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Subsequent Oral Agreements and Conduct Can Modify a Contract, Despite Explicit Contractual Clause to the Contrary

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Written contracts may be modified by subsequent oral agreements or conduct, even when they include clauses purporting to prohibit such modifications. A recent case in Florida, *MHW and Bacardi U.S.A. v. Gallo Wine Distributors*, serves as a dramatic reminder that subsequent party conduct may even revive an earlier agreement that was expressly superseded by such a contractual clause.

MHW and Bacardi U.S.A. involved a liquor distribution arrangement between Bacardi U.S.A. and its New York distributor, Premier Wines & Spirits. In 1998, Premier agreed to invest approximately $5.1 million in Bacardi over a six-year period to help Bacardi finance the purchase of five additional brands. According to Premier, Bacardi orally promised in exchange to continue using Premier as its New York distributor for ten years.

Premier then entered into a written contract in 1999 with MHW, Bacardi's wholesaler for New York sales. This 1999 contract contained a commonly-occurring boilerplate clause, which read as follows:

> This agreement supersedes any and all oral and written arrangements or agreements and represents the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and there are no promises, agreements, conditions, undertakings, warranties, or representations, whether written or oral, express or implied, between the parties other than as set forth herein. This agreement cannot be amended, supplemented, or modified except by an instrument in writing signed by the parties and no subsequent course of dealing or conduct of the parties shall result in a modification or extension of this Agreement . . .

The 1999 agreement also contained a termination clause, allowing either party to trigger termination without cause, upon giving 90 days prior written notice.

In December 2001, MHW sent a letter to Premier, expressing its desire to terminate the 1999 distribution agreement. Premier responded by pointing to its commitment from Bacardi under their 1998 oral agreement that Premier believed ensured a 10-year distribution arrangement.

A Florida trial court sided with Premier and enjoined Bacardi/MHW from terminating Premier, pending the completion of a trial on the merits. As a preliminary matter, the court noted the "clearly established" law that a clause such as the one quoted above, often referred to as a "merger" or "integration" clause, does not necessarily immunize a written contract from later non-written modifications. The court then turned to the parties' ongoing relationship and noted that Bacardi had accepted investment payments from Premier pursuant to the 1998 oral investment agreement *after* the execution of the 1999 agreement. Based on these subsequent actions, the court found that there was sufficient evidence to suggest that the 1998 oral investment agreement was either a surviving independent agreement or a modification of the 1999 distribution agreement, despite the merger clause in the 1999 agreement.

Florida is not the only state to conclude that contracts can be modified orally or by subsequent actions of the parties, notwithstanding statements to the contrary in merger clauses contained in those contracts. The First Circuit, for example, has looked beyond the plain text of a merger clause to the actual intent of the parties in deciding whether a contract constitutes the entire agreement between them. *Brennan v. Carvel Corp.*, 929 F.2D 801 (1st Cir. 1991). Similarly, Illinois law does not require the enforcement of a contract provision that purports to preclude subsequent oral modifications. *Consolidated Bearings Co. v. Ehret-Krohn Corp.*, 913 F.2d 1224 (7th Cir. 1990). In the words of the D.C. Circuit, "While the presence of an integration clause suggests that the agreement is fully integrated, it does not by itself dictate that conclusion." *Bowden v. United States*,106 F.3d 433, 440 (D.C. Cir. 1997).

The *MHW and Bacardi* case demonstrates that subsequent oral agreements and subsequent actions may not only create new obligations, but may also revive prior obligations that were purportedly extinguished. Even a clause in the 1999 agreement that explicitly prohibited modification through subsequent conduct did not prevent such a result. Although certainly not sounding the death knell of merger and integration clauses, the *MHW and Bacardi* case should serve as a powerful reminder that such clauses do not necessarily prevent oral modifications or conduct from amending written contracts which contain such clauses.

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