The Impact of Electronic Communications on Contract Modifications

Annie P. Kubic – July 19, 2017

Contracting parties generally and consistently rely on "no oral modification" (NOM) clauses to preclude counterparties from unilaterally altering contract terms and to protect against uncertain results. NOMs not only provide assurance, but they also provide a formal, predictable process on which contracting parties can rely to properly and predictably modify the contract.

The proliferation of emails, text messages, and other instant-messaging applications has created opportunities for parties to claim contract modifications in situations where, historically, such arguments would have been summarily precluded, significantly delaying litigation, precluding summary judgment, and causing increased legal fees to address and perhaps challenge the purported modification. Accordingly, while the availability of digital, instantaneous communication is designed to streamline discussions, these informal negotiations have blurred the lines and infused unpredictability into contract enforcement.

This article discusses general contract modification laws, highlighting how courts applying these laws have grappled with electronic communications by comparing New York and Delaware decisions and, finally, lists practical suggestions practitioners can employ to help guard against unintended contract modification through an electronic communication.

The Basics of Modification

Delaware follows the common-law rule with respect to NOM clauses. "[A]n oral agreement is sufficient to modify or rescind a written contract, notwithstanding a provision in the written contract purporting to require that subsequent modifications be evidenced in writing." *Williston on Contracts* § 29.42 (4th ed. 1999). The Supreme Court of Delaware held some time ago that a NOM clause in a written contract "may be waived or modified in the

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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 by the parties. *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico*, 297 A.2d 28, 33 (Del. 1972). However, any valid modification (whether oral or written) requires fresh consideration or the demonstration of subsequent reliance on the modification. *Continental Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1232 (Del. Ch. 2000). Thus, the precedent existed for a party to overcome a NOM clause in a written contract through modification with consideration or by waiver. *See J.A. Moore Constr. Co. v. Sussex Assocs. Ltd.*, 688 F. Supp. 982, 988 (D. Del. 1988).

A party seeking to prove an oral modification of a contract that contains a NOM clause "must prove the intended change with 'specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document.'" *Continental Ins. Co.*, 750 A.2d at 1230 (quoting *Reeder v. Sanford Sch. Inc.*, 397 A.2d 139, 141 (Del. Super. Ct. 1979)). The question of whether specificity and directness can be met by electronic communications is *sui generis*, and largely dependent on the circumstances of each case. Thus, counterparties that freely communicate by informal, electronic means are providing fodder for the other side to claim that there was a modification or reliance thereon.

By comparison, contract modification in New York is governed by statute that modifies the common law: New York General Obligations Law sections 5-1103, 5-701, and 15-301. Section 5-1103 states that a contract modification shall not be invalid for lack of consideration, as long as the modification "shall be in writing and signed by the party against whom it is sought to enforce[.]" N.Y. Gen. Oblig. § 5-1103. Basically, this provision allows a written contract to be modified without consideration, as long as the modification is a signed writing. Thus, the key question is what is deemed to be and accepted as done by a signed writing. Section 15-301 says that a written agreement containing a NOM clause "cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." *Id.* at § 15-301. Considered together with section 5-1103, the statutes provide that a signed writing may modify a contract with a NOM clause, regardless of consideration. Finally, section 5-701 is New York's Statute of Frauds, and has provided guidance to courts interpreting the signature requirements of section 15-301.

The ultimate effect of these three provisions is to prevent contractual modifications without a signed writing. The critical issue is whether emails or other electronic communications sent by the enforcing party can be deemed to be signed writings. Adding a further dimension to these matters is New York's common law, which provides, similar to Delaware law, that reliance alone can

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support modification even in the face of a NOM clause. *See Rose v. Spa Realty Assocs*., 42 N.Y.2d 338, 343-44 (N.Y. 1977); *Savage is Loose Co. v. United Artists Theatre Circuit, Inc.*, 413 F. Supp. 555, 559 (S.D.N.Y. 1976).

Emails and Instant Messages May Result in Contract Modification

Courts have begun addressing the impact of emails and instant messages on NOM clauses. In *Stevens v. Publicis, S.A.*, the New York Supreme Court, Appellate Division, First Department, held that a series of emails between contracting parties satisfied the requirements of a NOM clause, even without waiver or reliance. 50 A.D.3d 253, 256 (N.Y. App. Div. 1st Dep't 2008). Noting that "[e]ach of the e-mail transmissions bore the typed name of the sender at the foot of the message", the court held that:

> the e-mails from plaintiff constitute "signed writings" within the meaning of the statute of frauds, since plaintiff's name at the end of his e-mail signified his intent to authenticate the contents. Similarly, [defendant's agent's] name at the end of his e-mail constituted a "signed writing" and satisfied the requirement of section 13(d) of the employment agreement that any modification be signed by all parties.

Id. at 255–56 (internal citations omitted). Five years later, the First Department was once again confronted with an alleged modification through email in the case *Landesbank v. 45 John St. LLC*, 102 A.D.3d 587 (N.Y. App. Div. 1st Dep't 2013). In that case, the plaintiff-lender sought to foreclose on a construction loan granted in connection with a condominium-conversion project, and the loan agreement at issue contained NOM and no-waiver provisions. 102 A.D.3d at 587. Defendant-borrower counterclaimed, alleging breach of contract and breach of the implied covenant of good faith arising from the lender's failure to increase the amount of the loan. The Appellate Division affirmed the lower court's dismissal of the borrower's counterclaims because the email upon which the borrower relied to support same, which "contained a pre-printed signature" but not the sender's manually typed name at the bottom, "was not a sufficient writing under the statute of frauds" to modify the loan agreement.

Relying on the "pre-printed" versus "typed" distinction drawn by the First Department, the Supreme Court, Commercial Division (Marcy S. Friedman, J.), in *Watson v. MTV Network Enter., Inc.*, 156523/2012, 2013 N.Y. Misc. LEXIS 5099, 2013 NY Slip Op 32789 (U) (N.Y. Sup. Ct. N.Y. County Oct. 30, 2013), dismissed the plaintiff's breach-of-contract claim where the alleged modification, made in an email from the defendant's representative, was insufficient to satisfy the statute of frauds or comply with the NOM clause of the contract at issue because it "contain[ed] a pre-

printed signature only in its heading." 2013 N.Y. Misc. LEXIS 5099, at *5–6.

Other courts have been more liberal in recognizing modifications. In *CX Digital Media, Inc. v. Smoking Everywhere, Inc.*, CASE NO. 09-62020-CIV-ALTONAGA/Brown, 2011 U.S. Dist. LEXIS 29999 (S.D. Fl. March 23, 2011), the U.S. District Court for the Southern District of Florida (Cecilia M. Altonaga, D.J.), applying Delaware law, held that a series of instant messages between parties modified a written contract that contained a NOM clause. 2011 U.S. Dist. LEXIS 29999, at *38–39. In that case, the plaintiff brought a breach-of-contract action arising from an agreement for the plaintiff to promote and advertise the defendant's product, electronic cigarettes. The contract provided that the defendant would pay the plaintiff $45 per completed sale resulting from the advertisements, and that the plaintiff would not send more than 200 sales per day. Through a series of instant messages between the defendant's vice-president and an account manager at the plaintiff-corporation, the parties purportedly agreed to modify the original agreement (a) to increase the 200 sales per day, with "NO LIMIT" being imposed, and (b) to switch certain URL website addresses.

At trial, the defendant argued that, even if it did agree to modify the agreement, the modification was invalid because (a) it was not proven with "specificity and directness," (b) the agreement contained a NOM clause, which the defendant did not waive, and (c) there was no consideration. The court rejected each of these arguments and enforced the contract as modified.

As concern specificity and directness, the defendant relied on a leading Delaware case, *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, Civil Action No. 2502-VCP, 2007 Del. Ch. LEXIS 156 (Del. Ch. Nov. 9, 2007), for its argument that the instant messages were not specific and direct enough to prove that the parties agreed to a modification. 2011 U.S. Dist. LEXIS 29999, at *31.

In *Severn Savings*, the plaintiff argued that there was an oral modification discussed over various emails. The court, however, distinguished *Severn Savings* on two grounds: (a) the emails at issue in *Severn Savings* indicated that the parties "discussed different options orally, but never reached any agreement" and, therefore were simply part of an ongoing negotiation; and (b) the issue in *Severn Savings* concerned the actual terms of an oral modification, not whether a modification occurred at all, as was the issue in *CX Digital Media*. 2011 U.S. Dist. LEXIS 29999, at *32–35. Accordingly, the court found direct evidence of an agreement to modify based on the instant-message conversations, along with the simultaneous action and the increase in sales volume immediately following the conversation.

With respect to the defendant's argument that the NOM clause in the contract precluded the alleged modification, the court first

concluded that the modification was not oral because it appeared in writing in an instant-message conversation, but, nevertheless, the general rule concerning oral modification of contracts applies to the "informal, unsigned writing." Although recognizing the informality of the writing, the court nonetheless held that it was "[sufficient] under Delaware law to modify the Insertion Order despite the signed-writing clause. . . ." The court further noted that, even if the instant-message conversation did not qualify as a valid modification, the defendant waived its right to assert the NOM clause because the plaintiff "materially changed its position in reliance on [the defendant's] statements."

Finally, the court also rejected the defendant's contention that it did not provide the necessary consideration for a modification. The court found consideration in the form of an "implied promise to pay" for the additional sales contemplated by the modification. Moreover, the court once again noted that the plaintiff "reasonably and foreseeably materially changed its position in reliance on that modification."

Thus, the court upheld the modification through unsigned instant messages, even in the face of a NOM clause.

Courts in other jurisdictions have reached similar conclusions when addressing the issue. *See, e.g., Holsinger Clark & Armstrong v. Orange Stones Co.*, No. 396 WDA 2012, 2013 Pa. Super. Unpub. LEXIS 3089 (Pa. Super. Ct. July 18, 2013) (NOM clause waived and contract orally modified where parties' performance, together with numerous emails, evidenced parties' assent to modification); *Culebra II, LLC v. River Cruises & Anticipation Yachts, LLC*, 564 F. Supp. 2d 70, 81 (D. Me. 2008) (noting that emails "constitute written communications, and thus could modify the lease pursuant to its no-oral modifications clause.") (internal citations omitted).

ABA Section of Litigation Corporate Counsel Committee cochair Zachary G. Newman explains the practical issues involving modification challenges as follows:

> The ability of a party to claim modification or waiver through electronic communications has added a dimension to contract enforcement litigation that can significantly impact the costs and progression of litigation. When such a modification is suggested, the parties generally have to undertake additional, costly electronic discovery and pursue depositions and written discovery that would be unnecessary if the no oral modification clause was iron clad and enforced without question. The introduction of the defense or counterclaim also could very well support the existence of a disputed fact rendering dismissal and summary judgment motions more difficult to win, and thus prolonging the resolution of the matter. Furthermore, juries tend to place significant credibility and reliance on

> electronic communications, elevating their significance and persuasiveness. Regrettably, too often parties assume that the no oral modification clause will protect them from having to address such communications, but as the quantity and velocity of these communications rise, the likelihood of some confirmation or suggestion is simply too high to discount such a challenge in just about every case these days.

Good or bad, these communications are certainly not going away, and as courts continue to adjudicate the increasing litigation arising therefrom, one thing is clear: Modern technology is changing the game (and the law). Practitioners and parties alike should keep in mind that a NOM clause doesn't provide the protection it once used to.

Practice Points to Address the Changing Climate

The obvious lesson to be learned from these decisions is that generic NOM clauses stating that all modifications must be made in a signed writing are not necessarily enough to protect parties against unintended contract modifications through informal written communications. Practitioners would be wise to advise their clients that the mere existence of a NOM clause does not necessarily immunize them from challenges to the contract or the defense or counterclaim that the parties agreed to a modification. To this end, the following rules of thumb are recommended for contracting parties to follow to avoid the unnecessary delay and expense of having to deal with a modification claim.

First, any person discussing a contract or any changes to the terms thereof should always explicitly state his or her intent not to be bound by any such discussions. The inclusion of language that the discussions are not to be construed to be modifications, waivers, or changes to the contract, or that the contract is governed by a NOM clause that is not being modified or waived by any such discussions is also recommended. Such disclaimers will certainly be considered by a court, and will also eradicate (or, at the very least, substantially minimize) a possible reliance argument proffered by the other contracting party.

Second, if including a NOM clause in a contract, be specific about the type(s) of writings that can and will modify an existing contract. Perhaps include "No email modification" language, or indicate that any modification requires a handwritten, not electronic, signature by all parties. While this is not guaranteed to protect against a modification defense or counterclaim, it could prove useful in defending same.

Third, parties should use renewal contracts and amendments to confirm that there have been no modifications or waiver of any of the terms or conditions. This will help mitigate against such claims should a dispute arise.

Ultimately, careful attention must be paid during all stages of negotiation to ensure that any subsequent modifications to an existing contract are knowingly and intentionally entered into.

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