The Questionable Effect of Informal And Instantaneous Electronic Communications on the Validity of “No Oral Modification” Clauses: Are Texts, Tweets, and E-mail Destroying the Sanctity of Contract Law?

Diana Ovsepian, Loyola Law School - Los Angeles
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I. Introduction

Those who make a contract may unmake it. The clause which forbids a change may be changed like any other. The prohibition of oral waiver may itself be waived. ‘Every such agreement is ended by the new one which contradicts it.’ What is excluded by one act is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again.¹

Almost one hundred years after he uttered them, the words of Judge Cardozo ring true today more so than ever before. The proliferation of different types of instantaneous electronic communications...

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communications over the past few years have dramatically reshaped the way society converses. In both personal and professional life, individuals are increasingly using email, text messages, instant messages, and other similarly informal mediums as their dominant means of communication.\(^2\) With this new technology comes the question of how those communications will be applied in the context of established doctrines like contract law. Since the law changes at a relatively slow pace it is only natural that “technology outpaces law.”\(^3\) With that concern in mind, old doctrines must be applied to new technologies in ways that beget rational results and equitable outcomes.

In the interest of stability, contracting parties have traditionally relied on legal devices like No Oral Modification (“NOM”) clauses to provide assurance of the exact terms to which


(statating that businesses are increasingly using Electronic Data Interchange instead of paper orders and invoices, consumers are purchasing goods and services on the Internet with more frequency, and email is turning into a popular means of communication and contracting).

\(^3\) Amelia Rawls, Note, Contract Formation in an Internet Age, 10 Colum. Sci. & Tech. L. Rev. 200, 201 (2009).
they are bound. Typical NOM clauses require a signed writing to amend or modify a written contract. The formality of going through that process alerts parties of the change being made. Thus, a problem arises when the primary mode of communication between contracting parties is electronic. Parties may make statements that are often misunderstood, misinterpreted, unintended, or simply lost in the shuffle of communication. Moreover, as courts give legitimacy to these informal electronic communications, certain issues arise.

5 Id.
6 Lary Lawrence, 2A Anderson U.C.C. § 2-209:81 (3d. ed. 2011) (emphasizing the importance of the parties’ behavior in waiving NOM clauses).
7 See generally Robert A. Hillman & Jeffrey J. Rachlinski, Standard-Form Contracting in the Electronic Age, 77 N.Y.U. L. Rev. 429, 453 (2002) (Discussing the premise that “psychologists have demonstrated that people often engage in such “motivated reasoning,” meaning that they make inferences consistent with what they want to believe.”).
communications, parties become bound to obligations they never intended to make.\footnote{See also Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 \textit{Yale L.J.} 541, 611 (2003) (stating, in the context of investment contracts, that a court’s refusal to enforce an oral modification ban violates a basic justification for the existence of contract law itself).}

This Note will set forth the current law of contract modification as governed by the common law and by statute. In Section II, it will compare different interpretations of the common law using Delaware and New York as examples to highlight the types of approaches other courts may adopt. Next, it will discuss two cases, \textit{CX Digital Media, Inc. v. Smoking Everywhere, Inc.}\footnote{09-62020-CIV, 2011 WL 1102782 (S.D. Fla. Mar. 23, 2011).} and \textit{Stevens v. Publicis, S.A.},\footnote{50 A.D.3d 253 (N.Y. App. Div. 2008).} which applied the law of Delaware and New York respectively and upheld contract modifications made through informal electronic communications even though the original contracts contained NOM clauses.

Section III will analyze and critique the rationale of those cases. It will also discuss the distinctions between different types of electronic communications such as email and instant message. Finally, it will propose a list of possible
suggestions, both for contracting parties and for the courts, to guard against unintended contract modification by means of electronic communication.

II. The Law of Contract Modification

Due to the explosion of electronic communication over the past few years, old doctrines must be revisited to determine whether traditional contracting is becoming a thing of the past in a society where electronic messages dominate as the primary means of communication. This Section will first analyze the status of a “writing” as it applies to contract law. It will then set forth the general law of contract modification and NOM clauses, with primary emphasis on the common law and how that law is utilized in different states. Specifically, it will

11 See Tatiana Melnik, Note, Can We Dicker Online or Is Traditional Contract Formation Really Dying? Rethinking Traditional Contract Formation for the World Wide Web, 15 Mich. Telecomm. & Tech. L. Rev. 315, 316 (2008) (stating generally that “traditional contracting is not dying—it simply has to be rethought to accommodate this digital architecture.”). See also Pompian, supra note 2 (discussing the impact of new technologies on contracting and how those technologies do not fit neatly into old contract doctrines).
compare two different interpretations of the law, in Delaware and New York, to demonstrate the various approaches courts may take when confronted with electronic communications and contract modification.

A. Legal Status of a “Writing”

Before delving into the intricacies of contract modification law, a discussion is necessary as to what exactly constitutes a “writing.” Undoubtedly, the traditional notion of putting pen to paper suffices and serves as the benchmark from where all other inquiry must begin. Black’s Law Dictionary defines a “writing” as “any intentional recording of words that may be viewed or heard with or without mechanical aids. This includes hard-copy documents, electronic documents on computer media, audio and videotapes, e-mails, and any other media on which words can be recorded.”\(^{12}\) In the realm of contract law, the definition of “writing” has evolved\(^ {13}\) over time—both under the

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\(^{12}\) *Black’s Law Dictionary* 712 (9th ed. 2009).

\(^{13}\) John Anecki, *Selling in Cyberspace: Electronic Commerce and the Uniform Commercial Code*, 33 *Gonz. L. Rev.* 395, 406-07 (1998) (discussing how courts have, in the past, broadened “writing” to include “electronic impulses such as telegram and facsimile[,]” because they could not directly hold that an intangible form of communication constitutes a writing.).

This emphasis on tangibility is a logical extension of the primary principle of contract law that focuses on writings—the Statute of Frauds. Generally, the Statute of Frauds requires that certain types of agreements, in order to be legally enforceable, must be in writing and be subscribed by the party to be charged.\footnote{Under the common law, the five types of contracts that fall within the Statute of Frauds are: contracts that cannot be performed within one year, contracts transferring an interest in land, contracts to answer for the duty of another, promises in consideration of marriage, and executor’s contracts. See Restatement (Second) of Contracts § 110 (1981). The U.C.C. also has a Statute of Frauds provision which covers contracts for the}
prevent fraud and heighten accountability in the process of contract formation. On its face, the Statute of Frauds seems like an arcane reminder of the rigidity of contract law; however, in an effort to dispel this notion and maintain flexibility among contracting parties, certain requirements have been relaxed by statute.\(^\text{17}\) The gist of the requirement is that there be some written record indicating the existence of an agreement between parties.\(^\text{18}\) Consequently, the importance of tangibility makes sense in this context. Before all else, a “writing” must first be tangible—meaning retrievable—in order to serve its ultimate purpose, which is to show the existence of an agreement.\(^\text{19}\)

\[\text{sale of goods for $500 or more, as well as contracts for the sale of securities. U.C.C. §§ 2-201, 8-319 (amended 2003).}\]
\[\text{\textsuperscript{17} See also U.C.C. § 2-201, cmt.1 (amended 2003) (noting that “the required writing need not contain all the material terms of the contract . . . . All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction . . . .”).}\]
\[\text{\textsuperscript{18} Id.}\]
\[\text{\textsuperscript{19} See id.}\]
Generally, NOM\(^{20}\) clauses require a signed writing to modify an existing agreement.\(^ {21}\) Accordingly, if a “writing” must be tangible in order to indicate the existence of a contract, a “writing” must also be tangible to indicate modification of a contract. In the typical transactional setting, contract modification can be a spontaneous, spur of the moment decision, or it can come about as the result of intense, drawn-out negotiations. To guard against possible adverse consequences of such unpredictability—namely, questionable decisions made in the heat of the moment—some contracts include such NOM clauses.\(^ {22}\)

\(^{20}\) A typical NOM clause contains some variation of the following: “No change, modification, extension, termination, or waiver of this Agreement, or any of the provisions herein contained, shall be valid unless made in writing and signed by duly authorized representatives of the parties hereto.” Alan S. Gutterman, 19 Business Transactions Solutions § 87:78 (No Oral Modification) (Oct. 2011).


\(^{22}\) See Hillman & Rachlinski, supra note 7, at 451 (stating that parties often do not have all of the necessary information when they contract: “Psychologists long have believed that when making a decision, such as whether to enter into a contract,
This is because having to pause and put something in writing gives the party a moment of repose to stop and process the ramifications of their behavior. That written record then takes on great significance, not only because of the terms inscribed in it, but because it becomes a tangible representation of the parties' intent to make a change.\textsuperscript{23} Therefore, if the purpose of a "writing" reduces to "representation," the question then becomes: Do informal methods of communication—like email, text messages, and instant messages—qualify as tangible forms of "writing" sufficient to make a representation for purposes of contract modification?

\textsuperscript{23} See 17 Am. Jur. 2D Contracts § 514 (2011) (citing Quality Products & Concepts Co. v. Nagel Precision, Inc., 469 Mich. 362, (2003)) ("The significance of [NOM] clauses regarding the parties' intent to amend is heightened where a party relies on a course of conduct to establish modification; such restrictive amendment clauses are an express mutual statement regarding the parties' expectations regarding amendments.").
B. Modes of Contract Modification

Contract modification is either governed by the common law or by statute, depending on the type of contract at issue.\textsuperscript{24} Courts in many states have not yet directly confronted the issue of whether informal electronic correspondence may validly modify a written contract with a NOM clause. However, some states have enacted statutes that generally disfavor oral modifications and require state courts to uphold NOM clauses.\textsuperscript{25}

This Part will provide an overview of contract modification law, focusing primarily on the common law, by using Delaware and New York as examples. The focus is on these two states because they follow slightly varied approaches that represent the status of the law in a range of different states across the nation.

1. Law of Contract Modification in Delaware

Delaware follows the common law rule with respect to NOM clauses: “An oral agreement is sufficient to modify or rescind a

\textsuperscript{24} William D. Hawkland, 1 Hawkland Uniform Commercial Code Series § 2-102:4 (2011) (stating that the U.C.C applies to the sale of goods whereas the common law applies to service contracts and contracts for the sale of land).

written contract, notwithstanding a provision in the written contract purporting to require that subsequent modifications be evidenced by a writing.”26 However, any valid modification requires fresh consideration.27 Thus, under the common law, a written agreement that is subject to a writing requirement cannot be modified by an oral agreement without consideration


27 See Richard A. Lord, 3 Williston on Contracts § 7:8 (4th ed. 2009) (“Promises, in order to be enforceable, need consideration.”). Case law suggests that consideration requires a “detriment incurred by the promisee or a benefit received by the promisor at its request[,]” however; the Restatement, Second, of Contracts, on its face, requires nothing more than a bargained-for exchange. Id. at § 7:4 (4th ed. 2009).
unless certain exceptions—such as subsequent reliance on the oral modification—apply. If one of these exceptions applies,

28Restatement (Second) of Contracts § 89 (1981) (listing three scenarios where modification of an ongoing contract becomes binding: (1) “if the modification is fair and equitable” in light of circumstances not anticipated by the parties when the contract was made; (2) if authorized by statute; or (3) if justice would so require because of a “material change of position in reliance on the promise.”). See also Restatement (Second) of Contracts § 150 (1981) (stating that even if the Statute of Frauds applies, a contract may be orally modified if there has been “a material change of position in reliance” on the oral modification).

29Instead of suggesting that the unanticipated circumstances or subsequent reliance satisfy the common law requirement of consideration, the Restatement, Second, of Contracts, “adopts the position that a modified agreement, if it is to be enforced at all, is enforceable despite the absence of consideration[,]” because of a preexisting duty. Thus, in taking this approach, the drafters “carved out an exception under which, despite the absence of consideration resulting from an application of the preexisting duty rule, the modified agreement will be
the oral modification is deemed valid and the common law requirement of consideration is no longer necessary. Thus, reliance often becomes the dispositive factor.\textsuperscript{30} Consequently, because this exception requires a strong showing of material change in position based on reliance, the principal function of a NOM clause is to “make it easier for businesses to protect their agreement against casual subsequent remarks and manufactured assertions of alteration.”\textsuperscript{31}

Delaware case law on NOM clauses states that a party asserting an oral modification must prove the intended change with “such specificity and directness as to leave no doubt of the intention of the parties to change what they previously enforceable.” \textbf{Richard A. Lord, 3 Williston on Contracts} § 7:37 (4th ed. 2009).

\textsuperscript{30} \textbf{See Richard A. Lord, 10 Williston on Contracts} § 29:42 (4th ed. 2009) (“[W]here, following the oral modification, one of the parties materially changes position in reliance on the oral modification, the courts are in general agreement that the other party will be held to have waived or be estopped from asserting the no oral modification clause.”).

\textsuperscript{31} \textit{Id.}
solemnized by formal document."

Furthermore, the Supreme Court of Delaware has held that written contracts between parties, despite their terms, are not necessarily changeable only by formal written agreement; parties have a right to amend agreements and “they may, by their conduct, substitute a new oral contract without a formal abrogation of the written agreement.”

Thus, a NO-M clause in a written contract may be waived or modified just as any other contractual provision may be waived or modified by the course of conduct of the parties giving rise to reliance.

32 Reeder v. Sanford Sch., Inc., 397 A.2d 139, 141 (Del. 1979); see also Cont’l Ins. Co. v. Rutledge & Co., 750 A.2d 1219, 1230 (Del. Ch. 2000) (echoing the importance of specific and direct intent of contracting parties).


34 See J.A. Moore Const. Co. v. Sussex Assocs. Ltd., 688 F. Supp. 982, 988 (D. Del. 1988) (internal citations omitted) (holding that a contractor’s claim of forming a subsequent oral agreement with the other party to take on extra work without following the change procedures in the original contract was sufficient to withstand summary judgment because of the presence of an affidavit describing the alleged change.).
2. **CX Digital Media v. Smoking Everywhere: Instant Message as Valid Modification**

In **CX Digital Media v. Smoking Everywhere**, the District Court for the Southern District of Florida, applying Delaware law, held that a series of instant messaging conversations between parties modified a written agreement that contained a NOM clause. That modification resulted in a judgment against the defendant of over $1.2 million dollars. This result juxtaposes the stark contrast between the informality of the instant messaging conversation and the gravity and severity of its legal consequences.

Smoking Everywhere sells electronic cigarettes ("E Cigs") through its website. In an effort to increase revenue, Smoking Everywhere entered into a contract with CX Digital Media ("CX"), an affiliate marketing agency, to promote a free trial offer of

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36 Id. at *5.

37 Id. at *12.

38 Id. at *17.

39 Id. at *1.

40 Id. An affiliate marketing agency “acts as a middleman between” clients who want to advertise on the Internet and its
its product online.\textsuperscript{41} CX works with over 10,000 independent affiliates who each run websites or campaigns to advertise for CX’s client.\textsuperscript{42} When a consumer clicks on the advertisement, a “cookie” is placed on the consumer’s computer redirecting them to the client’s page containing the purchasable offer.\textsuperscript{43} Each time a valid sale is made, CX is paid a referral fee by the client, and in turn, CX pays a portion to the affiliate responsible for the referral.\textsuperscript{44} CX pays its affiliates on a weekly basis even if it has not yet received payment from the client.\textsuperscript{45}

On August 4, 2009, the vice-president of advertising for Smoking Everywhere, Nick Touris, entered into a contract entitled Insertion Order #6921 with CX.\textsuperscript{46} The Order stated that

\begin{quote}
network of affiliates which provide such online advertising space. Id.\textsuperscript{41}
\end{quote}

\begin{quotation}
\textsuperscript{41} Id. at *1-2. The free trial offer is termed “Gold E Cigarette Kit Free Trial.” Id. at *2.
\end{quotation}

\begin{quotation}
\textsuperscript{42} Id. at *1. The client here is Smoking Everywhere.
\end{quotation}

\begin{quotation}
\textsuperscript{43} Id. This “cookie” contains information identifying both the CX Client and the CX Affiliate.
\end{quotation}

\begin{quotation}
\textsuperscript{44} Id. at *2.
\end{quotation}

\begin{quotation}
\textsuperscript{45} Id.
\end{quotation}

\begin{quotation}
\textsuperscript{46} Id.
\end{quotation}
Smoking Everywhere promised to pay CX $45.00 for each completed sale and that CX would send no more than 200 sales per day.\footnote{Id. at *2, *5. A sale means the consumer filled out a registration form and successfully submitted credit card information. Id.} For the entire month of August, CX delivered 670 sales, never exceeding 200 sales per day.\footnote{Id. at *2.} CX sent Smoking Everywhere a $25,150.00 dollar invoice for the August sales—payment due on September 15, 2009— but payment was never made.\footnote{Id.}

Meanwhile, on September 2, Touris and Pedram Soltani, an account manager at CX, engaged in an instant messaging conversation regarding a wide variety of topics, including removal of the 200 sale per day limit:

pedramcx (2:49:45 PM): A few of our big guys are really excited about the new page and they're ready to run it

pedramcx (2:50:08 PM): We can do 2000 orders/day by Friday if I have your blessing

pedramcx (2:50:39 PM): You also have to find some way to get the Sub IDs working

pedramcx (2:52:13 PM): those 2000 leads are going to be generated by our best affiliate and he's legit

nicktours is available (3:42:42 PM): I am away from my computer right now.
pedramcx (4:07:57 PM): And I want the AOR when we make your offer #1 on the network

nicktouris (4:43:09 PM): NO LIMIT

pedramcx (4:43:21 PM): awesome!

Immediately following this conversation, CX began to substantially increase the number of sales, resulting in about 1,244 sales per day by the end of September. Eight days later, on September 10—about one week after the number of sales per day began to increase—Touris and Soltani exchanged emails about certain webpages requiring updates. Moreover, Touris and Soltani chatted “almost on a daily basis” during this period. On September 24, because Smoking Everywhere failed to pay the August invoice, CX stopped their advertisements on its network,

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50 AOR is an abbreviation for agent of record. It is a technical term meaning the “exclusive provider of affiliate advertising on the advertising campaign.” Id. at *8.

51 Id. at *3-4. In the interest of brevity, the beginning of the instant message conversation is not quoted here because it involves technical discussions of test links and webpages.

52 Id. at *4.

53 Id. Soltani fixed the problem immediately by sending email updates to his affiliates. Id.

54 Id. at *15 n.24.
and Soltani sent Touris an email requesting payment: “You guys need to wire us the money today so that we can turn the offer back live.” At the end of September, CX sent Smoking Everywhere yet another invoice for the August and September sales, Smoking Everywhere refused to make payment and CX sued.

At trial, Smoking Everywhere argued that even if it agreed to modify the Insertion Order, that modification was not valid for several reasons: (1) the modification was not proven with the requisite specificity and directness, (2) Smoking Everywhere did not waive the provision in the Order stating it can be “changed only by a subsequent writing signed by both parties[,]” and (3) Smoking Everywhere did not provide the necessary consideration for a valid modification of the Order.

Regarding specificity and directness, the court found direct evidence of an agreement by both parties to modify the Order based on their instant message conversation on September 2. The court reasoned that, in response to CX’s offer of 2000 sales per day, Smoking Everywhere made a counter-offer of “NO

55 Id. at *4.
56 Id. at *5.
57 Id. at *9. Smoking Everywhere raised several other defenses which are not pertinent to the issue of this Note, therefore, they are excluded from the discussion above.
LIMIT[,]” which CX readily accepted.\(^5^8\) CX’s reply of “awesome!” along with the increase in the number of sales per day immediately after that conversation “provide[s] specific and direct support that the change was intended.”\(^5^9\)

The court also cited and distinguished \(\text{Reserves Development LLC v. Severn Savings Bank,}\) in which a series of emails were deemed not sufficiently specific and direct to support the conclusion that the parties orally modified an existing written agreement.\(^6^0\) The court distinguished \(\text{Severn Savings,}\) for two reasons. First, the emails at issue in \(\text{Severn Savings}\) gave off the impression that the parties “discussed different options orally” but never reached a final agreement.\(^6^1\) Therefore, the emails were simply one part of an ongoing oral negotiation to finalize the details of the parties’ obligations. By contrast, in \(\text{CX Digital Media,}\) once the parties agreed to remove the maximum sale per day limit, CX started sending more sales immediately without further negotiation. Therefore, rather than showing a continued debate like the emails in \(\text{Severn Savings,}\)

\(^{5^8}\) Id. at *10.

\(^{5^9}\) Id. at *8, *10.

\(^{6^0}\) \text{Reserves Dev. LLC v. Severn Sav. Bank, FSB, CIV.A. 2502-VCP, 2007 WL 4054231 at *10 (Del. Ch. Nov. 9, 2007).}

\(^{6^1}\) \text{CX Digital Media, 09-62020-CIV, 2011 WL 1102782 at *11.}
the instant messages here indicated that the parties had come to an agreement. 62 Second, the issue in **Severn Savings** concerned the actual terms of the modification and the emails served as evidence of an oral modification with those specific terms. 63 By contrast, in this case, the issue was whether an oral modification actually occurred at all, “here, the instant messages operate collectively as an unsigned writing containing the terms of the agreement to modify the Insertion Order.” 64 In sum, the court concluded that in determining whether there was a modification at all, the parties’ conduct surrounding the instant message conversation provided specific and direct evidence of their agreement to modify the Order. 65

Next, regarding Smoking Everywhere’s contention that it did not waive the NOM clause in the Order, the court concluded that the modification was not oral because it appeared in writing in the instant message conversation. “[N]evertheless, the same principle applies to this informal, unsigned writing as to an oral modification . . . Therefore, the instant-message conversation, as an unsigned writing, suffices under Delaware

62 Id.
63 Id.
64 Id.
65 Id. at *10.
law to modify the insertion order despite the [NOM] clause.” 66 Moreover, the court noted that even if the NOM clause was enforceable and the instant message conversation did not qualify as a valid modification, Smoking Everywhere waived its right to assert that provision because CX materially changed its position in reliance on the statements made by Smoking Everywhere in that instant message conversation. 67 CX relied on that conversation and changed its course of performance by sending a substantially larger number of sales almost immediately. Smoking Everywhere was aware of the increase and did not complain; therefore, Smoking Everywhere was estopped from asserting the NOM clause as a defense. 68

Finally, the court rejected Smoking Everywhere’s contention that it did not provide the requisite consideration for a modification. 69 The court found an implied promise on the part of Smoking Everywhere to pay for any additional sales generated by CX’s removal of the 200 sale per day limit. 70 Moreover, the court reiterated that CX’s actions were “reasonable and foreseeable in

66 Id. at *12.
67 Id.
68 Id.
69 Id. at *13.
70 Id.
light of Touris’s statements and actions during that conversation, and CX Digital’s change in position was material because it had to pay its affiliates for the additional Sales.” 71

Conclusively, the court upheld the modification via instant message as valid, even in the face of the NOM clause, because it was executed with specificity and directness, and CX materially changed its position in reliance on that exchange.


Contract modification in New York is slightly different from the common law because it is codified by statute, namely General Obligations Law Sections 15-301, 5-1103, and 5-701. Section 5-1103 states that an agreement to modify a contract shall not be invalid for lack of consideration, as long as the agreement modifying the contract is in writing and signed by the party against whom the modification is enforced. 72 Essentially, Section 5-1103 allows a written contract to be modified without consideration as long as the modification is in a signed writing.

Section 15-301 says that a written agreement containing a provision that it cannot be changed orally, “cannot be changed by an executory agreement unless such executory agreement is in

71 Id.

writing and signed by the party against whom enforcement of the change is sought.”

In effect, this provision prohibits oral modifications of contracts containing NOM clauses. However, taken together, the statutes provide that even without consideration, a signed writing may modify a contract with a NOM clause. Section 5-701 is New York’s Statute of Frauds and courts in New York, when interpreting the signature requirement of Section 15-301, have looked to Section 5-701 for guidance. The overarching effect of these three statutory provisions is to prevent modifications without a signed writing. However, just as


74 N.Y. Gen. Oblig. Law § 5-701 (McKinney 2010) (“Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged . . . .”).

under the common law, all of these statutory provisions become obsolete in the face of reliance.\textsuperscript{76} Thus, New York case law allows for contract modification, both oral and written, when such modification is coupled with substantial reliance.\textsuperscript{77}

4. Stevens v. Publicis: Email as Valid Modification

In Stevens v. Publicis, S.A. the Supreme Court of New York, Appellate Division, held that a series of email exchanges

\textsuperscript{76} See 17 Am. Jur. 2D Contracts § 514 (2011) (“Under New York law, a contractual prohibition against oral modification may be waived by course of conduct, particularly where there has been performance in reliance on the oral modification.”).

\textsuperscript{77} See The Savage is Loose Co. v. United Artists Theatre Circuit, Inc., 413 F. Supp. 555, 559 (S.D.N.Y. 1976) (demanding reliance based on oral modification to effectively waive a NOM clause and modify a contract). See also Kurzman v. Graham, 817 N.Y.S.2d 888, 890-91 (Sup. Ct. 2006) (noting that courts have recognized an exception to the rule against oral modifications when a party has relied on that modification to her detriment). Rose v. Spa Realty Assoc., 397 N.Y.S.2d 922, 927(1977) (“[O]nce a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification.”).
constituted a valid modification of a written employment contract that contained a NOM clause, even though there was no reliance.\textsuperscript{78} To overcome the prohibitive effect of the NOM clause—absent any reliance—the court first classified the emails as “signed writings” sufficient to satisfy the Statute of Frauds.\textsuperscript{79} The court then further construed that classification expansively to say that the emails similarly satisfied the “signed writing” requirement of the NOM clause.\textsuperscript{80}

The facts are as follows. Stevens owned a public relations firm and decided to sell it to Publicis.\textsuperscript{81} The parties entered into two separate agreements, one for the sale of the firm, and the other—an employment agreement with a NOM clause—to retain Stevens as Chief Executive Officer (CEO) of the company for the next three years.\textsuperscript{82} However, the business began losing money and Stevens’ position as CEO was no longer secure.\textsuperscript{83} Stevens entered into an email exchange with his superior, Bob Bloom, and they


\textsuperscript{79} Id. at 255-56.

\textsuperscript{80} Id.

\textsuperscript{81} Id. at 254.

\textsuperscript{82} Id.

\textsuperscript{83} Id.
mutually redefined Stevens’ role in the company.\textsuperscript{84} Both parties enthusiastically agreed to the change, as evinced in their emails, and both typed their names at the bottom of each email message.\textsuperscript{85} Stevens later sued for breach of contract claiming there was no valid modification of the employment agreement.

The court held that the series of emails—including Bloom’s initial message with the terms of the proposal and Stevens’ response accepting those terms—memorialized the terms of their agreement to modify the original employment contract.\textsuperscript{86} The court reasoned that because Stevens’ emails constituted “signed writings” within the meaning of the Statute of Frauds (because his name at the bottom of each email indicated his intent to

\textsuperscript{84} Id. at 254-55.

\textsuperscript{85} Id. at 255. The court quotes at length from the email exchange in order to show both parties’ unqualified acceptance of the modification to the agreement: “I accept your proposal with total enthusiasm and excitement . . . I’m psyched again and will do everything in my power to generate business . . . . I am thrilled with your decision. You have my personal assurance that all of us will continue to work in the spirit of partnership to achieve our mutual goal and function together as close senior collaborators . . . .” Id.

\textsuperscript{86} Id.
authenticate it), similarly, Bloom’s name at the bottom of each email should also constitute a “signed writing” to satisfy the signed writing requirement of the NOM clause.  

III. Critique

This Section will analyze and critique the rationales and holdings in CX Digital Media and Stevens. It will then compare and contrast the differences between instant messages and email, and conclude that email, under certain circumstances, retains the formality and legitimacy of a “signed writing” for purposes of contract modification. Nevertheless, in all cases, courts must undertake a nuanced, fact-specific inquiry to obtain an equitable result.

A. Critique of Cases

In CX Digital Media, the court held that the instant message modification was valid because it was done with specificity and directness as evidenced by the parties’ conversation. CX made an offer to increase the limit to 2000 sales per day, Smoking Everywhere replied with a counter offer of “no limit” and CX accepted by responding with “awesome.”  

The court deemed this enthusiastic affirmation, along with an

87 Id. at 255-56.

immediate increase in the number of sales per day, as specific and direct evidence of the parties’ intent to make the change.\textsuperscript{89} The court also upheld the modification because Smoking Everywhere provided the requisite consideration in its implied promise to pay for all additional sales resulting from the removal of the maximum sale per day limit.\textsuperscript{90}

Regarding the issue of specificity and directness, the court’s rationale initially seems logical. However, when the conversation is viewed in the context of the applicable law, one starts to question how logical it is to conclude that the words “no limit” and “awesome”—when casually typed in an instant message—illustrate specifically and directly, so as to leave “no doubt” about the intention of the parties.\textsuperscript{91} The dubiousness of this rationale becomes apparent when we realize that, in a nutshell, the court gave a contract counter-offer a million dollar effect through an instant message replying, in sum, “awesome!”

\textsuperscript{89} Id. at *8, *10.

\textsuperscript{90} Id. at *13.

\textsuperscript{91} See Reeder v. Sanford Sch., Inc., 397 A.2d 139, 141 (Del. 1979) (discussing the requirement of specific and direct intent).
Moreover, the relaxed setting of the online conversation facilitates an aura of informality and makes it hard to believe that a sophisticated businessman like Touris would agree to such a substantial change, which could potentially cost his company millions of dollars, so flippantly. Furthermore, the fact that Touris said nothing after Soltani’s “awesome” indicates that Touris may not have understood the context and implications of the conversation because of the inherent ambiguity in communicating via instant message. Also, the word “awesome” itself may be ambiguous when used in different contexts because it can convey different emotions like happiness or sarcasm. Once again, most businesspeople would inquire into greater detail after agreeing to such a substantial change; thus, Touris’s silence is telling.

However, the most compelling reason to question the validity of the modification is buried in footnote 24 of the decision, in which the court noted that CX did indeed send a second modified Order to Smoking Everywhere following the instant message conversation. This explains why Smoking Everywhere understood the instant message conversation to be a

\[92\text{ CX Digital Media, 09-62020-CIV, 2011 WL 1102782 at *15 n.24 (the court states that this second modified order was excluded from evidence because of defendant’s abuse of discovery).}\]
negotiation, not a binding finalization of the proposed modification.

Next, regarding the issue of consideration for the modification, the court justified its finding of consideration by subjecting Smoking Everywhere to an “implied promise.” That rationale, however, is erroneous because of Smoking Everywhere’s preexisting duty to pay under the terms of the original Insertion Order. The preexisting duty rule does not allow courts to make arbitrary findings of consideration as it did here. Accordingly, because the modification lacks new consideration, it should not be enforceable under the common law.

The decision to enforce a modification on the grounds of a vague “implied promise” does a disservice because it does not give a contracting party adequate warning to indicate that something has changed. The fresh consideration before

93 Under the common law, modifications are subject to the preexisting duty rule, which requires new consideration before the modification becomes binding. Restatement (Second) of Contracts § 73 (1981). “Requiring new consideration provides relevant evidence that a modification did exist and that the parties did in fact mutually intend to modify their contract.” Rothermel, supra note 26, at 1250.

94 See Lord, supra note 27.
modification requirement is there to serve exactly that purpose, and a rejection of that requirement creates confusion and instability in contract law.\textsuperscript{95} Nevertheless, in this case, the court had its valid fallback argument of reliance. In this fact scenario, CX’s substantial reliance and material change in position following the instant message conversation trumped all other factors.

Even though enforcement of the oral modification is justifiable here because of the large and indisputable reliance factor, the validity of oral modifications to written agreements containing NOM clauses—when executed through such casual and informal modes of electronic communication—should be the exception, not the rule. The informality of a medium like instant message prompts contracting parties to let their guard down and speak as if they are engaging in casual conversation, not business negotiations. Not all business transactions require the formality of a boardroom. However, the informality of

instantaneous electronic communications, often between parties thousands of miles apart, is different from the informality of memorializing a deal in person by scribbling the terms down on a bar tab.\footnote{See Lucy v. Zehmer, 84 S.E.2d 516, 519 (1954) (holding that a land sale agreement scrawled on the back of a restaurant check was fully enforceable based on objective expressions of the parties’ intent).} While both scenarios are informal, the latter implies an obligation on contracting parties, giving them a sense of certainty about the binding ramifications of their actions, whereas the former lacks such gravitas.

Revisiting the issue of tangibility, arguably, instant messages are tangible in the sense that they can be retrieved from a computer and physically printed out on paper. However, typing an instant message, as part of a larger conversation, does not give one the same sense of importance as does stopping and physically writing down the result of a mutual agreement to change an existing contract. Touris’s instant message saying “NO LIMIT” had no lesser or greater significance to him than did any other instant message typed out in that entire conversation. Instant messages are by their very nature both instant and transient, hence, they lack the inherent concreteness of a formalized change.
Moreover, the problem with these types of electronic communications is not merely their informality but also their ambiguity.\(^97\) Anyone using instant messages, text messages, or tweets has experienced the frustration of miscommunication, whether they misunderstood the person on the other end or they themselves were misunderstood—after all, there is only so much one can convey in 140 characters or less.\(^98\)

Similarly, in Stevens, the New York appellate court held that an email validly modified an agreement containing a NOM clause because the email was equivalent to a “signed writing” as defined by the Statute of Frauds.\(^99\) If the email was adequate to

\(^{97}\) See 121 Am. Jur. Trials § 433 (2011) (“The notice provisions in some contracts have allowed for notice by text message . . . [but parties should] carefully consider the appropriateness of texting as the means of accomplishing notice because in litigation there can be a dispute whether notice was sent and received.”).

\(^{98}\) Tweeting, which is similar to instant messaging, allows for only 140 characters or less per tweet. See Kathleen Elliott Vinson, The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It, 41 U. Mem. L. Rev. 355, 412 n.8 (2010).

satisfy the Statute of Frauds, it should similarly be adequate to satisfy the “signed writing” requirement of the NOM clause.\textsuperscript{100}

The idea that email may satisfy the Statute of Frauds is one that has long been accepted in New York case law.\textsuperscript{101} The novelty of the Stevens decision lies in the fact that the court expanded that idea to hold that email may satisfy the requirement of a “signed writing” necessary to modify a contract with a NOM clause. Consequently, NOM clauses may no longer prevent or guard against unintended contracting by email and other informal methods of communication. This defeats the purpose of a NOM clause entirely because it contravenes the primary function of the clause, which is to allow businesses and individuals to protect their agreements against casual remarks and fraudulent assertions of modification.\textsuperscript{102}

\textsuperscript{100} Id. at 255.

\textsuperscript{101} Naldi v. Grunberg, 80 A.D.3d 1, 6-7(2010) (reiterating that New York courts have held in different contexts that email satisfies the statute of frauds). See also Rosenfeld v. Zerneck, 776 N.Y.S.2d 458 (N.Y. Sup. Ct. 2004) (stating that an e-mail reflecting an agreement to sell real property may satisfy the statute of frauds). Williamson v. Delsener, 59 A.D.3d 291(2009).

The holding in Stevens heightens the legal status of informal methods of communication, like email, to the point where they become equivalent to the formally signed and executed writings that were previously necessary to effectively modify a contract. From a legal perspective, this is problematic in a society where informal methods of communication—like emails, instant messages, text messages, tweets, and Facebook messages—are the preferred mode of communication. Accordingly, both businesses and individuals no longer have a solid line of demarcation to easily distinguish between casual conversation and binding agreement. The proliferation of this type of ambiguity and uncertainty both hinders the practice of contracting and creates confusion in the courts.

103 See generally Naldi v. Grunberg, 80 A.D.3d 1, 6 (2010) (stating that email is omnipresent in both business and personal affairs).

104 Paul J. Morrow, Cyberlaw: The Unconscionability / Unenforceability of Contracts (Shrink-Wrap, Clickwrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight, 11 U. Pitt. J. Tech. L. Pol'y 7 (2011) (stating generally that “the perspectives on the status and extenuations of the law” need to be analyzed because “the courts, legislatures, and society continue to struggle with the
appreciates these types of electronic communications because of their informal and instantaneous nature, that very same informality may unwittingly bind parties to obligations they never intended to make. Moreover, as the cases suggest, courts are choosing to enforce these obligations and their accompanying legal consequences without hesitating over the inherent informality and fleeting nature of such communications.

consistency of the common law applied to Internet transactions.”).


B. The Difference Between Email and Instant Message

Although CX Digital Media involved instant messages and Stevens involved email messages, both cases nevertheless upheld the electronic modifications as valid. While email and instant message are both instantaneous forms of electronic communication, arguably, in the corporate setting, the use of email\(^\text{107}\) is more conventional than the use of instant message. Also, because email is often seen as the equivalent of a letter,\(^\text{108}\) it has a slightly higher degree of formality than does an instant message.

Under that premise, the decision in Stevens to uphold modification via email is justifiable because the email is deemed to be a formal, signed writing in accordance with the terms of the NOM clause. The fact that the writing was in electronic form, namely email, made no difference to the court


\(^{108}\) Reno v. Am. Civil Liberties Union, 521 U.S. 844, 851 (1997) (the United States Supreme Court describes e-mail as a message sent to another individual or group that is “akin to a note or letter.”).
because nowadays email is a ubiquitous and acceptable method of communication between business associates. Accordingly, contract law, both by statute\textsuperscript{109} and in case law,\textsuperscript{110} seems to be heading toward the extreme where all forms of electronic communications,

\textsuperscript{109} See 15 U.S.C.A. § 7001 (West, 2000) ("A contract, or other record relating to such transactions may not be denied legal effect, validity, or enforceability solely because it is in electronic form."). See also Holly K. Towle, Dealing With Contract Formation and Amendment by E-mails, \textit{743 Pract. L. Inst./Pat.} 75, 79 (2003) (stating that today, writing requirements largely can be met electronically “under federal signature law, state signatures statutes, or the common law, depending upon the transaction.").

\textsuperscript{110} Courts in several states have held that electronic records can satisfy writing requirements. See In re RealNetworks, Inc., Privacy Litig., No. 00C1366, 2000 WL 631341 at *2-4 (N.D. Ill. May 8, 2000) (an electronic record met a writing requirement because the Court was “unconvinced that the plain and ordinary meaning of “writing” or “written” necessarily cannot include any electronic writings . . . .”).
regardless of their informality, qualify as legally enforceable instruments.\textsuperscript{111} Hypothetically, if the conversation in the Stevens fact pattern had taken place over instant message instead of email, then the court should not have found a valid modification for several reasons. First, instant messages are inherently more casual than email and often do not qualify as “signed writings” for purposes of contract law. Courts have deemed emails to be “signed writings” only when parties deliberately type their name at the bottom of each email, indicating a signature.\textsuperscript{112} By

\textsuperscript{111} See generally Woodrow Hartzog, Website Design As Contract, 60 Am. U. L. Rev. 1635, 1638 (2011) (articulating an even more abstract notion that, in some contexts, the design of a web site should be sufficient to bind its users to enforceable promises.).

\textsuperscript{112} Shattuck v. Klotzbach, 011109A, 2001 WL 1839720 at *3 (Mass. Super. Dec. 11, 2001) (holding that negotiations by email were sufficient to satisfy the relevant Statute of Frauds because the email contained a signature, “the typed name at the end of an e-mail is more indicative of a party's intent to authenticate . . . [because] the sender of an e-mail types and sends the message on his own accord and types his own name as he so chooses.”). The case also held that a spouse’s knowledge about the emails
contrast, there is no such equivalent in instant messages because users do not sign off on each message. Instead, each user is identified by his or her username, just as emails are generally identified by one’s email address. That extra step of typing a name at the end of an email highlights the writers’ intent to authenticate the email. Therefore, it makes sense to hold that writer accountable for a binding modification. The lack of an equivalent mechanism in instant messages makes them much less authoritative.

Second, Stevens lacked the overarching reliance factor that made the outcome in CX Digital Media justifiable. In pursuit of fairness and equity, contract law places great importance on the concept of reliance113 because it is indicative of the parties’

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was sufficient to satisfy a requirement that the contract be signed by both spouses, even if the spouse did not type his or her name at the end of the email. Id. This highlights the great potential for abuse because email is an especially troubling medium to justify the assumption that since one spouse signs off on an email it means the other spouse knows about it and impliedly signs off as well.

113 Restatement (Second) of Contracts § 89 (1981) (stating that modification of an ongoing contract becomes binding if justice
true state of mind. Again, in CX Digital Media, the court repeatedly emphasized that the most pressing reason to find a valid modification was because CX relied on the instant message conversation and materially changed its position based on that.\textsuperscript{114} CX’s reliance and the change in behavior of both parties after the conversation trumped all other factors and allowed the court to skirt the issue of the NOM clause and the informality of the instant messages.

Arguably, if there were no reliance factor in CX Digital Media, the court would have been very hard pressed to justify its holding based on the instant messages alone. They were informal, unsigned, and essentially the equivalent of chit-chat. Therefore, in CX Digital Media, it was not so much the medium of modification that mattered. Instead, it was the behavior of the parties. By contrast, in Stevens, since there was no reliance issue, the mode of modification became dispositive. In the eyes of the law, signed emails were sufficient to bind the parties to

their modification; however, instant messages would not pass muster here.

The two cases highlight how fact-specific each inquiry must be to achieve an evenhanded result. One can hope that even with their overflowing dockets, courts take the time to perform a nuanced factual analysis when considering informal, electronic communications in the context of contract disputes.

IV. Proposal of Possible Alternatives

The outcomes in CX Digital Media and Stevens indicate that generic NOM clauses, stating that all modifications must be made in a signed writing, are no longer sufficient to guard against unintended contract modification via informal communication. Various solutions are available to prevent such ad hoc modifications.

The first possible solution is to treat all electronic communications between parties as “signed writings” for purposes of contract law.115 Under this method any type of communication, including text message, email, or instant message, will qualify as a writing as long as it has some moniker identifying the party. This approach holds parties accountable to the statements

115 Goldman, supra note 106 (stating that the “default rules should be that all of these electronically-mediated communications qualify as writings.”).
that they make and eliminates confusion in the courts because it is a clear-cut rule without much flexibility. Also, all types of electronic communications will be deemed equal under this rule and parties will no longer have to debate over which mode is formal enough—modification by Tweet will be just as valid as modification by email. Furthermore, contracting parties will have a reliable, black-letter rule around which to formulate their business practices.

However, this solution is not feasible because of its rigidity. Contracting parties will be afraid to discuss anything electronically for fear that their words may later be used against them. The creation of such a communication barrier is an unacceptable consequence. Moreover, contracts themselves will no longer be seen as binding documents because of such susceptibility to change, and NOM clauses will effectively disappear. This approach is just not a realistic one today because business partners are often located thousands of miles apart from one another, and because most of society is dependent on emails and text messages as their primary means of communication.

The second possible solution is to apply different laws to different types of electronic communications. Emails and instant messages differ in their degree of formality and rate of acceptance within the business community. Therefore, courts may
uphold emails as valid “signed writings” for purposes of contract law because they are a formal and socially acceptable means through which to conduct business negotiations. However, instant messages, text messages, and other similar mediums are much more casual and do not enjoy the same level of acceptance within the business world. Since the two mediums are so different, the law may not be applied in the same way to both of them.

However, this solution is also likely to fail because it creates even more confusion in contract law. In terms of technology, we do not know where society will be even five years from now, therefore, a legal rule based on the type of technological medium at issue will not keep up with the rapidly changing pace of technology. Such a narrowly defined approach quickly outlives its usefulness because all of the possible

\[^{116}\text{See Towle, supra note 109, at 78 ("One byproduct of changes in law that have generally created equivalency between paper formalities and electronics is that e-mail has become a context in which enforceable contracts clearly can be formed. The end result may be at odds with what many regard as the informal or casual nature of the e-mail medium."); Kidd & Daughtrey, supra note 14, at 223 (stating that email is a “basic process used to form agreements."}].\]
types of electronic communications coming under its purview have not even been invented yet.

The third possible solution to prevent inadvertent contract modification is to denote the acceptable methods of modification more clearly in the original contract.117 Since a generic NOM clause requiring a “signed writing” is not sufficient to prevent modification, the parties must state with specificity the exclusive means of modification that they find acceptable. For example, the contract may state that modification by email is expressly disallowed or that all “signed writings” must include

117 Towle, supra note 109, at 78, 92 (“Parties may contract that amendment . . . of an existing contract may only be done in a writing that does not include e-mails (or other specified electronic formats) . . . if [parties] mean to include electronic records, they should specify which . . . Thus, a clause might provide that it cannot be amended “except in a signed, nonelectronic record except for [insert desired electronics].””). Moreover, some authors suggest using “no email modification” clauses in their contracts along with other drafting techniques to prevent e-mail modification. Stephanie Holmes, Comment, Stevens v. Publicis: The Rise of “No E-mail Modification” Clauses?, 6 Wash. J. L. Tech. & Arts 67, 79 (2010).
handwritten signatures, not electronic ones.\textsuperscript{118} Under this approach the parties can tailor the contract to fit their communication practices. In turn, neither party will later be caught off guard by an unanticipated modification.

The fourth possible solution is to include disclaimers in emails, text messages, and other electronic communications stating that all such communications are simply negotiations and do not manifest any intent to contract or to modify an existing contract.\textsuperscript{119} The use of this type of disclaimer\textsuperscript{120} gives unequivocal notice to both parties that their communications are not legally binding. However, the wrinkle in this approach is that cumbersome disclaimers may defeat the purpose of using

\textsuperscript{118} Holmes, supra note 117, at 79.

\textsuperscript{119} Towle, supra note 109, at 78 (suggesting that parties can include notice in their emails stating that they will not contract by email).

\textsuperscript{120} Such a disclaimer would look something like the following:

“NOTICE: The sender of this e-mail is not authorized and has no intent to make offers or contracts [or amendments to contracts] by e-mail unless the phrase “I hereby so contract and sign” appears above the sender’s name in the e-mail. No e-mail offers or contracts are binding upon sender or its principals unless that phrase appears.” Id. at 94 (emphasis omitted).
instantaneous electronic communications in the first place, that purpose being their efficiency and informality.

Although feasible, the third and fourth solutions discussed above are privy to the same loophole that is often used to invalidate NOM clauses—namely, reliance and waiver. Therefore, contracting parties must act consistently with such disclaimers and contractual provisions or else they run the risk of waiving away these safeguards.\textsuperscript{121}

The last possible solution is a judicial one that is effectuated after the fact, if none of the other methods proves failsafe. When faced with issues of contract modification using informal methods of communication, courts should engage in a nuanced, fact-specific inquiry on a case-by-case basis. That is the only guarantee for a fair and equitable result. Thus, because there is so much room for ambiguity, courts must not be stringent in their application of the law. A degree of flexibility is required in these cases because technology (and society’s appropriation of that technology) changes rapidly from day to day and there is no other way for contract law to keep at equal pace with those changes. Judicial flexibility is an important factor in rendering a fair decision because, for example, as discussed above, if the \textit{Stevens} and \textit{CX Digital Media} \textsuperscript{121} \textit{Id.} at 78, 93-94, 96-97. 
fact patters were reversed then the cases should have come out the other way around based on the type of electronic communication at issue. However, by taking into consideration the unique circumstances of the parties in each case, their different backgrounds, business arrangements, and relationships, the courts were able to appropriately tailor their decisions to each case within the confines of the law. As technology advances and new forms of communication take shape, the cases will become even more complex and require nuanced judicial analysis.

V. Conclusion

The technological explosion of communications in the past few years has created a society that is unquestionably dependent on email, text messages, instant messages, tweets and the like, as the way to keep in touch with one another. Both personally and professionally, individuals take advantage of these mediums to convey communications instantaneously and to stay in the loop. However, even with all of their advantages, these new mediums create novel questions in the realm of contract law. As modern businesses shift toward utilizing electronic communications to replace other forms almost exclusively, we must grapple with how and where such communications fit within contract law.

The ideal solution encompasses a combination of efforts both by contracting parties proactively and by the courts post
hoc. Contracting parties must take appropriate precautions to delineate in their original contracts the detailed and specific methods of modification they wish to recognize. Insertions of generic NOM clauses are no longer enough to guard against casual modifications. Thus, severe meticulousness up front will save everyone substantial headache and expense down the line. Moreover, parties should use disclaimers in electronic communications to make it clear that they have no intention to contract or amend existing agreements via those communications. Such disclaimers must be supported by the parties’ behavior or else reliance may rear its head and effectively nullify these efforts. In such cases, the burden then shifts to the courts to conduct a nuanced and fact-specific analysis on a case-by-case basis to reach an equitable result in tune with the times.