Oral Modifications Notwithstanding a No Oral Modification Clause:
Preserving the Right to Contract or Enabling Havoc?

By: Salma S. Safiedine¹, Mary Clarke, and Amanda Galbo²

A contract can be defined as a promise or set of promises for the specific performance of an agreement, for which the law gives a remedy if not abided by.³ A contract is comprised of three components: offer, acceptance, and consideration.⁴ A contract is also comprised of clauses, whether written or implied, to aid the contracting parties’ comprehension and interpretation of the acts to be performed by either side. This article will discuss the impact of an oral modification clause on a contractual party’s attempt to change obligation; and the impact of the clause, or lack thereof, on facilitating criminal behavior.

Expressed terms of a contract are those terms that are explicitly stated and agreed upon within the four corners of the agreement.⁵ Such expressed terms include: the parties to the agreement, methods of termination, and the services or goods to be performed or delivered. Further, an integration clause expressed in a contract affirms that the written contract is the final and whole agreement between the parties.⁶ Parties may also be bound by implied terms, components that are implicitly understood between both parties.⁷ For instance, in contractual agreements, the implied term of good faith is imposed.⁸

¹ Salma S. Safiedine is an attorney with the Michigan-based law firm of Safiedine Partners Law. Her practice primarily focuses on commercial contracts and negotiation. She is Project Director of the ABA Racial Justice Improvement Project and the current Co-Chair of the ABA Criminal Justice Race and Diversity Committee and the State Bar of Michigan Race and Inclusion Committee.
² Mary Clarke and Amanda Galbo are currently second year law students at The George Washington University Law School. Mary Clarke serves as the Assistant to the Project Director of the ABA Racial Justice Improvement Project.
³ Restatement (Second) of Contracts § 1 (1981).
⁵ Interpretation and enforcement of a contract requires a look into the, mese three components. Offer is summarized under Restatement (Second) of Contracts § 24 (1981) as an expression of willingness to enter into a bargain. An offer justifies another person’s understanding that his or her agreement to that bargain is requested.⁶ If the offer is accepted, it will solidify the contract between the parties. Consideration is anything of value that the contracting parties will exchange for the promise. (See Legal Three "Contracts Outline: The UCC and Restatement Second of Contracts (1L)"). These three components are necessary to formulate a binding contract. (See Svenson, Ernie. “Study a Real Life Contract Dispute Involving a Famous Internet Company,” available at http://ernietheattorney.net/study-a-real-life-contract-dispute-involving-a-famous-intern/).
After a contract becomes binding and solidified by a meeting of the minds, the parties may decide, whether or not subsequent to fulfilling a partial obligation under contract, to change the agreement in some capacity. Consistent with common law’s premise of protecting a party’s right to freely contract at all times, modifications to an original contract are sometimes unavoidable. A right to modify the contract may be written or oral, however, many contracts have expressly prohibited oral modifications through “no oral modification” clauses (NOM clauses), or clauses that do not allow modifications, even if in writing.

A typical NOM clause may read:

No amendment or variation to this agreement shall take effect unless it is in writing, signed by authorized representatives of each of the parties.

Whether a written or oral modification will be accepted or integrated into the original agreement depends on a number of factors, including the existence of such a clause and whether consideration was provided for the modification. Establishing a new consideration upon the modification of a contract ensures fairness. For example, if a creditor agrees to accept less than the contract amount at the due date, or if a contractor is promised more than the contract amount to complete a project, such promises are not binding without the other party agreeing to also alter their performance in consideration.

In Green v. Millman Bros, Inc., the Court stressed the importance of consideration to support an oral modification. The Greens were the owners and operators of the Wonderland Shopping Center in the city of Livonia, Michigan. The dispute arose out of

---

9 A modification to a contract is a change in one or more respects that presents new elements into the details of the contract, but leaves the general purpose uninterrupted. Crowe, Brian L., and Suzanne L. Sias. "Modification of Contracts." Contract Law 7 (2006).

10 Matuschak, Mark G. "Subsequent Oral Agreements and Conduct Can Modify a Contract, Despite Explicit Contractual Clause to the Contrary." WilmerHale.


14 See Green v. Millman Bros., Inc.
a written lease agreement between the plaintiffs, as landlords, and the defendant, as tenant. Action was taken by the Greens against Millman to recover alleged deficiencies in rental payments. Millman contended that two years into the rental agreement, he had “several conversations with… the general manager of the shopping center, relative to a reduction in the annual rent,”15 arriving at an oral understanding whereby the monthly rent was to be reduced by $150. Millman contends that the reduction in monthly rent was for the remaining term of the lease; however, the Greens denied this and also argued that the supposed oral modification lacked consideration.16 In deciding, the Court looked to whether the subsequent oral modification was supported by consideration. The defendant claimed that its continued occupancy formed the consideration for the oral agreement for reduced rent.17 However, “[t]he general rule [for consideration] is that a promise to do that which the promisor is legally bound to do, or the performance of an existing legal obligation, does not constitute consideration, or sufficient consideration, for a contract.”18 Therefore, because Millman’s occupancy was a pre-existing duty, the court held that Millman’s agreement to remain in possession of the premises did not supply the requisite consideration for the subsequent oral agreement for reduced rent.19 The court held that without sufficient consideration, the oral modification was not enforceable, regardless of the course of conduct of the parties.20 The Millman Court stressed the importance of consideration when modifying a written contract, but did not address the issue of whether an oral modification was binding notwithstanding a no oral modification clause.

Some courts have held that even when a NOM clause is present within the four corners of the contract, oral modifications may still apply assuming clear and convincing evidence of a mutual modification is established.21 Courts have, at times, “engage[d] in elaborate gymnastics to evade [no oral modification clause] enforcement”, often looking to the past behavior of the parties or reliance claims.22 Although a minority, some courts,

15 Id at 862.
16 Id.
17 See Green v. Millman Bros., Inc at 863.
19 See Green v. Millman Bros., Inc. at 867.
20 Id.
before deciding on whether to uphold the no oral modification clause, will look to the intent of the parties, the actions of the parties, and course of business.\textsuperscript{23}

NOM clauses are typically accompanied by “non-waiver” clauses. In some cases, two parties enter into an agreement and rely upon a “non-waiver” clause to protect their interests.\textsuperscript{24} The non-waiver clause is a component in the contract that allows one party to waive a term (or act inconsistent with the contract) without waiving the party’s right to later enforce the original term of the contract as written. A non-waiver clause essentially specifies that the parties to a contract may not change or adjust their agreement permanently unless both parties agree to the projected change or modification in writing.\textsuperscript{25} Though the enforcement of NOM clauses holds a checkered history within U.S. courts;\textsuperscript{26} when a NOM clause is accompanied by a non-waiver clause, courts are more likely to uphold that no modification existed between the parties, notwithstanding the parties’ course of conduct; due to the heightened standard imposed by the majority of courts for proving an intent of \textit{mutual} modification.\textsuperscript{27}

For instance, in \textit{Quality Products & Concepts Co. v. Nagel Precision}\textsuperscript{28} an employee-employer contract dispute arose. The Michigan Supreme Court held that “parties to a contract are free \textit{mutually} to waive or modify their agreement through written and oral agreements, as well as through conduct, notwithstanding the presence of [NOM clauses or non-waiver clauses] purporting to restrict that ability.”\textsuperscript{29} However, the Court went on to impose a heightened standard of mutuality for determining a modification when a NOM clause exists, stating that “[the] mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence\textsuperscript{30} of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract as long as


\textsuperscript{25} Id.

\textsuperscript{26} See, e.g., Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1286 (7th Cir. 1986); Wagner v. Graziano Construction Co., 390 Pa. 445, 448, 136 A.2d 82, 83-84 (1957); Corbin, \textit{supra} note 9, \S 1295, at 212; E. Farnsworth, Contracts 475 (1982).


\textsuperscript{29} See “Modification of a Contract Containing an Anti-Waiver or No Oral Modification Clause By Conduct or Oral Statements.”

\textsuperscript{30} In meeting this clear and convincing burden, a party advancing amendment must establish that the parties mutually intended to modify the particular original contract, including its restrictive amendment clauses such as written modification or anti-waiver clauses.
consideration was present.\textsuperscript{31} The Court went even further addressing situations where course of conduct is used to establish a waiver or modification, stating that the existence of a written modification and anti-waiver provision in the contract is sufficient evidence of the parties’ intent,\textsuperscript{32} and that since the parties’ intent, as expressed in the contract was to prohibit permanent oral modifications, the party moving to enforce the modification must still prove, by clear and convincing evidence, that the parties’ actual intent was to modify the agreement (and that the parties’ waived the non-waiver clause expressly written in the contract).\textsuperscript{33} Therefore, \textit{Quality Products} supports the proposition that even where parties agree in writing that their contract cannot be varied later on, it can be,\textsuperscript{34} but only with new consideration, mutual assent, and clear and convincing evidence of the parties’ intent to act inconsistent with the no oral modification clause and knowingly waive their rights under the non-waiver clause.\textsuperscript{35} Moreover, it cannot be overlooked that even if the oral modification clause is not upheld, courts must still look to other legal precedent or law, such as the statute of frauds or eligible consideration, before proceeding with enforcing the alleged oral modification or waiver.\textsuperscript{36}

A recent federal case, \textit{Fax Agency Inc. v. ERJ Insurance Group, Inc.}, applied the \textit{Quality Products} standard to a contract with an anti-waiver clause.\textsuperscript{37} In \textit{Fax Agency}, the defendant claimed that notwithstanding the clear provisions of an insurance broker contract, the plaintiff broker was not entitled to commissions on canceled policies due, in part, to NOM and anti-waiver clauses. The defendant offered evidence of canceled checks, invoices and correspondences, showing the plaintiff broker had, in fact, repaid some commissions on canceled policies, although the language of the written agreement did not require such repayment. The defendant claimed that this evidence was enough to avoid summary judgment in that it established a fact issue on mutuality for a modification or waiver of the plain language of the written agreement. The Court found that despite the presented evidence, the defendant failed to meet the heightened \textit{Quality Products standard} because the evidence failed to show any waiver of the anti-waiver clause in the broker contract:

The course of conduct of the parties must demonstrate through ‘clear and

\textsuperscript{31} \textit{Quality Products} at 365.
\textsuperscript{32} \textit{Id} at 365.
\textsuperscript{33} \textit{Id}.
\textsuperscript{34} \textit{Id}.
\textsuperscript{35} \textit{Id}.
\textsuperscript{37} \textit{Fax Agency Inc. v. ERJ Insurance Group, Inc.}, 2013 WL 2397408 (ED Mich. 2013).
convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms...’. First and foremost, the anti-waiver clause of the Contract is very clear... . The evidence of Plaintiff’s conduct does not demonstrate any desire to waive the actual anti-waiver provision, so the clause is still valid. The invoice and correspondence may show willingness on Plaintiff’s part to accept chargebacks for that specific month, but the anti-waiver provision expressly states that a party’s failure to exercise their rights at one time will not act to waive those rights in the future. ...It is also worth noting that, 'waiver of a substantial right... is a matter of contract which requires a consideration.' 38

Although Michigan’s restriction on parol evidence in the presence of a NOM clause is, at times, viewed as excessively narrow, other states including Maryland, New York, and Illinois have taken similar positions on the admissibility of extrinsic evidence of oral modifications when there is a NOM clause present within the writing. 39

In Maryland, courts have held similar rulings to Michigan, holding that the party alleging waiver of a contract provision “must show an intent to waive both the contract provision at issue and the non-waiver clause.” 40 In relying on course of performance to demonstrate an intent to waive, some courts believe that parties can opt out of the course of performance rule by explicitly stating so in the contract, finding a “non waiver clause” to be sufficient to dispute the course of performance as binding.” 41

Facing an influx of litigation in which parties attempt to enforce oral modifications, the New York Appellate Court recently ruled on the matter ultimately holding that “contractual provisions requiring amendments to be in writing trump any oral modifications or past practices by the parties.” 42 Citing specifically to New York General Obligations Law § 15-301, “the [New York] court stressed that any executory agreement not memorialized in a signed writing would be insufficient to modify a contract that explicitly required written amendments.” 43 This ruling denotes the significance of finalizing, in writing, any and all modifications to contracts between

38 Id slip op, pp 6-7 (citations omitted).
40 Id.
43 Edward Flanders, Teresa T. Lewi, “New York Appellate Court Enforces ‘No Oral Modification’ Clause, Holds Parties to Their Written Agreement.”
parties when those contractual agreements contain NOM and non-waiver clauses. New York recognized that the inclusion of such clauses and upholding them, maintains organization and proactively minimizes the risk of subsequent disagreement between parties regarding the terms and details of their agreement.

Similarly, Illinois has traditionally given dispositive deference to non-waiver clauses. In *Transcraft Corp. v. Anna Indus. Dev. Corp.*, the court gave “full force and effect” to a non-waiver clause when the plaintiff brought suit against a defendant who, for over twenty years, regularly and continuously breached the contract by failing to pay its portion of the local property taxes. The court held that “Non waiver clauses are enforceable under Illinois law and operate as matter of law.”

No oral modification clauses are one of the most popular standard clauses used in commercial contracts, and is often said to operate as a private statute of frauds. Originally developed to function in contracts governed by common law, NOM clauses were used to preclude all variations, which were not in accordance with the formalities required by the clause. Although, some distrust NOM clauses based on the suspicion that a writing does not necessarily promote cautionary functions due to the fast-paced nature of our corporate interactions, and the tendency individuals have to click agree or sign without reading or contemplating the terms. Today, many jurisdictions do not hold NOM clauses to an absolute standard, rather, they are most commonly used to protect against unfounded allegations of such alterations being made short of “a full-blown variation, which really does have the agreement of both parties”.

However, strictly enforcing NOM clauses means parties will make greater effort to put changes in writing. Arguably, the failure to strictly enforce NOM clauses opens the door to the unknown, and in some cases, even going so far as to facilitate criminal activity; a party’s allegation of an oral modification could be used to mask criminal behavior (i.e. masking bad faith when entering into the contract or leaving open prospective justification for a party’s non-compliance through an allegation of an oral

---


49 Professor Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941), p. 800.

Although fairly rare across the nation, the New York Supreme Court Appellate Division, Fourth Department addressed the issue of when breach of contract can result in criminal liability. In *People v. Abeel*, the defendant entered into a contract with a church regarding the completion of construction work, where the church agreed to fund his purchase of materials for the project. Abeel was subsequently charged with Grand Larceny in the third degree after he failed to complete any of the contractually agreed-upon work and, rather, used the money to finance personal purchases. “[Abeel] failed to return calls from church officials and, when questioned by the investigating trooper, offered a series of dubious excuses for failing to [perform the work, alleging an oral modification to their agreement had taken place]. The prosecution was successful in their claim of criminal breach of contract and larceny by false promise, against Abeel. Traditionally, in order to prevail on a larceny by false promise claim, the petitioner must prove that the defendant had a present intent not to perform the agreed upon promises, at the time they entered into the agreement. The alleged wrongdoer's criminal intent “must be ascertained by looking backward from the failure to perform and finding that at the time that the accused made the promise he did not intend to carry out his end of the bargain.” Leaving open the option for oral modifications in a contract with a NOM clause, allows parties to veil their intentions and actions by alleging side agreements or modifications that did not actually occur between the parties, in hopes that court’s will ignore the NOM clause and accept their defense. In strictly enforcing NOM clauses, parties are bound by a written contract where there are no discrepancies. This incentivizes the parties to place any modifications into writing and, therefore, better protects them from criminal and fraudulent activity because legal formalities often serve an evidentiary function in that they provide “evidence of the existence and purport of the contract”.

By refusing to entertain evidence of oral modification, courts may successfully hinder excessive litigation. In 2005, the Supreme Court of Indiana permitted evidence of

---

51 Other instances exist in which a breach of contract has constituted “larceny by false promise. “A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he [or she] . . . will in the future engage in particular conduct, and when he [or she] does not intend to engage in such conduct.” *People v. Abeel*, 67 A.D.3d 1408, 888 N.Y.S.2d 696 (2009).
53 Id.
56 Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941)
oral modification, in *Sees v. Bank One*, when a creditor, Bank One, brought suit against two guarantors, John and Robert Sees, for an outstanding loan that had been made out to their company. John and Robert Sees, brothers, were the owners of Sees Equipment. Under the company name, the brothers executed an “Unlimited Continuing Guaranty” that assured full payment of all debts Sees Equipment owed. The company was later sold, but the Sees’ remained as the guarantors for the loan. When the purchasers of the company defaulted, Bank One filed a complaint against all parties involved, including John Sees, as guarantor. Sees filed a cross motion for summary judgment contending that he had received oral assurances from a loan officer that the purpose of the guaranty was to provide leverage to guarantee corporation in the event of corporate default, and that such assurances amounted to an oral modification. However, within the contract was a no oral modification clause. The court denied Sees’ motion for summary judgment, in part, based on the heightened burden delineated by the NOM clause.

A concurring opinion goes on to draw conclusions about the hidden intent behind Sees’ attempted defense of oral modification, in stating that “Sees is himself an attorney fully capable of understanding that the guaranty put him on the hook for the borrowing. And …the document did that in no uncertain terms”. From these statements it is not attenuated to draw that John Sees, the pro-se defendant, brought the oral modification defense simply as a tactic to evade his status as guarantor. In strictly keeping with the NOM clause the Indiana Court was able to adequately serve justice and avoid additional litigation in refusing the admission of contemporaneous oral statements that contradict the terms of the agreement, not in writing.

Should the parties mutually agree to modify, they can simply put the modification in writing. Finding subsequent oral modifications to trump previously established, clearly written terms bears the potential to result in havoc, be it: feuding parties, ambiguity, disarray, and/or a flood of litigation. Allowing courts to honor oral modifications, in light of a NOM clause, enables the opportunity for individuals to forge, fraud, or otherwise criminally act.

Although non-waiver clauses that accompany NOM clauses heighten the standard of proving a permanent modification, parties still must proceed cautiously when deviating from contracted rights. Studies of implementing strict adherence to NOM clauses and their impact on litigation or public safety are few and far between. However, it is

---

57 *Sees v. Bank One*, 839 N.E.2d 154, 154 (Ind. 2005)
58 Id.
59 Id.
important to note that a NOM clause serves a purpose in a contract that is signed by the parties willing to abide by it, and holding those parties to that clause helps prevent allegations of untruths and fraud, while still preserving the parties’ free will to modify that contract, albeit in writing.