

An amateur computer whiz agreed in writing to build and deliver 50 new gaming laptops a year to a computer distributor over a five-year period. The writing provided, in a clause separately signed by the computer whiz, that "[n]o modification shall be binding on the distributor unless made in writing and signed by the distributor's authorized representative."

Because of family problems, the computer whiz delivered and the distributor accepted only 30 gaming laptops a year for the first three years; but the laptops were popular with gamers and the distributor made no objection. Accordingly, the computer whiz spent substantial sums on new laptop parts that would aid in speeding up future builds. In the first quarter of the fourth year, however, the distributor terminated the contract on the ground that the computer whiz had breached the annual-quantity term.

In the computer whiz's suit against the distributor for damages, the jury found that the contract had been modified by conduct, and the trial court awarded the computer whiz substantial compensatory damages.

Is this result likely to be reversed on appeal?

- A. No, because the contract's no-oral-modification clause was unconscionable as against an amateur computer builder.
- B. No, because the distributor by its conduct waived the annual-quantity term and the computer whiz materially changed his position in reasonable reliance on that waiver.
- C. Yes, because the contract's no-oral-modification clause was a material part of the agreed exchange and could not be avoided without new consideration.
- D. Yes, because the contract's no-oral-modification clause was not expressly waived by the distributor.

Explanation:

Unwritten modifications of contracts

Contract silent on modification

(common law & UCC)

Unwritten modification valid unless statute of frauds applies

Contract clause requires written modification

Common law

Clause unenforceable
Unwritten modification valid unless statute of frauds applies

UCC

Clause *enforceable* (ie, unwritten modification invalid) if:
contract written & signed
clause separately signed by nonmerchant if sued by merchant
Clause *waived* (ie, unwritten modification valid) if:
parties intended unwritten modification
one party materially changed position in reliance

UCC = Uniform Commercial Code.

Under the **UCC**, contract clauses that require modifications to be in writing (ie, **no-oral-modification clauses**) are generally enforceable against non-merchants who separately sign the clause. But these clauses are **waived if**:

the parties **attempt to modify** the contract orally or **by their conduct** (eg, tendering and accepting an alternate performance) *and*

one party **materially changes** his/her **position in reliance** on that modification.

In that case, the attempted **modification is valid**. And if either party breaches or terminates the modified contract, the other party is entitled to compensatory damages.

Here, the computer whiz agreed to deliver 50 gaming laptops a year over a five-year period but delivered only 30 laptops a year for the first three years. By tendering and accepting this alternate performance, the parties attempted to waive the annual-quantity term. And since the computer whiz relied on that modification and materially changed his position by spending substantial sums on new laptop parts, the no-oral-modification clause was waived. Therefore, the computer whiz's compensatory damages will not be reversed on appeal.

(Choice A) A court can refuse to enforce a contract clause that is unconscionable—eg, unfairly influenced by the parties' unequal bargaining power. But here, although the computer whiz was an amateur, there is no indication that the no-oral-modification clause was unfairly influenced by the distributor's superior bargaining power.

(Choice C) A sale-of-goods contract *can* be **modified** without new consideration—even if the modification avoids a material part of the agreed exchange—so long as the modification is sought in good faith.

(Choice D) The parties to a sale-of-goods contract can demonstrate their intent to waive a no-oral-modification clause expressly (eg, orally) OR by their conduct (as seen here).

Educational objective:

Under the UCC, no-oral-modification clauses are generally enforceable against non-merchants who separately sign the clause. But these clauses are waived if (1) the parties attempt to modify the contract orally OR by their conduct and (2) one party materially changes his/her position in reliance on that modification.

UCC = Uniform Commercial Code

References

U.C.C. § 2-209 (Am. Law Inst. & Unif. Law Comm'n 2020) (explaining that a contract clause requiring written modification is generally enforceable by a merchant against a non-merchant who separately signs the clause).

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