

A toy company contracted with a manufacturer to produce gel packets used to simulate water in its faux aquarium toy. On May 1, in a writing signed by both parties, the manufacturer agreed to deliver 1 million gel packets for a total price of \$1 million to be paid on June 1, the date of delivery. The writing specified that any modification of its terms required the toy company's signed, written consent.

On May 15, the manufacturer called the toy company to explain that it was running low on raw material and would need more time to produce the desired quantity of gel packets. The parties agreed in the telephone conversation to postpone the delivery date to July 1. On July 1, the manufacturer delivered the gel packets to the toy company, which refused to accept or pay for them.

Is the manufacturer likely to prevail in a breach-of-contract suit against the toy company?

- A. No, because any modification to the parties' agreement required the toy company's signed, written consent.
- B. No, because there was no consideration to support the May 15 agreement.
- C. Yes, because the manufacturer reasonably relied on the toy company's having waived the signed-writing requirement.
- D. Yes, because the May 15 agreement was enforceable under the statute of frauds.

Explanation:

"No oral modification" (NOM) clause

Common law

(contracts for services or real estate)

- NOM clause enforceable only if modification must be in writing under statute of frauds

UCC

(contracts for sale of goods)

- All parties are merchants – NOM clause always enforceable
- ≥ 1 party is nonmerchant – NOM clause in merchant's form must be separately signed by nonmerchant(s) to be enforceable

UCC = Uniform Commercial Code.

The **UCC statute of frauds** applies to contracts for the **sale of goods for \$500 or more** (eg, 1 million gel packets for \$1 million) and renders them unenforceable unless they are in a writing that:

- provides a reasonable basis to believe a contract was formed
- states the quantity of goods to be sold *and*
- is signed by the party against whom enforcement is sought.

Modifications to a contract that falls within and satisfies this statute **generally need not be in writing** because the enforceability of the initial contract passes to any modifications. However, the UCC will enforce a **"no oral modification" (NOM) clause** that requires modifications to be in writing. A NOM clause **can be waived** by the parties through words or conduct, and the waiver **cannot be retracted** if a party has **materially changed its position** in **reasonable reliance** on the waiver.

Here, the parties' May 1 contract fell within and satisfied the statute of frauds. As a result, their May 15 oral agreement did not violate this statute **(Choice D)**. Although the contract contained a NOM clause that prohibited modifications without the toy company's written consent, the toy company waived the clause on May 15 by orally agreeing to postpone the delivery date to July 1 **(Choice A)**. And since the manufacturer materially and reasonably relied on the waiver by delivering the gel packets on that date, it will likely prevail.

(Choice B) Consideration is *not* required to modify a contract for the sale of goods, but any modification must be sought in good faith and comply with reasonable commercial standards of fair dealing.

Educational objective:

The UCC will enforce a "no oral modification" (NOM) clause even if the modification would not otherwise need to be in a writing that satisfies the statute of frauds. NOM clauses can be waived through the parties' words or conduct, and the waiver cannot be retracted if a party has materially changed position in reasonable reliance on the waiver.

UCC = Uniform Commercial Code.

References

- U.C.C. § 2-201 (Am. Law Inst. & Unif. Law Comm'n 2020) (formal requirements for the statute of frauds).
- U.C.C. § 2-209 (Am. Law Inst. & Unif. Law Comm'n 2020) (modification, rescission, and waiver).

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