CLIENT ALERTS & INSIGHTS

# Course of Performance as Contract Amendment or Waiver: When Business Practices Overrides Paper Terms

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Featured Practices: Litigation, Vendor Disputes

**Key Takeaways**

- A party's course of conduct can carry significant weight in a contract dispute. Repeatedly accepting late deliveries, price increases or nonconforming goods without objection may affect how a court interprets and enforces the agreement's written terms.
- Businesses that tolerate contractual noncompliance over time may inadvertently weaken key protections, including provisions intended to prohibit oral modifications or preserve rights following a breach. In some jurisdictions, a consistent pattern of conduct can outweigh what the contract says on paper.
- Companies should pair careful contract drafting with active contract management. Clear documentation of objections, written reservations of rights and contractual language addressing course-of-performance issues can help preserve enforcement rights when disputes arise.

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Imagine you are a leading manufacturing company, and you purchase a critical widget from a supplier. You have a carefully negotiated contract in place-one that spells out specific pricing, delivery timelines, and product specifications for those widgets. Then things start to go sideways. The supplier begins delivering late. It demands higher prices. The goods themselves fall short of the agreed-upon specifications. But because the widget is an essential component of your flagship product, you accept the deliveries anyway and hope the supplier gets its act together. It does not. So you decide to pull the trigger and terminate the contract.

At first, you might feel confident. After all, the supplier has been tendering non-conforming goods for months. Better yet, your contract contains a no-oral-modification clause and a no-waiver clause, both of which your legal team insisted on including precisely for situations like this. Case closed, right? Not exactly.

## The Boilerplate Term That Might Not Save You

Many commercial contracts, particularly supply or manufacturing agreements, contain two provisions that contracting parties tend to view as ironclad protections. The first is a no-oral-modification clause, which typically provides that the agreement may not be amended or modified except by a writing signed by both parties. The second is a no-waiver clause, which states that a party's failure to enforce a right under the contract does not constitute a waiver of that right, either as to the specific instance or as to future breaches. These clauses are ubiquitous, and for good reason: they are designed to ensure that the parties' carefully negotiated deal terms cannot be eroded by informal conversations, handshake agreements, or simple inaction. The problem is that, in practice, these clauses do not always deliver the protection they promise.

## Enter the Uniform Commercial Code

For contracts involving the sale of goods, like our hypothetical, Uniform Commercial Code ("UCC") introduces a concept that can undercut even carefully drafted contractual protections: course of performance.

Under UCC Section 1-303, a "course of performance" arises when a contract involves repeated occasions for performance by either party, the other party has knowledge of the nature of the performance, and the other party has an opportunity to object but fails to do so. In that scenario, the pattern of conduct becomes relevant to interpreting the parties' agreement and can even supplement or qualify the express terms of the contract itself. This is where things can get tricky for the aggrieved buyer in our hypothetical. Section 1-303(f) provides that, subject to UCC Section 2-209 (which governs modifications), a course of performance "is relevant to show a waiver or modification of any term inconsistent with the course of performance." That means if you have been accepting late deliveries, paying higher prices, and receiving non-conforming goods without objection over a sustained period, a court may find that your conduct effectively modified or waived the very contract terms you now seek to enforce. Several states recognize this principle. Below, we discuss the law in California, Delaware, and New York.

**Why No-Oral-Modification Clauses Are Not a Silver Bullet**

In California, Civil Code section 1698 makes clear that a no-oral-modification clause is not the impenetrable shield many contracting parties assume it to be. Under subdivision (b), a written contract may be modified by an oral agreement "to the extent that the oral agreement is executed by the parties." Critically, this rule applies even when the contract expressly prohibits oral modifications. The Law Revision Commission comments on section 1698 state plainly that a no-oral-modification clause "would not apply to an oral modification valid under subdivision (b)." The key word here is "executed": if the parties actually change their behavior-not merely discuss a change, but carry it out-the modification could become enforceable as a matter of law regardless of the contract's integration clause. The case of *LGCY Power, LLC v. Superior Court*, 75 Cal. App. 5th 844 (2022), illustrates the practical consequences of this rule. There, an employer's employment agreement contained a clause requiring that all modifications be "executed in writing by the party to be bound thereby." But over time, the parties' conduct departed from the written terms: the employee was promoted, given new job responsibilities, and placed on a different compensation structure-all without a written amendment. The court held that because the parties had actually performed under these new terms, the changes constituted a fully executed oral modification enforceable under section 1698(b), and the no-oral-modification clause could not bar it. *Id.* at 867-68. *LGCY Power* is a cautionary tale for any party that relies on a no-oral-modification clause as a backstop while allowing day-to-day conduct to drift from the written deal. Once the parties begin performing under different terms, which may include changed pricing or altered delivery schedules, as in our example, a court may find that an executed oral modification has occurred simply because the parties acted as though it had.

New York, like most states, recognizes that parties' "course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance." N.Y. U.C.C. § 2-208(3). In *Teva Pharms. USA, Inc. v. Perrigo, LLC*, the Southern District of New York applied N.Y. U.C.C. § 2-208(3) in holding that parties can waive a signed-writing requirement for contractual modifications based on parties' course of performance. 714 F. Supp. 3d 395, 400 (S.D.N.Y. 2024). That case involved "a years-long process during which [the purchaser] never objected to the use of estimated payments [as opposed to actual costs] in invoices" contrary to the written terms of the parties' agreement. *Id.* By failing to object, the court held that the purchaser may "have elected to affirm the contract despite the failure of the condition, or to have waived the satisfaction of the condition." *Id.*

**No-Waiver Provisions are Not Always Iron-Clad**

Generally, no waiver provisions "give a contracting party some assurance that its failure to require the other party's strict adherence to a contract term will not result in a complete and unintended loss of its contract rights if it later decides that strict performance is desirable." *Rehoboth Mall Ltd. P'ship v. NPC Int'l, Inc.*, 953 A.2d 702, 704 (Del. 2008). In *Rehoboth*, a commercial tenant committed several defaults during the original fifteen-year term of a ground lease, including late rent payments. When the tenant exercised its option to extend the lease for a first five-year renewal term, the landlord did not object. Instead, the landlord accepted rent payments and allowed the tenant to remain in possession for the entire first renewal period, during which the tenant committed no further defaults. When the tenant then attempted to exercise a second renewal option, the landlord refused, citing the defaults from the original lease term as grounds for denial. The Delaware Supreme Court rejected the landlord's position. The lease in question did have a no-waiver clause, but the court held that it operates prospectively: it preserves the landlord's right to enforce strict compliance in the future, but it does not permit the landlord to revive defaults that it had already waived through years of acquiescence. The court was "satisfied that [the landlord's] conduct over this extended period of time constitutes a waiver of the no default requirement, as a matter of law." *Id.* at 705. The takeaway for contracting parties is clear: a no-waiver clause does not freeze time. If a party sits on a known default for years while continuing to accept the benefits of the contract, a court may conclude that the default has been waived regardless of what the boilerplate terms say.

Perhaps most striking of all, Delaware courts have recognized that the no-waiver clause *itself* is not immune from waiver. In *PJT Holdings, LLC v. Costanzo*, 339 A.3d 1231, 1262 (Del. Ch. 2025), the Court of Chancery held that where members of an LLC had known for an extended period that a fellow member had failed to make a required capital contribution but never demanded compliance, they had "waited so long to invoke [the member's] obligation ... that they waived both the no-waiver provision and the breach." In reaching this conclusion, the court relied on the longstanding Delaware principle that "[t]he prohibition against amendment except by written change may be waived or modified in the same way in which any other provision of a written agreement may be waived or modified, including a change in the provisions of the written agreement by [the] course of conduct of the parties." *Id.* at 1262 n.163 (quoting *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 33 (Del. 1972)).

New York courts, too, have recognized that a no-waiver clause itself may be waived. *PC COM, Inc. v. Proteon, Inc.*, 946 F. Supp. 1125, 1131 (S.D.N.Y. 1996) (an anti-waiver "clause itself may be waived, but courts should be slow to find waiver of anti-waiver provisions."). In *Kamco Supply Corp. v. On the Right Track, LLC*, the parties' course of conduct "equitably estopped" a seller from invoking a no-waiver clause in its contract with a purchaser. 149 A.D.3d 275, 285-86 (N.Y. App. Div. 2017). In that case the purchaser's "persistent and repeated failure to meet minimum purchase requirements," coupled with the seller's "continued acceptance of such conduct without any reservation or protest" precluded the seller's attempt to rely on the no-waiver clause in the parties' agreement. *Id.* at 285.

In short, a no-waiver clause is itself just another contractual provision - and like any contractual provision, it can be waived through a course of conduct that is fundamentally inconsistent with an intent to enforce it.

**Potential Solutions**

The lesson is straightforward: if you do not want your contract to be modified, do not act as though it has been. But contracting parties can't always strictly conform their behavior to the terms of a contract due to unforeseen circumstances. For contracting parties who wish to insulate their contractual terms from course-of-dealing or course-of-performance modifications, there is a better solution than the boilerplate no-oral-modification clause. To protect itself, the manufacturing company ("the Buyer") in our hypothetical should consider including not just "no waiver" and "no oral modification" clauses in its contracts, but also a clause that explicitly bars modification of the contract through course of performance or course of dealing. That provision could look something like this:

Course of performance and course of dealing shall not be construed as a waiver and shall not be a factor in the Buyer's right to reject nonconforming goods. Supplier acknowledges that any reliance on course of performance, course of dealing, or similar conduct to override the express terms of the agreement would be unreasonable.

Parties under California law can find support for this kind of provision in Section 1302(a) of the Commercial Code which provides that "the effect of provisions of this code may be varied by agreement." In other words, parties have the autonomy to contractually vary the operation of Section 1303 of the Commercial Code, which under normal circumstances provides that course of performance and course of dealing are relevant to ascertaining the meaning of the parties' contract and may be used to supplement or give meaning to specific terms. This section includes a hierarchy, though: when express terms and course of performance or course of dealing cannot reasonably be construed as consistent, express terms prevail over course of performance, which in turn, prevails over course of dealing and usage of trade. Cal. Com. Code § 1303(e). This means that in practice, the more specific the terms of the contract, the better, to avoid the course of performance taking over to supplement ambiguous terms. Some parties may wish to include a provision like the one above, expressly disclaiming waiver through course of performance or course of dealing.

Courts applying New York law have enforced a similar provision in a supply agreement providing that "no course of dealing, usage of trade, or course of performance shall be relevant to explain or modify any term expressed in the Agreement." *See GE Trans. Parts, LLC v. Cent. Ry. Mfg., LLC*, 468 F. Supp. 3d 607, 616 (S.D.N.Y. 2020). The court rejected the plaintiff's argument that "the parties' course of dealing and performance" were incorporated into the agreement, because the agreement "foreclose[d] this argument by overriding the UCC in this respect." *Id.* A carveout of specific conduct may be even more effective. To take it one step further, our hypothetical Buyer could also consider adding a clause in its contracts going forward that certain specific conduct does not constitute modification of the contract or a waiver of certain clauses. For example:

Customer has absolute discretion to accept late delivery. Mere acceptance of late delivery shall not modify the delivery requirements in this Agreement.

Courts give considerable weight to such contractual provisions insulating specific conduct from waiver or modification defenses. For example, the Southern District of New York enforced a

construction contract provision providing that "[n]either the permitting of the Contractor to proceed with the Project subsequent to" the substantial completion date, "the making of any payments to the Contractor, nor the issuance of any Change Order, shall operate as a waiver on the part of [plaintiff] of any rights under this Contract." *Lockheed Martin Trans. Sec. Sols. v. MTA Cap. Constr. Co.*, 2014 WL 12560686, at *23 (S.D.N.Y. Sept. 16, 2014). Based on this provision, the court denied the contractor's motion for summary judgment on the issue of the plaintiff's waiver of its right to terminate the contractor for delay. *Id.* Broadly speaking, New York law holds that such clauses may protect a party who fails to give notice of a breach: "[A] party's failure to insist upon strict compliance is not considered a waiver of his right to demand exact compliance." *Fin. Techs. Int'l, Inc. v. Smith*, 247 F. Supp. 2d 397, 407 (S.D.N.Y. 2002) (enforcing clause providing "[f]ailure by either party ... to require performance by the other party or to claim a breach of any term of this Agreement will not be construed as a waiver of any right under this Agreement."). This is so even under the UCC, which expressly permits course of performance and course of dealing evidence, even where the contract is unambiguous. *Div. of Triple T Serv., Inc. v. Mobil Oil Corp.*, 60 Misc. 2d 720, 732 (N.Y. Sup. Ct. 1969) (enforcing clause providing "right to require strict performance shall not be affected by any previous waiver or course of dealing").

Further, when things inevitably go sideways for our Buyer, and the Seller begins shipping products later and later or otherwise fails to comply with the contract, it would be a best practice for the Buyer to send the Seller a written objection and reservation of rights for each and every violation, stating clearly the Buyer's stance that the Seller is not complying with the terms of the contract. Though it is not often cited, this reservation of rights is expressly permitted by California's Commercial Code: "[A] party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved." Cal. Com. Code § 1308. Courts view these notices as best practice when one party breaches but the other party continues performing nonetheless. *See Shea-Kaiser-Lockheed-Healy*, 73 Cal. App. 3d 679, 690 (Ct. App. 1977) (holding that where the seller continued delivering "under protest" and "with an explicit reservation of all rights" after the buyer's breach, it did not waive the breach or prejudice any reserved rights, including its right to sue for damages).

Providing such notice will go a long way in protecting the hypothetical Buyer's rights under Delaware law as well. In *Lockhead Martin Trans. v. MTA Capital Constr. Co.*, the Southern District of New York, applying Delaware law, ruled against the breaching seller asserting a waiver defense, stating that the buyer "repeatedly notified [seller] that [buyer] considered the original date to be operative and that [seller] was potentially liable for liquidated damages." 2014 WL 12560686, at *23 (S.D.N.Y. Sept. 16, 2014). Indeed, failure to object may result in a finding of a course of performance. *AMG Vanadium LLC v. Glob. Advanced Metals U.S.A., Inc.*, 2020 WL 1233752 (Del. Super. Ct. Feb. 6, 2020) ("[A] course of performance is established following repeated occasions for performance that the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.") (citing Del. Code Ann. tit. 6, § 1-303(a)).

With the right approach, you can protect yourself from inadvertently modifying your contract through a course of performance or course of dealing.

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