

ANSWER TO QUESTION NO. 11

For the following reasons, I would advise Best Brakes that it has a cause of action for breach of contract because the original contract was modified, despite the absence of a written modification.

1. Despite the written modification and anti-waiver clauses of the contract, Best Brakes and Allied retain the power to mutually modify the contract or waive certain of its terms. Because the parties retain their freedom to contract, notwithstanding such clauses, it is settled that a written contract may be varied by a subsequent oral agreement even where the original contract provided that it could not be changed except by written agreement. *Reid v Bradstreet Co*, 256 Mich 282, 286 (1931).

2. The freedom to contract does not permit a party to unilaterally modify an existing bilateral contract, but it does allow Best Brakes to establish a waiver and/or modification by clear and convincing evidence that the parties mutually intended to modify or waive provisions of the original contract. Processes was an Allied Vice President who was vested with authority under the contract to modify it. Processes evidenced his assent to the modification by promising Best Brakes that commissions on all filter sales would commence immediately despite the absence of a written modification. Best Brakes evidenced its mutual assent by then pursuing and obtaining sales of filter products. This evidence, if proven, is sufficient to establish a mutual agreement necessary to give effect to the modification. [NOTE: This can be characterized as either a mutual agreement to modify the existing contract or a mutual agreement to enter into a new contract covering the same subject matter as the original contract.] *Quality Products v Nagel Precision*, 469 Mich 362, 369-372 (2003); *Klaus v Pearce Hardware & Furniture Co*, 202 Mich 334, 339-340 (1918).

3. Because Processes made an affirmative statement, albeit oral, assenting to the modification, there was also a waiver, i. e., a voluntary and intentional abandonment of a known right. Vice President Processes' affirmative direction to proceed forthwith with filter sales in exchange for commissions demonstrated a voluntary and intentional abandonment of Allied's rights at issue under the contract.

4. As to any rights upon renewal, Best Brakes' efforts to attempt to enforce the oral modification upon any renewal 18 months

hence would be subject to challenge under the statute of frauds. Without a writing to support a promise to include a term some 18 months hence, the statute of frauds would probably prohibit any attempt to enforce such alleged rights. *Kelly-Stehney v McDonald's (on remand)*, 265 Mich App 105, 110-116 (2005).

5. This is not a case where alternative relief can be sought under *quantum meruit*. Under *quantum meruit*, the law will imply a contract in order to prevent unjust enrichment when one party unfairly receives and keeps a benefit from another. The facts here seem to fit in this framework, except for the well-established rule that an implied contract cannot exist if there is an express contract between the same parties covering the same subject matter. *Morris Pumps v Centerline Piping*, 273 Mich App 187, 194 (2006)