7 Modification of Contracts

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I. [7.1] SCOPE OF CHAPTER

Contract modification appears deceivingly simple. If certain requirements are not met, however, an allegedly modified contract can become a source of contention, particularly if the parties contest the sufficiency of the modification and their respective rights and obligations under the contract. These situations frequently end up before a judge, decided by a court of law rather than the parties. Parties can avoid litigation, however, by meeting the necessary requirements for a successful contract modification. This chapter covers those requirements, including offer, acceptance, and consideration. It addresses the effect of a contractual modification on the original contract between the parties and discusses issues unique to contracts governed by the statute of frauds and the Uniform Commercial Code. Finally, the chapter concludes with a discussion of the merger doctrine under Illinois law and the effect it has on multiple agreements covering the same subject matter entered into between the same parties.

II. [7.2] MODIFICATION GENERALLY

When parties enter into a contract, they are not locked into its terms forever. *Schwinder v. Austin Bank of Chicago,* 348 Ill.App.3d 461, 809 N.E.2d 180, 189, 284 Ill.Dec. 58 (1st Dist. 2004). Ordinarily, the parties to a contract are "as free to change it after making it as they were to make it in the first instance." *Id.* When parties exercise this right, the result is a modified contract.

In *Schwinder,* the First District explained that "[a] 'modification' of a contract is a change in one or more respects which introduces new elements into the details of the contract or cancels some of them, but leaves the general purpose undisturbed." *Id.* It generally occurs when the parties agree to "alter a contractual provision or to include additional obligations, while leaving intact the overall nature . . . of the original agreement." *Id.*

An enforceable contractual modification generally requires offer, acceptance, and consideration. *Scutt v. LaSalle County Board,* 97 Ill.App.3d 181, 423 N.E.2d 213, 216 – 217, 53 Ill.Dec. 21 (3d Dist. 1981). These requirements may be satisfied through untraditional means. For example, in *Advance Iron Works, Inc. v. ECD Lincolnshire Theater, L.L.C.,* 339 Ill.App.3d 882, 791 N.E.2d 631, 274 Ill.Dec. 539 (2d Dist. 2003), the Second District found an agreed order sufficient to modify an existing contract. In *Advance,* the defendant general contractor entered into a contract with the plaintiff subcontractor for the construction of a movie theater. The contract contained a provision that required all disputes related to the contract be submitted to arbitration.

During the course of construction, the plaintiff filed a complaint against the defendant for outstanding amounts due under the contract. The complaint contained four counts: Count I sought an accounting, Count II sought damages for breach of contract, Count III sounded in quantum meruit, and Count IV alleged unjust enrichment. During the proceedings, the trial court entered an agreed order staying Counts I, III, and IV of the complaint pending arbitration of Count II. Following arbitration, the plaintiff filed a motion in the trial court for interest and attorneys' fees on its claims. The trial court denied the motion, finding that the contract required all matters to be arbitrated.

The plaintiff appealed, arguing that the agreed order modified the original contract and, under the modified contract, only Count II required arbitration. The appellate court agreed and reversed the trial court. The appellate court found that "[a]n agreed order is not a judicial determination of the parties' rights, but, rather, it is a recordation of the agreement the parties reached." 791 N.E.2d at 635. The court stated that "[l]ike any other agreement, an agreed order is subject to the law of contracts." *Id.* Accordingly, the court found that through the agreed order, both parties modified their original contract and gave up their right to arbitrate Counts I, III, and IV of the complaint. *Id.*

III. REQUIREMENT OF MUTUAL ASSENT

A. [7.3] Generally

A court generally will enforce a contractual modification in which the necessary requirements of offer, acceptance, and consideration are met. Like contract formation, contract modification requires mutual assent — a meeting of the minds. If the parties fail to agree on (or even discuss) an essential term, any purported modification most likely will fail for lack of mutual assent. *Delcon Group, Inc. v. Northern Trust Corp.,* 187 Ill.App.3d 635, 543 N.E.2d 595, 600, 135 Ill.Dec. 212 (2d Dist. 1989). In other words, to establish a contractual modification, "it must be shown that the parties assented to the same terms." *MAJS Investment, Inc. v. Albany Bank & Trust Co.,* 175 Ill.App.3d 478, 529 N.E.2d 1035, 1037, 124 Ill.Dec. 918 (1st Dist. 1988).

In *UIDC Management, Inc. v. Sears, Roebuck & Co.,* 167 Ill.App.3d 81, 520 N.E.2d 1164, 117 Ill.Dec. 813 (1st Dist. 1988), the court refused to enforce a contractual modification when the plaintiff failed to establish a meeting of the minds. In that case, the plaintiff shopping center and the defendant department store entered into a thirty-five-year contract that, among other things, required the shopping center be maintained in a "first class manner." 520 N.E.2d at 1166. During the first nine years of the contract, the plaintiff performed the required maintenance and the defendant paid its pro rata share from year to year. In the tenth year of the contract, the defendant notified the plaintiff that it intended to perform its own maintenance. *Id.*

The plaintiff sued, alleging that even if the original contract allowed the defendant to perform its own maintenance, the parties modified the contract through their course of dealing over the previous nine years. 520 N.E.2d at 1167. The plaintiff argued that the yearly agreements for the plaintiff to maintain the shopping center resulted in a modification to the original contract. The court disagreed. It found that although the parties may have entered into yearly agreements related to maintenance, the writings failed to show a meeting of the minds to modify the contract and appoint the plaintiff to maintain the property for the remaining twenty-five years. Accordingly, the court refused to find a modification of the contract and dismissed the plaintiff's complaint. *Id.*

B. [7.4] Modifications Evidenced by Parties' Conduct

Contract modification requires a meeting of the minds — mutual assent. This requirement may be satisfied through the conduct of the parties. "A contract is validly modified if the party

which did not propose the changes is shown to acquiesce in the modification through a course of conduct consistent with acceptance." *Maher & Associates, Inc. v. Quality Cabinets, Division of Texwood Industries, Inc.,* 267 Ill.App.3d 69, 640 N.E.2d 1000, 1002, 203 Ill.Dec. 850 (2d Dist. 1994). This situation may be categorized as estoppel: a court will estop a party to a contract from denying a modification if the party acted consistently with the terms of the contract, as modified. *Nagle v. General Merchandising Corp.,* 58 Ill.App.3d 344, 374 N.E.2d 1137, 16 Ill.Dec. 362 (3d Dist. 1978). It also may be categorized as ratification: a party ratifies the modification of a contract through acquiescence in a course of conduct consistent with the existence of that modification. *Corrugated Metals, Inc. v. Industrial Commission,* 184 Ill.App.3d 549, 540 N.E.2d 479, 484, 132 Ill.Dec. 739 (1st Dist. 1989). *But see Trans Leasing International v. Schmer,* 194 Ill.App.3d 70, 550 N.E.2d 1085, 1089 – 1090, 141 Ill.Dec. 39 (1st Dist. 1990).

Regardless of the characterization, "[w]hether the terms of a written contract are modified by acts or conduct is a matter for the trier of fact and its determination will not be disturbed unless contrary to the manifest weight of the evidence." *Sosin v. Hayes,* 258 Ill.App.3d 949, 630 N.E.2d 969, 971, 196 Ill.Dec. 804 (1st Dist. 1994). *See also Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.,* 240 Ill.App.3d 737, 607 N.E.2d 1337, 1344, 180 Ill.Dec. 824 (1st Dist. 1992); *Martz v. MacMurray College,* 255 Ill.App.3d 749, 627 N.E.2d 1133, 1135, 194 Ill.Dec. 491 (4th Dist. 1993). For example, in *Deien Chevrolet, Inc. v. Reynolds & Reynolds Co.,* 265 Ill.App.3d 842, 639 N.E.2d 949, 203 Ill.Dec. 390 (5th Dist. 1994), the parties entered into a contract for the lease of a computer system. The contract required that all disputes arising thereunder be submitted to arbitration. 639 N.E.2d at 950. Subsequently, the parties negotiated new provisions to the contract. After the defendant delivered the equipment, the plaintiff sued for fraudulent inducement, alleging that the defendant failed to disclose that the computer system was reconditioned, rather than new. *Id.*

The defendant moved to compel arbitration under the terms of the contract. The plaintiff responded that it had cancelled the original contract when it renegotiated with the defendant. The court disagreed, finding that the conduct of the parties did not support the plaintiff's assertion that the contract was cancelled, rather than modified. 639 N.E.2d at 951 – 952. By way of example, the court noted that the plaintiff issued payment under the terms of the original agreement and never requested a refund or stopped payment on the check. *Id.* Accordingly, the court concluded that the subsequent negotiations between the parties modified the terms of the original agreement, which did not affect the liabilities under the other terms of the agreement. Accordingly, the court compelled arbitration. 639 N.E.2d at 952.

IV. PARTIES NECESSARY TO MODIFICATION

A. [7.5] Generally

The requirements for contract modification are identical to those for contract formation: there must be an offer, acceptance, and consideration. *Schwinder v. Austin Bank of Chicago,* 348 Ill.App.3d 461, 809 N.E.2d 180, 188, 284 Ill.Dec. 58 (1st Dist. 2004). Given these requirements, and the resulting element of mutual assent, one party generally cannot modify a contract unilaterally without the knowledge and consent of the other party. *Id.*

For example, in *Brooks v. Village of Wilmette,* 72 Ill.App.3d 753, 391 N.E.2d 133, 136, 23 Ill.Dec. 934 (1st Dist. 1979), the plaintiff landowners sued the Village of Wilmette for breach of contract when the village refused to fix broken water mains on their respective properties. The plaintiffs alleged that they had entered into a contract with the village whereby they agreed to pay for, and the village agreed to provide, water services. The plaintiffs alleged that the ordinance in effect at the time they began receiving water services placed the burden of repairing damaged pipes on the village, which became a part of the village's obligation in rendering water services. Although the village purported to amend the water ordinance to place responsibility for repair or replacement of the water mains on the owners of the property, the plaintiffs further alleged that they did not know of the amendment until after they suffered the water main break at issue. The plaintiffs alleged that the amendment could not be effective because the village unilaterally altered its contractual obligations without the plaintiffs' knowledge and consent.

The defendant moved to dismiss the plaintiffs' complaint for failure to state a claim. In denying the motion, the court found that "[t]he legal relationship between the municipality engaged in the business of furnishing water to its inhabitants and a water consumer is essentially one of contract." 391 N.E.2d at 136. "The consumer's obligation to pay for the services and for use of the water furnished by the municipality and the obligation of the municipality to render adequate and reasonable water service rest upon the contract made between the user and the municipality." *Id.* According to the court, the municipality's ordinances regulating the supply of water to residents became an implied term of the contract by operation of law. *Id.*

The court also found it well established that "[n]o contract can be modified or amended in *ex parte* fashion by one of the contracting parties without the knowledge and consent of the remaining party to the agreement." *Id.* Based on the foregoing principles, the court held that the plaintiffs stated a claim for breach of contract despite the alleged amendment to the ordinance. *But see Rosborough v. City of Moline,* 30 Ill.App.2d 167, 174 N.E.2d 16 (2d Dist. 1961) (no claim for breach of contract when contract for water services between municipality and landowner expressly provided that contract was subject to all present and future regulations of water department and when one such regulation placed burden of repair on water user).

B. [7.6] Exception: Terminable-at-Will Contract

Despite the general rule requiring an offer, acceptance, and consideration for contract modification, a terminable-at-will contract may be unilaterally modified at any time. *See Bass v. Prime Cable of Chicago, Inc.,* 284 Ill.App.3d 116, 674 N.E.2d 43, 220 Ill.Dec. 772 (1st Dist. 1996). For example, in *Garber v. Harris Trust & Savings Bank,* 104 Ill.App.3d 675, 432 N.E.2d 1309, 1310 – 1311, 1313 – 1314, 60 Ill.Dec. 410 (1st Dist. 1982), the plaintiffs sued the defendants for breach of the provisions of "cardholder agreements" related to certain credit cards issued to the plaintiffs by the defendants. The plaintiffs alleged the defendants unilaterally modified the terms of the cardholder agreements without the plaintiffs' consent. 432 N.E.2d at 1310 – 1311. The court disagreed.

First, the court found the "prevailing view in this country is that the issuance of a credit card is only an offer to extend credit." 432 N.E.2d at 1313. Accordingly, the issuers could terminate or modify the terms of their offers to extend credit as to all future transactions at any time.

Regardless, the court found that even if the cardholder agreements constituted contracts between the issuers and the cardholders, it was for an indefinite term and was, therefore, terminable at the will of either party. 432 N.E.2d at 1313 – 1314. According to the court: “A contract terminable at the will of either party can be modified at any time by either party as a condition of its continuance.” 432 N.E.2d at 1314. Accordingly, the cardholder agreements in question could be modified at any time by the defendants and the plaintiffs’ complaint failed. *Id.*

V. CONSIDERATION FOR MODIFICATION

A. Contracts Not Subject to the Uniform Commercial Code

1. [7.7] Generally

Except for contracts governed by the Uniform Commercial Code (discussed in §7.9 below), in addition to offer and acceptance, a valid contractual modification requires consideration. *Watkins v. GMAC Financial Services,* 337 Ill.App.3d 58, 785 N.E.2d 40, 44, 271 Ill.Dec. 389 (1st Dist. 2003). Although seemingly simple, parties commonly litigate what constitutes consideration. *See, e.g., Greenberg v. Mallick Management, Inc.,* 173 Ill.App.3d 653, 527 N.E.2d 943, 123 Ill.Dec. 305 (1st Dist. 1988). Under Illinois law, consideration consists of some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. *Doyle v. Holy Cross Hospital,* 186 Ill.2d 104, 708 N.E.2d 1140, 1145, 237 Ill.Dec. 100 (1999); *De Fontaine v. Passalino,* 222 Ill.App.3d 1018, 584 N.E.2d 933, 939, 165 Ill.Dec. 499 (2d Dist. 1991); *Flint v. Court Appointed Special Advocates of DuPage County, Inc.,* 285 Ill.App.3d 152, 674 N.E.2d 831, 839, 221 Ill.Dec. 38 (2d Dist. 1996); *Kapoor v. Robins,* 214 Ill.App.3d 248, 573 N.E.2d 292, 297, 157 Ill.Dec. 874 (2d Dist. 1991). Any act or promise that is a benefit to one party or a detriment to the other is sufficient consideration to support a contractual modification. *Doyle, supra; De Fontaine, supra; Flint, supra; Kapoor, supra.* Preexisting obligations, however, do not constitute consideration. *Watkins, supra*; *Flint, supra,* 674 N.E.2d 831 at 838.

When parties to a contract agree to a modification, consideration generally is found through the varied obligations of both parties. *Doyle v. Holy Cross Hospital,* 289 Ill.App.3d 75, 682 N.E.2d 68, 71, 224 Ill.Dec. 507 (1st Dist. 1997). In some cases, continued action may constitute consideration. For example, a modification to a contract terminable at will is supported by consideration when a party provides services that it is not obligated to provide in the future. *Bass v. Prime Cable of Chicago, Inc.,* 284 Ill.App.3d 116, 674 N.E.2d 43, 50, 220 Ill.Dec. 772 (1st Dist. 1996). This situation is akin to the employment-at-will scenario whereby continued employment constitutes consideration for a modification unilaterally implemented by an employer.

In other cases, continued action does not constitute consideration. The Illinois Supreme Court addressed this issue in *Doyle, supra,* 708 N.E.2d at 1142 – 1143. In that case, former employees sued their former employer for, among other things, breach of contract. Specifically, the plaintiffs alleged that the employer violated the provisions of the employee handbook in effect at the time the plaintiffs were hired when it terminated them. 708 N.E.2d at 1142. The handbook in use by

the defendant when the plaintiffs began work did not disclaim the existence of an employment relationship and contained a provision governing termination. 708 N.E.2d at 1142. During the course of the plaintiffs' employment, the hospital issued a new handbook that expressly disclaimed the existence of an employment relationship and confirmed the at-will status of employees. 708 N.E.2d at 1143.

The defendant moved to dismiss the plaintiffs' complaint pursuant to 735 ILCS 5/2-619(a)(9) arguing that the disclaimer added to the employee handbook prevented the plaintiffs' claims. 708 N.E.2d at 1144. It asserted that the plaintiffs' decision to continue to work for the defendant after the amendment constituted sufficient consideration to support the modification. *Id.* The court disagreed. According to the court: "Because the defendant was seeking to reduce rights enjoyed by the plaintiffs under the employee handbook, it was the defendant, and not the plaintiffs, who would properly be required to provide consideration for the modification." 708 N.E.2d at 1145.

Despite the defendant's contention to the contrary, the employees' decision not to quit their jobs did not satisfy this requirement. The court stated that "in adding the disclaimer to the handbook, the defendant provided nothing of value to the plaintiffs and did not itself incur any disadvantage." *Id.* Accordingly, the court concluded that "after an employer is contractually bound to the provisions of an employee handbook, unilateral modification of its terms by the employer to an employee's disadvantage fails for lack of consideration." *Id.*

2. [7.8] Exception: Executed Modification

For contracts not governed by the Uniform Commercial Code, a contractual modification generally must be supported by consideration. Once the parties perform their obligations under a contract, however, a modification will not be undone for lack of consideration. *De Fontaine v. Passalino,* 222 Ill.App.3d 1018, 584 N.E.2d 933, 940, 165 Ill.Dec. 499 (2d Dist. 1991), citing *Snow v. Griesheimer,* 220 Ill. 106, 77 N.E. 110, 111 (1906), and *Protective Insurance Co. v. Coleman,* 144 Ill.App.3d 682, 494 N.E.2d 1241, 1249, 98 Ill.Dec. 914 (2d Dist. 1986); *Corrugated Metals, Inc. v. Industrial Commission,* 184 Ill.App.3d 549, 540 N.E.2d 479, 484, 132 Ill.Dec. 739 (1st Dist. 1989); *Terminal Freezers, Inc. v. Roberts Frozen Foods, Inc.,* 41 Ill.App.3d 981, 354 N.E.2d 904, 910 (3d Dist. 1976).

Davison v. Board of Trustees of Carl Sandburg College, District No. 518, 132 Ill.App.3d 980, 478 N.E.2d 3, 87 Ill.Dec. 864 (3d Dist. 1985), addressed this issue. In *Davison,* the parties orally agreed that the plaintiff, a full-time instructor, would teach summer school at the defendant college. At the time the parties made the agreement, each understood that the plaintiff would be paid at the rate for a full-time instructor. Before he started teaching under the agreement, however, the plaintiff resigned his full-time status. Accordingly, the college determined that the plaintiff's rate of pay for the summer school would be that of a part-time instructor. The college explained its decision to the plaintiff before he began teaching for the summer and inquired into whether the plaintiff would teach. Although the plaintiff initially objected to the reduction in pay, he agreed that he would indeed teach.

True to its word, the college paid the plaintiff at a part-time rate for his work. After he received his first paycheck, however, the plaintiff instituted a grievance proceeding against the

college to obtain the higher full-time rate of pay. Moreover, before cashing the paycheck, he noted on it that his endorsement did not "imply [his] agreement that the amount is all that is due to [him] at this time." 478 N.E.2d at 5. The college refused the grievance, and the plaintiff brought suit.

The court ruled in favor of the college. It found that the college's actions amounted to an offer to modify an executory agreement. "By carrying the modified contract into effect and accepting its benefits, [the plaintiff] ratified the new agreement and waived performance of the original contract." *Id.* The court found that the plaintiff's actions indicated he agreed to accept the terms of the modified contract before performance. According to the court, although he never expressly agreed to work at the part-time rate, the plaintiff was fully aware of the pay scale offered by the college and still agreed to teach. The court found it inconsequential that the plaintiff later changed his mind, and protested after receiving his first paycheck, given that he completed the contract as modified.

Davison has a strong dissenting opinion in which Justice Stouder found that the plaintiff "did not agree to the college's unilateral modification of the oral employment contract" and that the plaintiff's "conduct in no way evinced acceptance, either tacit or otherwise, of the terms as suggested by the majority." 478 N.E.2d at 6.

B. [7.9] Contracts Subject to the Uniform Commercial Code

Contracts for the sale of goods are governed by the Uniform Commercial Code (UCC). Under the UCC, a contractual modification does not need consideration to be binding. 810 ILCS 5/2-209(1). The comments explain that this provision is designed to "protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments [at common law, in other words, consideration]." See Official Comment 1, 810 ILCS 5/2-209.

Although a modification to a sales contract need not be supported by consideration, it must meet the good-faith requirement imposed by the UCC under §2-103. See Official Comment 2, 810 ILCS 5/2-209. The comments are insightful:

> **The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith . . .**
>
> **The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616.** *Id.*

See also Greenberg v. Mallick Management, Inc., 173 Ill.App.3d 653, 527 N.E.2d 943, 123 Ill.Dec. 305 (1st Dist. 1988) (finding that purpose of UCC was to change rules under prior Illinois decisions requiring consideration to support modification but also finding that right to modify without consideration is not absolute and must be done in good faith). Parties should also be aware that although consideration is unnecessary, certain contracts governed by the UCC must be in writing, and consequently, so must modifications to those contracts. *See June G. Ashton Interiors v. Stark Carpet Corp.,* 142 Ill.App.3d 100, 491 N.E.2d 120, 96 Ill.Dec. 306 (1st Dist. 1986) (modifications to contracts under UCC need no consideration to be binding but must be done in good faith and signed by party to be charged). This concept is discussed more fully in §7.13 below.

With the divergence of authority between the common law and the UCC regarding the necessity of consideration to support a contractual modification, contracts partially for the sale of goods and partially for services present an interesting issue. In these circumstances, at least one court has applied the UCC to the entire agreement, finding consideration unnecessary for an enforceable modification executed in good faith. *See Greenberg, supra,* 527 N.E.2d at 948.

In *Greenberg,* the contract at issue governed the sale of goods and also contained a noncompetition clause. 527 N.E.2d at 949. Technically, the portion of the contract related to the sale of goods was governed by the UCC and enforceable without consideration, whereas the portion of the contract related to the noncompetition clause was not. The court, however, opined that neither equity nor logic would permit it to grant the agreement in part and deny it in part. *Id.* According to the court, "[t]he public policy considerations that dictated passage of section 2-206 are just as valid for in other contracts as they are in contracts for the sale of goods." *Id.* Accordingly, the court held that, under certain circumstances, parties acting in good faith should be permitted to adjust their agreements without the necessity of a new and different detriment and benefit. *Id.*

The *Greenberg* court was not entirely clear on the circumstances in which it intended its holding to apply. It noted the situation in which a construction contract is not completed in compliance with the time requirements of the original agreement. *Id.* It also noted other cases of difficulty (or impossibility) of performance, such as weather, strikes, illness, death, sudden shortages of materials, recessions, and even war. *Id.* It is clear, however, that the *Greenberg* holding does not apply to contracts wholly outside the purview of the UCC. For example, in *J & R Electric Division of J.O. Mory Stores, Inc. v. Skoog Construction Co.,* 38 Ill.App.3d 747, 348 N.E.2d 474, 477 (4th Dist. 1976), the court ruled that a contract (or subcontract) for the construction of a building is not a "contract for sale" as defined by Article 2 of the UCC. Accordingly, the court refused to enforce a purported contractual modification to the construction contract at issue when consideration was lacking. *Id.*

VI. [7.10] EFFECT OF MODIFICATION

After parties agree to a modification of an existing contract (and for contracts not governed by the Uniform Commercial Code, the modification is supported by consideration), in most instances, the modified contract becomes a new agreement that replaces the old original contract.

Barrett v. Lawrence, 110 Ill.App.3d 587, 442 N.E.2d 599, 601, 66 Ill.Dec. 173 (1st Dist. 1982). To the extent that a modified contract contains a term inconsistent with a term of the original contract, it "is interpreted as including an agreement to rescind the inconsistent term in the earlier contract." *Schwinder v. Austin Bank of Chicago,* 348 Ill.App.3d 461, 809 N.E.2d 180, 189, 284 Ill.Dec. 58 (1st Dist. 2004). "The modified contract is regarded as creating a new single contract consisting of so many of the terms of the prior contract as the parties have not agreed to change, in addition to the new terms on which they have agreed." *Id.*

Under Illinois law, however, parties do not form a new contract every time an original contract is somehow altered or amended. Instead, "courts observe whether the contractual modifications were significant enough to change the parties' obligations under the particular contract." *Nebel, Inc. v. Mid-City National Bank of Chicago,* 329 Ill.App.3d 957, 769 N.E.2d 45, 53, 263 Ill.Dec. 843 (1st Dist. 2002). Immaterial amendments that do not have a legal effect different from the original contractual language are insufficient to establish a new contract that replaces the original agreement. 769 N.E.2d at 51 – 52*,* citing *McKay Nissan, Ltd. v. Nissan Motor Corporation in U.S.A.,* 764 F.Supp. 1318 (N.D.Ill. 1991).

Although it appears to be a distinction without difference, this concept becomes important when legislation is enacted during the term of a contract that affects the rights and obligations of the parties. For example, *Nebel* involved litigation over a 99-year lease originally executed in 1906. 769 N.E.2d at 46. The lease contained a provision requiring that rental payments be paid "in standard gold coin of the United States." 769 N.E.2d at 47. In 1933, the United States Congress adopted a joint resolution making all obligations requiring payment in gold unenforceable. In 1977, Congress amended the 1933 resolution, making obligations requiring payment in gold enforceable if issued after October 27, 1977. *Id.*

In 1989, the parties to the lease entered into a first lease amendment to permit the defendant to construct a walkway on the premises. 769 N.E.2d at 49. Among other things, the lease amendment stated that "except as otherwise expressly modified by this first Amendment, all the terms and provisions of the Lease are reaffirmed and are not modified by this First Amendment." *Id.*

In 1998, the plaintiff made a written demand that the defendant pay the monthly rent in gold coin, as provided by the lease. The defendant refused, and the plaintiff sued for a declaratory judgment and other relief. *Id.* The trial court granted the defendant's motion for summary judgment, finding the gold coin provision in the 1906 lease unenforceable pursuant to the 1933 resolution because the defendant did not undertake any new obligation after October 27, 1977. *Id.* The court found that "despite the use of the term reaffirm [in the Lease Amendment], nothing really changed except the fact that the bank was given permission to build a pedestrian walkway." *Id.*

The plaintiff appealed. It argued that the lease amendment, executed after October 27, 1977, created a new contract that reaffirmed all of the terms and conditions of the original lease plus the new terms added by the amendment. The appellate court agreed and reversed the trial court. First, the court opined that the lease amendment constituted a significant enough change to the parties' obligations to result in the formation of a new contract. 769 N.E.2d at 53. According to the court,

the lease amendment increased the defendant's obligations to the plaintiff under the lease because the defendant undertook new construction on the premises and agreed to maintain, repair, and insure the walkway. *Id.* The court then reasoned that by reaffirming the obligations of the 1906 lease, the lease amendment "demonstrated that defendant obligated itself anew to pay rent in gold." 769 N.E.2d at 53 – 54. Accordingly, the court found the gold clause in the lease enforceable. 769 N.E.2d at 53 – 54. *See also McKay Nissan, supra,* 764 F.Supp. at 1320 (finding routine contractual modifications, including relocation of franchise, change of corporate name, and change of corporate address, immaterial and too insubstantial to establish new contract that replaced original agreement for purposes of applying statute enacted subsequent to execution of original contract.)

Regardless of whether the court interprets a contractual modification as forming a "new" contract, when a contract is modified or amended by a subsequent agreement, any lawsuit to enforce the agreement must be brought on the terms of the modified agreement and not on the terms of the original agreement. *Schwinder, supra.*

VII. APPLICABILITY OF THE STATUTE OF FRAUDS TO MODIFICATIONS

A. Contracts Not Subject to the Statute

1. [7.11] Generally

Except for agreements governed by the statute of frauds, Illinois law allows a written contract to be modified by subsequent oral agreements. *See Krautsack v. Anderson,* 329 Ill.App.3d 666, 768 N.E.2d 133, 147, 263 Ill.Dec. 373 (1st Dist. 2002). Oral modifications must be proved through extrinsic evidence and generally present issues of fact. *E.A. Cox Co. v. Road Savers International Corp.,* 271 Ill.App.3d 144, 648 N.E.2d 271, 277, 207 Ill.Dec. 815 (1st Dist. 1995); *A.W. Wendell & Sons, Inc. v. Qazi,* 254 Ill.App.3d 97, 626 N.E.2d 280, 287 – 288, 193 Ill.Dec. 247 (2d Dist. 1993).

Proving an oral modification to a written contract is not easy. For example, in *South Shore Amusements, Inc. v. Supersport Auto Racing Ass'n,* 136 Ill.App.3d 284, 483 N.E.2d 337, 338, 91 Ill.Dec. 55 (1st Dist. 1985), the plaintiff and defendant entered into a written contract that provided the plaintiff would lease premises to the defendant so the defendant could show a closed circuit telecast of the boxing match between Muhammad Ali and George Foreman. Prior to the boxing match, one of the athletes was injured and the contest was postponed. 483 N.E.2d at 338. The plaintiff alleged that the parties orally agreed that the defendant would make the venue available for the rescheduled date of the match. When the defendant failed to provide the premises, the plaintiff sued for breach of contract. The defendant denied the oral modification. The plaintiff prevailed at trial, and the defendant appealed. *Id.*

The appellate court found it well established "[t]hat parties to a written contract may alter or modify its terms by a subsequent oral agreement." 483 N.E.2d at 340. The court further opined that "[w]hether an oral contract exists, its terms and conditions and the intent of the parties, are questions of fact to be determined by the trier of fact." *Id.* After reviewing the record, the court

found that the testimony presented by the plaintiff at trial insufficient to establish that the parties modified the original written contract by subsequent oral agreement. *Id.* The court found that the plaintiff's testimony was wholly uncorroborated as it failed to present any cancelled contracts, cancelled checks, written correspondence, evidence of equipment rescheduling, or any other evidence of subsequent acts to support its contention. *Id.* Moreover, the court found it persuasive that the record was devoid of any evidence establishing the date on which the boxing match was rescheduled to be shown. Accordingly, the appellate court reversed the decision of the trial court. *Id.*

2. Contracts Prohibiting Oral Modification

a. [7.12] Common Law

Illinois law is well settled that "the terms of a written contract can be modified by a subsequent oral agreement even though . . . the contract precludes oral modifications." *Tadros v. Kuzmak,* 277 Ill.App.3d 301, 660 N.E.2d 162, 170, 213 Ill.Dec. 905 (1st Dist. 1995), citing *A.W. Wendell & Sons, Inc. v. Qazi,* 254 Ill.App.3d 97, 626 N.E.2d 280, 287, 193 Ill.Dec. 247 (2d Dist. 1993); *Falcon, Ltd. v. Corr's Natural Beverages, Inc.,* 165 Ill.App.3d 815, 520 N.E.2d 831, 835, 117 Ill.Dec. 480 (1st Dist. 1987). The terms of an oral modification must be definite and certain, and the party who asserts the oral modification has the burden of proving its existence. *Estate of Kern v. Handelsman,* 142 Ill.App.3d 506, 491 N.E.2d 1275, 1280, 96 Ill.Dec. 815 (1st Dist. 1986).

b. [7.13] Uniform Commercial Code

Unlike the common law, the Uniform Commercial Code prevents a party from orally modifying a contract for the sale of goods when the parties expressly required all modifications be in writing. *See Williams v. Jader Fuel Co.,* 944 F.2d 1388, 1395 (7th Cir. 1991). The UCC 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." 810 ILCS 5/2-209(2). In essence, this subsection allows parties to "make their own Statute of Frauds as regards any future modification of contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by signed writing." Official Comment 3, 810 ILCS 5/2-209. These contracts are discussed more fully in §7.14 below, including the possibility of waiver of the contractual requirements.

B. [7.14] Contracts Subject to the Statute

The statute of frauds requires certain contracts or transactions to be in writing. Illinois has at least two versions of the statute of frauds applicable to different types of contracts. The first "general" version of the statute of frauds appears in the Frauds Act, 740 ILCS 80/0.01, *et seq.* Contracts within its purview include (1) those in consideration of marriage; (2) those that cannot be performed within one year; (3) those for the sale of land; (4) a promise to answer for the debt of another (surety); and (5) a promise to answer a debt from one's estate. For these types of contracts, just as the original must be in writing, Illinois law appears to require any modification

be in writing. *See National Importing & Trading Co. v. E.A. Bear & Co.,* 324 Ill. 346, 155 N.E. 343 (1927); *Becker v. Morstadt,* 381 Ill. 422, 45 N.E.2d 643 (1942). *See also Wyatt v. Dishong,* 127 Ill.App.3d 716, 469 N.E.2d 608, 611, 83 Ill.Dec. 1 (5th Dist. 1984) (finding oral modifications to written contract containing noncompetition clause enforceable because noncompetition clause can be performed within one year such that it is not subject to statute of frauds).

A second version of the statute of frauds appears in the Uniform Commercial Code at 810 ILCS 5/2-201. With certain enumerated exceptions beyond the scope of this chapter, §2-201(1) provides that "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 or by his authorized agent or broker." Section 2-201(1) further provides that "[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."

In addition to contract formation, the requirements of §2-201 apply to contract modification. According to §2-209(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." 810 ILCS 5/2-209(3). This subsection is intended to "protect against false allegations of oral modifications." Official Comment 3, 810 ILCS 5/2-209. The comments further provide:

> **The Statute of Frauds provisions of this Article are expressly applied to modifications by subsection (3). Under those provisions the "delivery and acceptance" test is limited to the goods which have been accepted, that is, to the past. "Modification" for the future cannot therefore be conjured up by oral testimony if the price involved is $500.00 or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to the quantity of goods set forth in it there is safeguard against oral evidence.** *Id.*

See also Tuteur Associates, Inc. v. Taubensee Steel & Wire Co., 861 F.Supp. 693, 698 (N.D.Ill. 1994); *Ray Dancer, Inc. v. DMC Corp.,* 175 Ill.App.3d 997, 530 N.E.2d 605, 609 – 610, 125 lll.Dec. 447 (2d Dist. 1988).

The statute of frauds does not always require a formal signed writing. Informal communication may suffice, including e-mail. For example, *Cloud Corp. v. Hasbro, Inc.,* 314 F.3d 289 (7th Cir. 2002), involved a contract for the sale of packets of powder by the plaintiff necessary to produce a toy manufactured by the defendant. During the term of the contract, the defendant sent the plaintiff e-mails increasing the quantity of packets it needed to meet its manufacturing requirements. 314 F.3d at 293 – 294. When the defendant refused to pay for the increased quantity, the plaintiff sued. 314 F.3d at 292.

Because the contract was for the sale of goods over $500, the UCC statute of frauds required that any modification to the contract be in writing signed by the party to be charged. 314 F.3d at 295. Interestingly, the court found the e-mails sent by the defendant to the plaintiff (plus a consistent notation by another employee of the defendant) satisfied this requirement. *Id.*

According to the court: "The UCC does not require that the contract itself be in writing, only that there be adequate documentary evidence of its existence and essential terms." *Id.* The court found this requirement satisfied by the e-mails and notation. The court further found that "[n]either the common law nor the UCC requires a handwritten signature." 314 F.3d at 296. According to the court, therefore, the typed name at the conclusion of the e-mail satisfied the statute's requirement of a signed writing. *Id.* Accordingly, the court found a valid modification to the contract.

Although the UCC prohibits oral modifications to contracts required to be in writing (such as by the statute of frauds for goods over $500 or by agreement of the parties), §2-209(4) provides that an attempted oral modification may operate as a waiver of the requirement. According to the comments: "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." Official Comment 4, 810 ILCS 5/2-209(4). *See Central Illinois Public Service Co. v. Atlas Minerals, Inc.,* 965 F.Supp. 1162, 1172 (C.D.Ill. 1997); *Ray Dancer, supra,* 530 N.E.2d at 610 – 611.

Courts, however, are mindful that the exception may swallow the rule. Accordingly, courts require that a party also establish reasonable reliance on the waiver. In *Cloud, supra,* the Seventh Circuit explained that "[t]o prevent the 'attempt' provision from eviscerating the statute of frauds, the courts require that the attempting modifier . . . must show . . . that it reasonably relied on the other party's having waived the requirement of a writing." 314 F.3d at 297. Although there must be reasonable reliance, it is unnecessary for a waiver to be clear and unequivocal. 314 F.3d at 298.

Furthermore, a waiver may not be absolute. Even if a court determines that a party initially waived the right to require modifications in writing, under §2-209(5), a party "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." 810 ILCS 5/2-209(5).

VIII. [7.15] SUPERSEDING AGREEMENTS AS MODIFICATIONS

Parties attempting to modify a contract should also consider the merger doctrine. Generally, "a written agreement that is complete on its face supersedes all prior agreements on the same subject matter and bars the introduction of evidence concerning any prior term or agreement on that subject matter, particularly when the contract contains an unambiguous merger or integration clause." *Magnus v. Lutheran General Health Care System,* 235 Ill.App.3d 173, 601 N.E.2d 907, 914, 176 Ill.Dec. 209 (1st Dist. 1992), citing *Kraft v. No. 2 Galesburg Crown Finance Corp.,* 95 Ill.App.3d 1044, 420 N.E.2d 865, 870, 51 Ill.Dec. 451 (3d Dist. 1981). Merger occurs when the same parties execute two contracts that involve the identical subject matter and the second contract is a distinct agreement. In these circumstances, the second agreement extinguishes the first. *See Courtois v. Millard,* 174 Ill.App.3d 716, 529 N.E.2d 77, 79, 124 Ill.Dec. 360 (5th Dist. 1988) ("The defendants' contention that the first contract is part of the total agreement between the parties fails because the two contracts involve identical subject matter, and the second

contract is a distinct agreement which merges and supersedes the first contract.”). *See also Wilson v. Wilson,* 217 Ill.App.3d 844, 577 N.E.2d 1323, 1327 – 1328, 160 Ill.Dec. (1st Dist. 1991) (distinguishing *Courtois* on its facts and failing to find merger).

Parties may expressly incorporate the merger doctrine into their agreement by including an unambiguous integration clause. Courts have found the following language sufficient: “This Agreement, including the Schedules annexed hereto, constitute the entire agreement and supersedes all other prior agreements and understandings, both written and oral, among the parties or any of them, with respect to the subject matter thereof.” *Magnus, supra,* 601 N.E.2d at 914.

Even with an unambiguous integration clause, however, there are at least two situations in which merger will not occur. First, merger will not occur when the second contract does not satisfy all of the terms of the original agreement and “it plainly appears, from the character of the contracts, that the last one was not intended to be in performance or supersedure of the former one, and that the provisions in the former, not embraced in the latter, were intended to remain unaffected.” *Alton Banking & Trust Co. v. Schweitzer,* 121 Ill.App.3d 629, 460 N.E.2d 105, 108, 77 Ill.Dec. 246 (5th Dist. 1984). In other words, distinct and separate acts contained in an original contract are not merged into a subsequent instrument and remain in full force and effect. *Harris Trust & Savings Bank v. Chicago Title & Trust Co.,* 84 Ill.App.3d 280, 405 N.E.2d 411, 415 – 416, 39 Ill.Dec. 658 (2d Dist. 1980). *See also Hakala v. Illinois Dodge City Corp.,* 64 Ill.App.3d 114, 380 N.E.2d 1177, 1183, 21 Ill.Dec. 1 (2d Dist. 1978) (“While it is the general rule that all prior verbal understandings or agreements with reference to the subject-matter become merged in a deed upon its acceptance and the deed constitutes the only contract between the parties which binds them . . . [w]here the contract provides for other acts besides the conveyance, the contract remains in force after the delivery of the deed until it has been fully performed.” Quoting *Trapp v. Gordon,* 366 Ill. 102, 7 N.E.2d 869, 873 (1937).).

Second, merger will not occur when the subsequent agreement is not a valid contract. *See Ogle v. Hotto,* 273 Ill.App.3d 313, 652 N.E.2d 815, 819, 210 Ill.Dec. 13 (5th Dist. 1995) (refusing to find merger when documents subsequent to agreement did not create valid written contract).

Under the merger doctrine, a complete subsequent agreement between the parties extinguishes any prior agreements involving the same subject matter. Once an agreement is fully integrated, however, parol evidence of subsequent understandings is inadmissible. *Geoquest Productions, Ltd. v. Embassy Home Entertainment,* 229 Ill.App.3d 41, 593 N.E.2d 727, 730 – 731, 170 Ill.Dec. 838 (1st Dist. 1992). This concept is known as the parol evidence rule. “The question of whether a document constitutes a fully integrated agreement has been characterized as a question of law to be determined by the trial court.” 593 N.E.2d at 730. Although the details of the parol evidence rule are beyond the scope of this chapter, the four corners of the document itself must demonstrate that an agreement is incomplete before a court will admit extrinsic evidence. *Id.*

The parol evidence rule does not apply when a prior contract fails to express the complete agreement and understanding of the parties. In these circumstances, subsequent proceedings serve

to exemplify the terms of the original contract. *Lewis v. Loyola University of Chicago,* 149 Ill.App.3d 88, 500 N.E.2d 47, 50, 102 Ill.Dec. 425 (1st Dist. 1986). For example, in *Lewis,* a professor brought suit for breach of contract when the dean failed to submit his name for tenure as agreed through a modification to the employment contract between the parties. 500 N.E.2d at 49. The school argued that letters subsequent to the employment contract could not be considered because the employment contract constituted the entire agreement between the parties. 500 N.E.2d at 50. The court disagreed, finding the letters to be valid modifications of the contract. *Id.*

The court stated that the original employment agreement was a form contract for a teaching position, which could not embody the complete agreement and understanding of the parties. *Id.* According to the court, the form contract did not address material issues such as the position the plaintiff accepted, staffing considerations, long-term or short-term funding, or physical space. *Id.* Because the original agreement did not contain the entire understanding of the parties, subsequent letters regarding the terms and conditions of the plaintiff's employment, therefore, were incorporated in, and became a part of the employment contract. *Id.*

IX. [7.16] EFFECT OF DURESS

Contract modifications procured through duress are unenforceable by the party causing the duress. "Duress is a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of the exercise of his free will, and a contract executed under duress is voidable." *De Fontaine v. Passalino,* 222 Ill.App.3d 1018, 584 N.E.2d 933, 940, 165 Ill.Dec. 499 (2d Dist. 1991). To constitute duress, "[t]he acts or threats must be wrongful, and wrongfulness is not limited to acts that are criminal, tortious or in violation of a contractual duty but extends to acts wrongful in a moral sense." *Id.*

Economic duress, also known as business compulsion, consists of a wrongful act and the "absence of the quality of mind essential to the making of a contract." 584 N.E.2d at 941. Although "wrongful acts" vary, there must be more than annoyance, vexation, personal embarrassment, a difficult bargaining position, or the pressure of financial circumstances. A court must find wrongful or unlawful pressure before it will void a contractual modification based on duress. *Id.*

X. [7.17] CONCLUSION

Although seemingly simple, contract modification presents issues that must be understood by the parties. In most circumstances, there must be offer, acceptance, and consideration. Each of these elements presents complexities that must be taken into account. The parties should also contemplate the materiality of a modification, which affects whether the modified contract becomes a new agreement that replaces the old. Finally, it is imperative that the parties consider issues raised by the statute of frauds and the merger doctrine under Illinois law (including the parol evidence rule) before completing a contractual modification. If all of the necessary requirements for modification are met, the parties will determine their own fate, instead of having it determined by a court of law.