va. 233, 237, 94 S.E. 117, 119 (1917).
The code provision, contrarily, encourages the use of practical construction and does not hinge upon consideration of the course of performance upon a prior determination that the contract language is ambiguous. Cases which contain statements such as that found in Salisbury v. Brooks usually involve an attempt to enlarge occasional or sporadic acts into a "course of performance." For example, in the Salisbury case, the seller attempted to show that a contract of absolute sale rather than an agency to sell had been created upon the basis of two transactions which appeared to be outright sales to the agent but where other more numerous transactions under the same agreement had clearly involved the agency formula.

In such cases, the acts relied upon by the party seeking to invoke practical construction do not fall within the definition set out in the Code section. Thus, what was called a course of performance and ignored by the court on grounds of an unambiguous contract would not amount to a course of performance under the Code provision. The apparent disparity may be resolved then on a shift in emphasis.

Clearly, Hall Mining Co. v. Consolidated Fuel Co., is in accord with the Code provision. That case involved a contract term requiring a selling agent to pay a fixed amount per ton of coal sold, and based upon monthly settlements repeated over a period of eight months the court concluded that the contract actually meant the agent was bound to obtain at least the stated amount on an average for all coal mined.

The provision would elaborate the law in this area but would not make any practical changes.

---

64 69 W. Va. 47, 70 S.E. 857 (1911).
65 See, Franklin v. Pence, 128 W. Va. 353, 36 S.E.2d 505 (1945). (Act of accepting sight drafts for first two shipments of lumber held relevant to determine method of payment where contract silent on this particular.) Elk Refining Co. v. Falling Rock Cannel Coal Co., 92 W. Va. 479, 489, 115 S.E. 431, 435 (1922). ("Happily, however, in the present instance, we are guided by a high authority. That is to say, the construction put upon the instrument by the parties themselves." This, following a determination that the contract language was ambiguous.) Compare; implicit reliance on practical construction involving only a single performance where buyer purchased a stack of lumber containing woods other than beech but written contract called for only beech. Hartland Collier Co. v. J. N. Barnes & Brother Co., 112 W. Va. 44, 163 S.E. 714 (1932).
Section 2-209. Modification, Rescission and Waiver.

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

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

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

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

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

Subsection (1) makes a clear change in the present West Virginia law. The provision states that a modification to a contract needs no consideration to be binding. West Virginia has adhered to the rule that doing what one has already promised and bound himself to do is not a consideration which will bind a modified promise. Also, the drafters of the Code felt that commercial practice recognizes modification without consideration as fair. The thrust of the rule in West Virginia has been blunted by the apparent ease


67 See, HAWKLAND, SALES AND BULK SALES (1958) at 11: "Most modifications of sales contracts run afoul of the pre-existing duty rule, but there have been growing doubts as to the soundness and social wisdom of that rule, and this has influenced some courts in their actual decisions to evade it. Evasions take the form of rationalizations couched in terms of mutual rescission, waiver and gift."

with which mutual modifications of prior contracts may be made,\textsuperscript{68} coupled with the announced rule that the court will not look behind a "dispute" under an original contract to determine who in fact was "right" or gave up something in order to constitute consideration for the new, modified agreement.\textsuperscript{69}

Subsections (2) and (3) limit oral modifications of contracts. Subsection (2) permits the parties to prescribe their own statute of frauds, so to speak, by requiring modifications of the contract to be in writing.\textsuperscript{70} In deals not between merchants, such provisions limiting future modification require separate signing. Subsection (3) makes it clear that if the contract as modified would be within the statute of frauds provision, the modification must be in writing.

Subsection (4) makes it clear that though an agreed change in the original contract may not satisfy the requirements of the two preceding subsections relating to when the modification must be in writing, the attempt to modify may operate as a waiver. This provision seems to be aimed at the same situation resolved to the same effect in \textit{Simpson v. Mann}.\textsuperscript{71} There, Simpson sought to recover for work performed in constructing a building above and beyond the contract price on the basis of additional work orally agreed upon by Mann. The original contract provided that "no alterations or additions shall be allowed or paid for" unless agreed upon in writing. The court ruled flatly that such provision in the original contract could not bar future oral modifications. The result is compatible with the Code provision on the basis of the defendant's waiver of the written modification provision by acceptance of the work according to the oral modifications. It is problematical of course what the court would have held had the defendant Mann notified the builder that he would not accept construction according to the terms of the orally modified contract and Simpson would have refused to proceed according to the original contract. If there had been no

\textsuperscript{68} See, Tide Water Oil Sales Corp. v. Jarvis Oil Co., 114 W. Va. 493, 172 S.E. 522 (1933) (question of whether parties agreed to a modification was for the jury, though original contract was definite on the question of price which was the principal subject of the modification). See, 4 \textit{Michie's Juris., Contracts} § 54.

\textsuperscript{69} \textit{Producers' Coal Co. v. Mifflin Coal Co.}, 82 W. Va. 311, 95 S.E. 948 (1918).

\textsuperscript{70} See enforcement of such provision in \textit{Wood v. J. Q. Dickinson & Co.}, 115 W. Va. 723, 117 S.E. 770 (1934) holding seller's cooperation with a test of delivered machine which varied from testing method specified in the contract did not bar the seller from refusing to accept objections based upon such tests as showing machine failed to meet performances guaranteed.

\textsuperscript{71} \textit{Simpson v. Mann}, 71 W. Va. 516, 76 S.E. 895 (1912).
material change in position by Simpson, there seems to be no reason why the original contract provision restricting prohibiting oral modification could not and should not be enforced. Subsections (4) and (5) anticipate these problems and offer equitable solutions.

Section 2-210. Delegation of Performance; Assignment of Rights.

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 2-609).

This provision is a general restatement and elaboration of the law relating to assignment of rights and the delegation of duties
under sales contracts. It follows general principles of contract law already recognized in this state. Subsection (5) is noteworthy in that it expressly provides that the non-assigning party to a contract may demand adequate assurance of performance under section 2-609 of the Code. This right has been indirectly recognized by the West Virginia Supreme Court.

[A further discussion of the Sales Article will appear in the next issue.]

---


73 Myers v. Cook, 87 W. Va. 265, 104 S.E. 593 (1920). The court intimated that the non-assigning party to a logging contract would have the right to demand assurance of adequate performance from the assignee of the other original party who had assigned the right to do the logging.