

United States Court of Appeals,
Seventh Circuit.
WISCONSIN KNIFE WORKS, Plaintiff-Appellant,
v.
NATIONAL METAL CRAFTERS, Defendant-
Appellee.
No. 85-1801.
781 F.2d 1280

Argued Dec. 10, 1985.

Decided Jan. 22, 1986.

Rehearing and Rehearing En Banc Denied Feb. 19,
1986.

Before CUMMINGS, Chief Judge, and POSNER and
EASTERBROOK, Circuit Judges.

POSNER, Circuit Judge.

[...] Wisconsin Knife Works, having some unused manufacturing capacity, decided to try to manufacture spade bits for sale to its parent, Black & Decker, a large producer of tools, including drills. A spade bit is made out of a chunk of metal called a spade bit blank; and Wisconsin Knife Works had to find a source of supply for these blanks. National Metal Crafters was eager to be that source. After some negotiating, Wisconsin Knife Works sent National Metal Crafters a series of purchase orders on the back of each of which was printed, "Acceptance of this Order, either by acknowledgment or performance, constitutes an unqualified agreement to the following." A list of "Conditions of Purchase" follows, of which the first is, "No modification of this contract, shall be binding upon Buyer [Wisconsin Knife Works] 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." There were six purchase orders in all, each with the identical conditions. National Metal Crafters acknowledged the first two orders (which had been placed on August 21, 1981) by letters that said, "Please accept this as our acknowledgment covering the above subject order," followed by a list of delivery dates. The purchase orders had left those dates blank. Wisconsin Knife filled them in, after receiving the acknowledgments, with the dates that National Metal Crafters had supplied in the acknowledgments. There were no written acknowledgments of the last four orders (placed several weeks later, on September 10, 1981). Wisconsin Knife Works wrote in the delivery dates that National Metal Crafters orally supplied after receiving purchase orders in which the space for the date of delivery had again been left blank.

Delivery was due in October and November 1981. National Metal Crafters missed the deadlines. But Wisconsin Knife Works did not immediately declare a breach, cancel the contract, or seek damages for late delivery. Indeed, on July 1, 1982, it issued a new batch of purchase orders (later rescinded). By December 1982 National Metal Crafters was producing spade bit blanks for Wisconsin Knife Works under the original set of purchase orders in adequate quantities, though this was more than a year after the delivery dates in the orders. But on January 13, 1983, Wisconsin Knife Works notified National Metal Crafters that the contract was terminated. By that date only 144,000 of the more than 281,000 spade bit blanks that Wisconsin Knife Works had ordered in the six purchase orders had been delivered.

Wisconsin Knife Works brought this breach of contract suit, charging that National Metal Crafters had violated the terms of delivery in the contract that was formed by the acceptance of the six purchase orders. National Metal Crafters replied that the delivery dates had not been intended as firm dates. It also counterclaimed for damages for (among other things) the breach of an alleged oral agreement by Wisconsin Knife Works to pay the expenses of maintaining machinery used by National Metal Crafters to fulfill the contract. The parties later stipulated that the amount of these damages was \$30,000.

The judge ruled that there had been a contract but left to the jury to decide whether the contract had been modified and, if so, whether the modified contract had been broken. The jury found that the contract had been modified and not broken. Judgment was entered dismissing Wisconsin Knife Works' suit and awarding National Metal Crafters \$30,000 on its counterclaim. Wisconsin Knife Works has appealed from the dismissal of its suit. The appeal papers do not discuss the counterclaim, and the effect on it of our remanding the case for further proceedings on Wisconsin Knife Works' claim will have to be resolved on remand.

The principal issue is the effect of the provision in the purchase orders that forbids the contract to be modified other than by a writing signed by an authorized representative of the buyer. The theory on which the judge sent the issue of modification to the jury was that the contract could be modified orally or by conduct as well as by a signed writing. National Metal Crafters had presented evidence that Wisconsin Knife Works had accepted late delivery of

the spade bit blanks and had cancelled the contract not because of the delays in delivery but because it could not produce spade bits at a price acceptable to Black & Decker.

[Section 2-209\(2\) of the Uniform Commercial Code](#) provides that "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." [...] The meaning of this provision and its proviso is not crystalline and there is little pertinent case law. One might think that an agreement to exclude modification except by a signed writing must be signed in any event by the party against whom the requirement is sought to be enforced, that is, by National Metal Crafters, rather than by the party imposing the requirement. But if so the force of the proviso ("but except as between merchants ...") becomes unclear, for it contemplates that between merchants no separate signature by the party sought to be bound by the requirement is necessary. A possible reconciliation, though not one we need embrace in order to decide this case, is to read the statute to require a separate signing or initialing of the clause forbidding oral modifications, as well as of the contract in which the clause appears. There was no such signature here; but it doesn't matter; this was a contract "between merchants." Although in ordinary language a manufacturer is not a merchant, "between merchants" is a term of art in the Uniform Commercial Code. It means between commercially sophisticated parties (see [UCC § 2-104\(1\)](#); White & Summers, Handbook of the Law Under the Uniform Commercial Code 345 (2d ed. 1980)), which these were.

Of course there must still be a "signed agreement" containing the clause forbidding modification other than by a signed writing, but there was that (see definition of "agreement" and of "signed" in [UCC § § 1-201\(3\), \(39\)](#)). National Metal Crafters' signed acknowledgments of the first two purchase orders signified its assent to the printed conditions and naturally and reasonably led Wisconsin Knife Works to believe that National Metal Crafters meant also to assent to the same conditions should they appear in any subsequent purchase orders that it accepted. Those subsequent orders were accepted, forming new contracts on the same conditions as the old, by performance--that is, by National Metal Crafters' beginning the manufacture of the spade bit blanks called for by the orders. See [UCC § 2-207\(3\)](#). So there was an agreement, signed by National Metal Crafters, covering all the purchase orders. The fact

that the delivery dates were not on the purchase orders when received by National Metal Crafters is nothing of which it may complain; it was given *carte blanche* to set those dates.

When National Metal Crafters had difficulty complying with the original specifications for the spade bit blanks, Wisconsin Knife Works modified them; and National Metal Crafters argues that the engineering drawings containing those modifications are the written modification that [section 2-209\(2\)](#), if applicable, calls for. In fact these particular modifications seem to fall within the clause of the contract that allows the buyer (Wisconsin Knife Works) to modify the specifications by notice. The context of this clause makes clear that such notice is not the written modification to which the previous sentence refers. But in any event there was no modification of the delivery dates. The "pert charts" which National Metal Crafters supplied Wisconsin Knife Works, and which showed new target dates for delivery, do not purport to modify the contract and were not signed by Wisconsin Knife Works.

We conclude that the clause forbidding modifications other than in writing was valid and applicable and that the jury should not have been allowed to consider whether the contract had been modified in some other way. This may, however, have been a harmless error. [Section 2-209\(4\)](#) provides that an "attempt at modification" which does not satisfy a contractual requirement that modifications be in writing nevertheless "can operate as a waiver." Although in instructing the jury on modification the judge did not use the word "waiver," maybe he gave the substance of a waiver instruction and maybe therefore the jury found waiver but called it modification. Here is the relevant instruction:

Did the parties modify the contract? The defendant bears the burden of proof on this one. You shall answer this question yes only if you are convinced to a reasonable certainty that the parties modified the contract.

If you determine that the defendant had performed in a manner different from the strict obligations imposed on it by the contract, and the plaintiff by conduct or other means of expression induced a reasonable belief by the defendant that strict enforcement was not insisted upon, but that the modified performance was satisfactory and acceptable as equivalent, then you may conclude that the parties have assented to a modification of the original terms of the contract and that the parties have agreed that the different mode of performance will satisfy the obligations imposed on the parties by the contract.

To determine whether this was in substance an instruction on waiver we shall have to consider the background of [section 2-209](#), the Code provision on modification and waiver.

Because the performance of the parties to a contract is typically not simultaneous, one party may find himself at the mercy of the other unless the law of contracts protects him. Indeed, the most important thing which that law does is to facilitate exchanges that are not simultaneous by preventing either party from taking advantage of the vulnerabilities to which sequential performance may give rise. If A contracts to build a highly idiosyncratic gazebo for B, payment due on completion, and when A completes the gazebo B refuses to pay, A may be in a bind--since the resale value of the gazebo may be much less than A's cost--except for his right to sue B for the price. Even then, a right to sue for breach of contract, being costly to enforce, is not a completely adequate remedy. B might therefore go to A and say, "If you don't reduce your price I'll refuse to pay and put you to the expense of suit"; and A might knuckle under. If such modifications are allowed, people in B's position will find it harder to make such contracts in the future, and everyone will be worse off.

The common law dealt with this problem by refusing to enforce modifications unsupported by fresh consideration. See, e.g., [Alaska Packers' Ass'n v. Domenico](#), 117 Fed. 99 (9th Cir.1902), discussed in [Selmer Co. v. Blakeslee-Midwest Co.](#), 704 F.2d 924, 927 (7th Cir.1983). Thus in the hypothetical case just put B could not have enforced A's promise to accept a lower price. But this solution is at once overinclusive and underinclusive--the former because most modifications are not coercive and should be enforceable whether or not there is fresh consideration, the latter because, since common law courts inquire only into the existence and not the adequacy of consideration, a requirement of fresh consideration has little bite. B might give A a peppercorn, a kitten, or a robe in exchange for A's agreeing to reduce the contract price, and then the modification would be enforceable and A could no longer sue for the original price. See White & Summers, *supra*, at 47; Farnsworth, Contracts 271-78 (1982).

The draftsmen of the Uniform Commercial Code took a fresh approach, by making modifications enforceable even if not supported by consideration (see [section 2-209\(1\)](#)) and looking to the doctrines of duress and bad faith for the main protection against exploitive or opportunistic attempts at modification, as in our hypothetical case. See [UCC § 2-209](#),

official comment 2. But they did another thing as well. In [section 2-209\(2\)](#) they allowed the parties to exclude oral modifications. National Metal Crafters argues that two subsections later they took back this grant of power by allowing an unwritten modification to operate as a waiver.

The common law did not enforce agreements such as [section 2-209\(2\)](#) authorizes. The "reasoning" was that the parties were always free to agree orally to cancel their contract and the clause forbidding modifications not in writing would disappear with the rest of the contract when it was cancelled. "The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof." [...] This is not reasoning; it is a conclusion disguised as a metaphor. It may have reflected a fear that such clauses, buried in the fine print of form contracts, were traps for the unwary; a sense that they were unnecessary because only modifications supported by consideration were enforceable; and a disinclination to allow parties in effect to extend the reach of the Statute of Frauds, which requires only some types of contract to be in writing. But the framers of the Uniform Commercial Code, as part and parcel of rejecting the requirement of consideration for modifications, must have rejected the traditional view; must have believed that the protection which the doctrines of duress and bad faith give against extortionate modifications might need reinforcement--if not from a requirement of consideration, which had proved ineffective, then from a grant of power to include a clause requiring modifications to be in writing and signed. An equally important point is that with consideration no longer required for modification, it was natural to give the parties some means of providing a substitute for the cautionary and evidentiary function that the requirement of consideration provides; and the means chosen was to allow them to exclude oral modifications.

If [section 2-209\(4\)](#), which as we said provides that an attempted modification which does not comply with subsection (2) can nevertheless operate as a "waiver," is interpreted so broadly that *any* oral modification is effective as a waiver notwithstanding [section 2-209\(2\)](#), both provisions become superfluous and we are back in the common law--only with not even a requirement of consideration to reduce the likelihood of fabricated or unintended oral modifications. A conceivable but unsatisfactory way around this result is to distinguish between a modification that substitutes a new term for an old, and a waiver, which merely removes an old term. On this interpretation National Metal Crafters could

not enforce an oral term of the allegedly modified contract but could be excused from one of the written terms. This would take care of a case such as *Alaska Packers*, where seamen attempted to enforce a contract modification that raised their wages, but would not take care of the functionally identical case where seamen sought to collect the agreed-on wages without doing the agreed-on work. 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. We can see that in this case. National Metal Crafters, while claiming that Wisconsin Knife Works broke their contract as orally modified to extend the delivery date, is not seeking damages for that breach. But this is small comfort to Wisconsin Knife Works, which thought it had a binding contract with fixed delivery dates. Whether called modification or waiver, what National Metal Crafters is seeking to do is to nullify a key term other than by a signed writing. If it can get away with this merely by testimony about an oral modification, [section 2-209\(2\)](#) becomes very nearly a dead letter.

The path of reconciliation with subsection (4) is found by attending to the precise wording of (4). It does not say that an attempted modification "is" a waiver; it says that "it can operate as a waiver." It does not say in what circumstances it can operate as a waiver; but if 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. Reliance, if reasonably induced and reasonable in extent, is a common substitute for consideration in making a promise legally enforceable, in part because it adds something in the way of credibility to the mere say-so of one party. The main purpose of forbidding oral modifications is to prevent the promisor from fabricating a modification that will let him escape his obligations under the contract; and the danger of successful fabrication is less if the promisor has actually incurred a cost, has relied. There is of course a danger of bootstrapping--of incurring a cost in order to make the case for a modification. But it is a risky course and is therefore less likely to be attempted than merely testifying to a conversation; it makes one put one's money where one's mouth is. [...]

Our approach is not inconsistent with [section 2-209\(5\)](#), which allows a waiver to be withdrawn while the contract is executory, provided there is no "material change of position in reliance on the waiver." Granted, in (5) there can be no tincture of reliance; the whole point of the section is that a

waiver may be withdrawn unless there is reliance. But the section has a different domain from [section 2-209\(4\)](#). It is not limited to attempted modifications invalid under subsections (2) or (3); it applies, for example, to an express written and signed waiver, provided only that the contract is still executory. Suppose that while the contract is still executory the buyer writes the seller a signed letter waiving some term in the contract and then, the next day, before the seller has relied, retracts it in writing; we have no reason to think that such a retraction would not satisfy [section 2-209\(5\)](#), though this is not an issue we need definitively resolve today. In any event we are not suggesting that "waiver" means different things in (4) and (5); it means the same thing; but the *effect* of an attempted modification as a waiver under (4) depends in part on (2), which (4) (but not 5) qualifies. Waiver and estoppel (which requires reliance to be effective) are frequently bracketed. See, e.g., [Chemetron Corp. v. McLouth Steel Corp., 522 F.2d 469, 472-73 \(7th Cir.1975\)](#); [Hirsch Rolling Mill Co. v. Milwaukee & Fox River Valley Ry., 165 Wis. 220, 161 N.W. 741 \(1917\)](#). [...]

Missing from the jury instruction on "modification" in this case is any reference to reliance, that is, to the incurring of costs by National Metal Crafters in reasonable reliance on assurances by Wisconsin Knife Works that late delivery would be acceptable. And although there is evidence of such reliance, it naturally was not a focus of the case, since the issue was cast as one of completed (not attempted) modification, which does not require reliance to be enforceable. National Metal Crafters must have incurred expenses in producing spade bit blanks after the original delivery dates, but whether these were *reliance* expenses is a separate question. Maybe National Metal Crafters would have continued to manufacture spade bit blanks anyway, in the hope of selling them to someone else. It may be significant that the stipulated counterclaim damages seem limited to the damages from the breach of a separate oral agreement regarding the maintenance of equipment used by National Metal Crafters in fulfilling the contract. The question of reliance cannot be considered so open and shut as to justify our concluding that the judge would have had to direct a verdict for National Metal Crafters, the party with the burden of proof on the issue. Nor, indeed, does National Metal Crafters argue that reliance was shown as a matter of law.

[...] REVERSED AND REMANDED.

EASTERBROOK, Circuit Judge, dissenting.

The majority demonstrates that the clause of the contract requiring all modifications to be in writing is enforceable against National Metal Crafters. There was no modification by a "signed writing." Yet [§ 2-209\(4\) of the Uniform Commercial Code](#), which Wisconsin has adopted, provides that "an attempt at modification" that is ineffective because of a modification-only-in-writing clause "can operate as a waiver." The majority holds that no "attempt at modification" may be a "waiver" within the meaning of [§ 2-209\(4\)](#) unless the party seeking to enforce the waiver has relied to its detriment. I do not think that detrimental reliance is an essential element of waiver under [§ 2-209\(4\)](#).

"Waiver" is not a term the UCC defines. At common law "waiver" means an intentional relinquishment of a known right. A person may relinquish a right by engaging in conduct inconsistent with the right or by a verbal or written declaration. I do not know of any branch of the law--common, statutory, or constitutional--in which a renunciation of a legal entitlement is effective only if the other party relies to his detriment. True, the law of "consideration" imposed something like a reliance rule; payment of a pine nut (the peppercorn of nouvelle cuisine) is a tiny bit of detriment, and often the law of consideration is expressed in terms of detriment. But [§ 2-209\(1\) of the UCC](#) provides that consideration is unnecessary to make a modification effective. The introduction of a reliance requirement into a body of law from which the doctrine of consideration has been excised is novel. [...]

Not all novel things are wrong, although legal novelties, like biological mutations, usually die out quickly. This novelty encounters an obstacle within [§ 2-209](#). [Section 2-209\(5\)](#) states that a person who "has made a waiver affecting an executory portion of the contract may retract the waiver" on reasonable notice "unless the retraction would be unjust in view of a material change of position in reliance on the waiver." [Section 2-209](#) therefore treats "waiver" and "reliance" as different. Under [§ 2-209\(4\)](#) a waiver may be effective; under [§ 2-209\(5\)](#) a waiver may be effective *prospectively* only if there was also detrimental reliance.

The majority tries to reconcile the two subsections by stating that they have different domains. [Section 2-209\(4\)](#) deals with oral waivers, while [§ 2-209\(5\)](#) "is not limited to attempted modifications invalid under subsections (2) or (3); it applies, for example, to express written waivers, provided only that the

contract is executory." 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. See comment 4 to [§ 2-209](#). The two have the same domain--all attempts at modification, be they oral, written, or implied from conduct, that do not satisfy the Statute of Frauds, [§ 2-209\(3\)](#), or a "signed writing" requirement of a clause permitted under [§ 2-209\(2\)](#). The majority suggests that [§ 2-209\(5\)](#) also applies to signed waivers, but this gets things backward. A "signed writing" is binding as a modification under [§ 2-209\(2\)](#) without the need for "waiver." [Section 2-209\(1\)](#) lifts the requirement of consideration, so a signed pledge not to enforce a term of a contract may not be revoked under [§ 2-209\(5\)](#) unless the pledge reserves the power of revocation. Because "waiver" is some subset of failed efforts to modify, it cannot be right to treat a successful effort to modify (a signed writing) as a "waiver" governed by subsection (5).

"Waiver" therefore ought to mean the same in subsections (4) and (5). Unsuccessful attempts at modification may be waivers under [§ 2-209\(4\)](#). Then [§ 2-209\(5\)](#) deals with a subset of these "waivers," the subset that affects the executory portion of the contract. Waivers affecting executory provisions are enforceable or not depending on reliance. We know from the language and structure of [§ 2-209](#) that there is a difference between waivers that affect the executory portions of contracts and waivers that do not. Under the majority's reading, however, there is no difference. No 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...."

[...] The subsections read well together if waiver means "intentional relinquishment of a known right" in both. [Section 2-209\(4\)](#) says that a failed attempt at modification may be a waiver and so relinquish a legal entitlement (such as the entitlement to timely delivery); [§ 2-209\(5\)](#) adds that a waiver cannot affect the executory portion of the contract (the time of future deliveries, for example) if the waiving party retracts, unless there is also detrimental reliance. But for [§ 2-209\(2\)](#) the oral waiver could affect the executory portion of the contract even without reliance. It is not necessary to vary the meaning of the word to make sense of each portion of the statute.

The majority makes reliance an ingredient of waiver not because the structure of the UCC demands this reading, but because it believes that otherwise the UCC would not deal adequately with the threat of opportunistic conduct. The drafters of the UCC chose to deal with opportunism not through a strict reading of waiver, however, but through a statutory requirement of commercial good faith. See [§ 2-103](#) and comment 2 to [§ 2-209](#). The modification-only-in-writing clause has nothing to do with opportunism. A person who has his contracting partner over a barrel, and therefore is able to obtain a concession, can get the concession in writing. The writing will be the least of his worries. In almost all of the famous cases of modification the parties reduced the new agreement to writing.

A modification-only-in-writing clause may permit the parties to strengthen the requirement of commercial good faith against the careless opportunist, but its principal function is to make it easier for business to protect their agreement against casual subsequent remarks and manufactured assertions of alteration. It strengthens the Statute of Frauds. Even so, the Code does not allow the clause to be airtight. Comment 4 to [§ 2-209](#) states: "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 as a waiver is further regulated in subsection (5)." In other words, the UCC made modification-only-in-writing clauses effective for the first time, but the drafters meant to leave loopholes. The majority's observation that waiver under [§ 2-209\(4\)](#) could nullify some benefits of clauses permitted under [§ 2-209\(2\)](#) is true, but it is not a reason for adding novel elements to "waiver." It might be sensible to treat claims of oral waiver [...]

A requirement of reliance will not make a difference very often--certainly not in this case. Any waiver that is more than a condonation of an existing default will induce some reliance. The buyer who asks a seller of fungible goods to defer delivery induces reliance even though the waiver of timely delivery will not affect the production of the goods. When the goods have a custom design, as the spade bit blanks do, some reliance is close to a certainty. I doubt that National Metal Crafters would have produced the same goods in the same quantity but for a belief that Wisconsin Knife Works wanted to have them. A change of position in reliance on the frequent discussions is all the majority requires. Summary judgment cannot be far away. Still, it is

better not to ask unnecessary questions even when the questions have ready answers.