

B. Statute of Frauds

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May 24, 2003

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Dear Mike and King:

I am writing to ask for correction of the proposed Official Comments to UCC 2-201 (statute of frauds) on part performance. One proposed new sentence, which should be stricken from the Comments, states: "When the seller accepts partial payment for a single item the statute is satisfied entirely." [hereinafter "the proposed new sentence"].

1. At the ALI's May 2003 annual meeting in Chicago, Professor Boss asserted during the general discussion that the proposed new sentence already appears in the Comments. The statutory text and Comments show that her statement was wrong. *See* attachment.

2. The proposed new sentence would conflict with both the statutory text (UCC 2-201(3)(c)) and other parts of the Comments. *See* attachment. Moreover, it makes no sense to say that a buyer's part

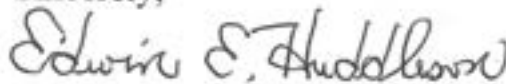
performance satisfies the statute only for goods "received and accepted," while a seller's acceptance of partial payment for a single item satisfies the statute entirely.

Today the law is, and should remain, that a "person [buyer] accepting and receiving one unit of goods, should not thereby be exposed to the risk that someone will claim that he ordered 100,000 units," and similarly that a person [seller] accepting payment of the price for a single item should not thereby be exposed to the risk that someone will claim that he sold and must supply 100,000 units. *See* Hawklund UCC Series §2-201:7; *and see id.* ("the quantity will always be at least one unit when any payment had been made"). No sound reason exists, and none has been asserted, to favor either party over the other in the rules on part performance.

One of the benefits of a record is that, unlike fleeting oral statements, it preserves the truth in a way that allows the correction of misstatements.

Thank you for your attention to this matter.

Sincerely,



Edwin E. Huddleson, III

Attachment

ATTACHMENT
UCC 2-201(3)(c) AND ITS OFFICIAL COMMENTS

1. The statutory text of UCC 2-201(3)(c) states in pertinent part:

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable * * *

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted.

2. Today Official Comment 2 to UCC 2-201 states:

2. "Partial performance" as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods. The overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.

Part performance by the buyer requires the delivery of something by him that is accepted by the seller as such performance. Thus, part payment may be made by money or check, accepted by the seller. If the agreed price consists of goods or services, then they must also have been delivered and accepted.

3. Proposed "Preliminary Official Comment" 3 to UCC 2-201 states:

"Partial performance" as a substitute for the required record can validate the contract only for goods which have been accepted or for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods. The overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.

Part performance by the buyer requires that the buyer deliver something that is accepted by the seller as the performance. Thus, part payment may be made by money or check accepted by the seller. If the agreed price consists of goods or services, then they must also have been delivered and accepted. When the seller accepts partial payment for a single item the statute is satisfied entirely.



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June 9, 2003

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RE: Comment to Section 2-201

Dear Ed:

I have received a copy of your May 24, 2003, letter to Mike Traynor and King Burnett regarding the last sentence of proposed Comment 3 to Section 2-201. I appreciate you taking the time point out the problem.

When I drafted the sentence, I had in mind the case when a seller receives and accepts partial payment for a single item. However, when there are multiple items, as you point out, the sentence misstates the rule by overstating the extent of the exception. I have redrafted the sentence to state: "When the seller accepts partial payment for a single item the statute is satisfied as to that item. See *Lockwood v. Smigel*, 18 Cal. App. 3d 800, 99 Cal. Rptr. 289 (1971)." In *Lockwood*, the seller of a Rolls Royce Silver Shadow accepted a \$100 down payment and thereafter attempted unsuccessfully to invoke the statute of frauds. This revision is consistent with virtually all the cases, and this is what I should have written originally. I have spoken with Boris Aurbach, Bill Henning and Amy Boss, and they agree that this change fixes the problem you pointed out.

Again, thank you for the correction.

With best personal regards,

Henry Gabriel

cc: Michael Traynor, King Burnett