Clarifying the Boundary Between the Parol Evidence Rule and the Rules Governing Subsequent Oral Modifications

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I. INTRODUCTION

What rules govern whether an oral agreement that purports to modify a written contract is legally effective? The usual understanding is that if the oral agreement was entered into before the execution of the written contract, its legal effect is governed by the parol evidence rule[1] and general contract formation rules.[2] If the oral agreement was entered into after the execution of the written contract, the parol evidence rule limitations are inapplicable and the legal effect of the agreement is governed by the rules relating to subsequent oral modifications.[3]

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1. There is some debate among commentators whether the parol evidence rule applies only to prior oral agreements, or whether it applies also to oral agreements reached contemporaneously with the execution of a written contract. JOSEPH PERILLO, CALAMARI AND PERILLO ON CONTRACTS 125-26 (5th ed. 2003). Under the latter understanding of the parol evidence rule, once it has been established that an oral promise has resulted in a contractual agreement under basic contract law principles, and that this agreement was entered into prior to or contemporaneous with the execution of a written contract, the rule's limitations would then be applied to determine whether that oral agreement became part of the written contract, or was enforceable as a separate collateral agreement, or at least had explanatory significance for the written contract, or was instead altogether precluded by the written contract.

There are numerous authorities that discuss the complexities of the parol evidence rule jurisprudence. *See, e.g.*, E. ALLAN FARNSWORTH, CONTRACTS 413-35 (4th ed. 2004). I will not discuss in this brief essay whether the parol evidence rule should apply to contemporaneous oral agreements as well as to prior agreements, or any of the many other issues raised in applying the parol evidence rule to determine the legal effect of an oral agreement on a subsequent or contemporaneous written contract. I will focus solely on the question of how various oral agreements should be classified under this conventional before-or-after categorization framework.

2. For an oral promise to result in a contractual agreement that would potentially have legal significance for a subsequent written contract, it would also have to be embodied in an offer which was accepted, or be enforceable under foreseeable reliance estoppel principles or other equitable principles that may be applicable, or else be enforceable by statute.

3. *See, e.g.*, ARTHUR LINTON CORBIN, 6 CORBIN ON CONTRACTS 84-85 (interim ed. 1960) ("Any contract . . . can be discharged or modified by subsequent agreement. . . . No contract . . . can be varied, contradicted or discharged by an antecedent agreement."); FARNSWORTH, *supra* note 1, at 435-36 ("the parol evidence rule applies only to precontractual negotiations, it does not bar evidence of subsequent negotiations to show modification of the contract"); PERRILO, *supra* note 1, at 125 ("[t]he parol evidence rule applies to terms agreed upon prior to, or at the same time as, the integration . . . [however,] [t]he rule does not apply to subsequent agreements") (emphasis omitted); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 435 (4th ed. 2001) ("[t]he parol evidence rule was designed to preclude evidence of prior agreements[;] . . . the parol evidence rule has no application to subsequent agreements or modifications")

This different treatment of oral agreements based upon their timing can have significant legal consequences. Application of the parol evidence rule to oral agreements often precludes those agreements from being used to alter or even supplement the terms of written contracts.[4] The rules applicable to subsequent oral modifications, however, will be preclusive only under much more limited circumstances.[5] Therefore, it becomes quite important to ascertain whether an oral agreement was formed before or after the written contract that it purports to modify as a threshold step in assessing its legal effect.

Numerous courts and academic commentators have commented on the significance of the before-or-after classification of oral agreements.[6] They have, however, consistently done so in a limited and conclusory fashion that fails to address several interesting possibilities which do not fit so neatly into

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(emphasis and footnotes omitted); SAMUEL WILLISTON, 11 A TREATISE ON THE LAW OF CONTRACTS 557-58 (4th ed. 1999) ("[t]he parol evidence rule is subject to limitations inherent in its proper statement, such as . . . that it only applies to prior or contemporaneous agreements, not subsequent modifications"). There are numerous cases that support this understanding. *See, e.g.*, Thomas v. Garrett, 456 S.E.2d 573, 574-75 (Ga. 1995); S. Atl. Prod. Credit Ass'n v. Gibbs, 361 S.E.2d 167, 169 (Ga. 1987); Mich. Nat'l Bank of Detroit v. Holland-Dozier-Holland Sound Studios, 250 N.W.2d 532, 533 (Mich. Ct. App. 1976); Connell v. Diamond T. Truck Co., 188 A. 463, 464 (N.H. 1936); Wilson v. Landstrom, 315 S.E.2d 130, 134 (S.C. App. 1984); Hofeldt v. Mehling, 658 N.W.2d 783, 787 (S.D. 2003). The rules applicable to determine whether subsequent oral modifications of a contract are effective would be, first, the general principles applicable to contract formation, and second, any special requirements that may be imposed either by any applicable statute of frauds or by any applicable rules governing the enforceability of contractual no-oral-modification clauses if such a clause is present in the written contract being modified.

4. The general principle is that if the written contract is regarded as a complete integration—a complete and final statement of the terms of the contract—then it cannot be either contradicted or supplemented by a prior or contemporaneous oral agreement, and such an oral agreement can be used only to explain the terms of the complete integration, or to address formation or enforceability issues, or to prove the existence of a separate, collateral agreement. If, however, the written contract is regarded as only being a partial integration—a final statement of the terms that it addresses—then it may also be supplemented by a prior or contemporaneous oral agreement. Written contracts often include a merger clause to the effect that the parties intend for the contract to be regarded as a complete integration, and courts generally give effect to such provisions. *See generally* FARNSWORTH, *supra* note 1, at 414-35.

5. The parol evidence rule limitations do not apply to subsequent modifications made after the execution of the initial contract. Sometimes contracts include no-oral-modification clauses that purport to preclude such subsequent oral modifications from having legal effect unless they are embodied in mutually signed writings. *Id.* at 436. Courts generally will not enforce such clauses. *Id.* at 436-37. However, this statement must be qualified in that Uniform Commercial Code section 2-209(2) provides that such clauses are enforceable for sale of goods transactions, subject to the waiver provisions of sections 2-209(4) and (5). U.C.C. § 2-209 (2000). This statement is also subject to the additional qualification that many courts will require a showing of promisee reliance upon the oral agreement to override a no-oral-modification clause. FARNSWORTH, *supra* note 1, at 437.

6. *See Thomas*, 456 S.E.2d at 574-75; *S. Atl. Prod. Credit Ass'n*, 361 S.E.2d at 169; *Mich. Nat'l Bank of Detroit*, 250 N.W.2d at 533; *Connell*, 188 A. at 464; *Wilson*, 315 S.E.2d at 134; *Hofeldt*, 658 N.W.2d at 787.

this simple categorization.[7] In this short essay, I will describe several overlooked situations which present some classification difficulties for this traditional framework of analysis. I will also offer my thoughts on whether any doctrinal changes in contract formation timing rules, or any particular interpretive stances, are called for to address these situations.

Let me briefly summarize my conclusions. With regard to the first of these situations—which involve what I will label as oral "straddle" agreements—I conclude that no change should be made in the applicable contract formation timing rules. While a minor change in timing rules that would definitively impose the parol evidence rule upon oral straddle agreements would initially appear desirable, its effect could be easily evaded by an unscrupulous person. The only effective means of preventing such evasion would be through a more substantial change in the law. Not only would the timing rules need to be changed, but more sweeping enforceability of "no-oral-modification" clauses would need to be endorsed, which would raise broader issues that are outside the scope of this brief essay.

In each of the three other problematic situations that I will discuss, I conclude that the current contract formation timing rules are adequate for policing attempts at improperly evading the parol evidence rule limitations. My overall conclusion is therefore that no changes in those particular legal rules are called for. However, in one of these situations—where an alleged oral agreement is made after the execution of a written contract, but before the subsequent execution of a written amendment to that contract—I conclude that the courts should embrace a stance that construes any ambiguous reaffirmation of unmodified terms contained in that written amendment in favor of subjecting the alleged oral agreement to the parol evidence rule limitations.

In Part II of this essay, I will discuss each of these four situations in more detail and offer my recommendations. Part III will present a brief overall conclusion.

II. SEVERAL INTERESTING SCENARIOS

I would like to discuss four possible situations that raise difficult questions of whether oral agreements should be regarded as pre-written

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7. *See Thomas*, 456 S.E.2d at 574-75; *S. Atl. Prod. Credit Ass'n*, 361 S.E.2d at 169; *Mich. Nat'l Bank of Detroit*, 250 N.W.2d at 533; *Connell*, 188 A. at 464; *Wilson*, 315 S.E.2d at 134; *Hofeldt*, 658 N.W.2d at 787. It is understandable that courts would not be inclined to include extraneous explanatory dicta in their opinions in the many ordinary controversies that raise both parol evidence rule and subsequent oral modification issues but whose facts do not raise any of these interesting possibilities. However, I have found it somewhat surprising that none of the many parol evidence rule or subsequent oral modification cases that I reviewed in writing this essay squarely raised any of these seemingly plausible possibilities, and that none of the prior commentators appear to have explored any of these possibilities.

contract agreements, rather than as subsequent oral modifications, for parol evidence rule purposes. The first situation is where an oral promise is made *before* the execution of a written contract—but where the acceptance of the offer containing that promise, or the reasonable and forseeable reliance upon that promise which would make it enforceable under promissory estoppel principles even in the absence of an acceptance of an offer[8]—takes place *after* the execution of the written contract. In other words, this is the situation that arises when the oral promise and the subsequent conduct by the promisee that forms a contract involving that oral promise "straddle" the time of execution of the written contract.

The second situation is where an oral offer is both made and orally accepted before the execution of a written contract, and where the offer is then reasonably and foreseeably relied upon after the execution of the written contract. This situation raises the possibility that the promisee may wish to choose which of his two acts—the oral acceptance or the subsequent post-written contract reliance—will be regarded as the relevant contract-forming event for the purpose of parol evidence rule application. If he is permitted this choice, he will undoubtedly choose the post-written contract reliance as the act of formation in an attempt to have the oral agreement characterized as a subsequent oral modification of the contract. Such a strategic choice would avoid the preclusive limitations of the parol evidence rule.

The third situation is closely analogous to the one just described, and occurs when an oral offer is reasonably and foreseeably relied upon prior to the execution of a written contract, and the promisee then orally accepts the offer after the execution of the written contract. Again, if the promisee is allowed to choose between his two acts, reliance and then acceptance, as to which will be regarded as the relevant contract-forming event for parol evidence rule purposes, he will most likely choose the post-written contract acceptance in order to have the oral agreement characterized as a subsequent oral modification that is not subject to the parol evidence rule.

The fourth and final situation I will discuss is where an oral agreement is formed (either through oral acceptance of an oral offer or through foreseeable reliance on an oral promise) after the execution of a written contract, but prior to the subsequent execution of a written amendment that does not address the specific terms of the oral agreement and which contains reaffirmation language stating that the terms of the contract which are not modified by that written amendment are to remain in force. This situation raises the question of whether the original written contract or the subsequent written amendment should be regarded as the relevant written contract in relation to the oral agreement for parol evidence rule purposes. If the

8. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

amendment is regarded as the relevant written contract then the further question is raised as to how the reaffirming language of that amendment should be interpreted. I shall now discuss each of these four situations in turn with regard to the applicability of the parol evidence rule to the oral agreement.

A. An Oral Promise and Its Acceptance (or Reliance Upon) that Straddles the Execution of the Written Contract

One interesting scenario is where an oral promise was made *prior* to the execution of the written contract, and then was orally accepted (assuming that the promise was contained in an offer) or relied upon *after* the execution of that contract. This is what I refer to as an oral straddle agreement. We could classify this straddle agreement as a pre-written contract oral agreement that is subject to the parol evidence rule limitations. We could instead classify it as a subsequent oral modification of that contract that is not subject to those limitations. In other words, we must determine whether this oral agreement should be regarded as being made at the time of the promise, or instead at the later time when the promise becomes a contractual agreement either through acceptance of an offer, or through reasonable reliance, for parol evidence rule application purposes.

The proper approach here is not immediately evident. As a matter of general contract law, a contract is not formed until all of its necessary elements exist.[9] A straightforward application of this general principle would classify this oral agreement as a subsequent oral modification that is not subject to the parol evidence rule. However, categorizing an oral agreement in such a way would prevent the alleged promisor from invoking the parol evidence rule in an attempt to avoid engaging in a "he said, she said" type of contest as to whether the alleged oral promise was ever made in the first place. To successfully defend against a false allegation of an oral promise, the alleged promisor must then win this battle, or else attempt to prevail with the argument that the written agreement was an implicit revocation of the alleged oral promise before it was later accepted or relied upon,[10] or that the promisee's alleged reliance was no longer reasonably foreseeable after the written agreement was executed.[11] The main purpose of the parol evidence rule is to allow a party to draft a contract that will minimize the possibility of facing this difficult evidentiary or argumentative burden. That purpose would

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9. "[I]f a party has become contractually bound by a promise, there must have been some moment 'at which the deal was closed,' before which that party was not bound and after which it was." FARNSWORTH, *supra* note 1, at 109.

10. *See supra* notes 3-4 and accompanying text for brief discussion of this possibility.

11. *See id.*

be thwarted by categorizing this scenario involving an alleged pre-written contract oral promise as a subsequent oral modification. This concern suggests that oral agreements technically formed by oral acceptance or reliance upon the promise after the execution of a written contract, but which are based on alleged pre-contractual oral promises, should perhaps be regarded as pre-contractual agreements for parol evidence rule purposes.

I am not aware of the existence of any case law or academic commentary that addresses the determination of the relevant formation date, for parol evidence rule purposes, of oral agreements that straddle the execution of a written contract.[12] I have concluded that an exception to the general contract formation doctrines which would change the relevant date so as to subject such oral straddle agreements to the parol evidence rule is *not* warranted unless it is also accompanied by a policy to more broadly enforce no-oral-modification clauses (the merits of which is a larger topic beyond the scope of this essay).

There are several reasons for my conclusion. One facially plausible argument that can be made in favor of this conclusion is that under oral straddle agreements, the alleged promisor generally would be able to successfully argue that the written contract that was entered into after the alleged oral promise was made was an implied revocation of any offer embodied by the promise. If so, then the offer could not have been accepted after the execution of the written contract. Moreover, any written contract that did not explicitly reaffirm the alleged oral promise could be argued to also render any subsequent reliance on that promise both unreasonable and unforeseeable. Therefore, under existing law the pre-written contract oral promise would rarely, if ever, result in a post-written contract oral modification that was not subject to the parol evidence rule limitations. Consequently, no legal changes are necessary to avoid this possibility.

However, this argument is not quite as compelling as it may first appear. It is true that if the written contract contains a term that specifically contradicts the terms of the alleged oral promise, then it is quite likely that a reviewing court would regard that written contract as an implicit revocation of any offer embodied by that promise so that it could not be accepted, and that any subsequent reliance by the alleged promisee on that oral promise

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12. The several cases cited by one or another of the commentators, *see supra* note 3, each simply restate the conventional wisdom as to the before-or-after classification of oral agreements in the context of facts that fall neatly within one or the other of those two categories, and do not address any of the more problematic classification situations that I discuss in this essay. *See, e.g., Thomas*, 456 S.E.2d at 574-75; *S. Atl. Prod. Credit Ass'n*, 361 S.E.2d at 169; *Mich. Nat'l Bank of Detroit*, 250 N.W.2d at 533; *Connell* 188 A. at 464; *Wilson*, 315 S.E.2d at 134; *Hofeldt*, 658 N.W.2d at 787. I have, somewhat surprisingly, been unable to locate any cases or academic commentary dealing explicitly with the time of formation categorization of oral straddle agreements.

would be unreasonable and unforeseeable. Thus, no subsequent oral modification would be found to exist. However, if the written contract does not address the specific terms of the alleged oral promise, then it is not so clear whether that written contract necessarily would be regarded as an implicit revocation of any offer embodied by that promise. Nor would it be clear whether any subsequent reliance upon that oral promise would be regarded as unreasonable and unforeseeable. In addition, if the oral promise is also alleged to have included a statement that it would not be revoked for a significant period of time, whle this statement would not prohibit the promisor from subsequently revoking such a gratuitous promise it would still make it less likely that a reviewing court would find that a written contract executed within that period of time that did not expressly refer to the prior promise was an implicit revocation of the promise. Reviewing courts would also be less likely to find that any post-written contract reliance on the alleged promise was unforeseeable and unreasonable.

At least some oral promises made prior to the execution of a written contract may therefore be regarded as having survived the execution of that written contract and could provide a basis for a subsequent oral modification through later oral acceptance or reliance that would not be subject to the parol evidence rule limitations. Perhaps a minor doctrinal change is needed to subject such promises to the parol evidence rule limitations. However, there is a second, more powerful argument against adopting an exception to standard contract formation timing doctrines that would close this apparent loophole and prevent such an evasion of the parol evidence rule. My argument is that such an exception is not warranted because it would likely be ineffective at achieving its objective.

Unscrupulous persons who are willing to fraudulently allege oral agreements that would alter written contracts can easily avoid any parol evidence rule constraints that are imposed on oral straddle agreements by simply stating that the oral promise as well as the subsequent oral acceptance or reliance *both* took place *after* the execution of the written contract. This would definitely constitute an alleged subsequent oral modification that is not subject to the parol evidence rule. Such modifications generally are enforceable even if the written contract includes a no-oral-modification clause.[13] Given this obvious possibility, it seems pointless to introduce such a complication into conventional contract formation timing rules as a means of preventing one means of evading the parol evidence rule limitations when another form of evasion already exists. This alternative means of evading the limitations of the parol evidence rule has led me to conclude that an exception to standard contract formation timing doctrines addressing the situation of oral straddle

13. *See supra* note 5 and accompanying text.

agreements is not warranted unless it is accompanied by more expansive judicial enforcement of no-oral-modification clauses, which would raise additional issues not considered here.

B. An Oral Promise That Is Orally Accepted Prior to the Formation of a Written Contract, and Then Relied Upon After that Written Contract Is Formed

This second possibility is that an oral promise that constitutes an offer may be accepted prior to the execution of a written contract and then reasonably relied upon after the execution of the contract. The court must then determine whether this agreement is to be regarded as a pre-written contract oral agreement subject to the parol evidence rule, or whether it is a subsequent oral modification. The court must also determine whether the promisee should be permitted to choose between these different characterizations of the agreement.

In general, when an offeree accepts an offer and then also reasonably and foreseeably relies upon that offer in a fashion that allows him to invoke promissory estoppel principles as an alternative basis for contract formation, had he not first accepted the offer, the offeree rarely advances the promissory estoppel theory of contract formation rather than the classical contract-by-acceptance theory. This is because there are typically no advantages for the promisee to do so even were the choice available. Moreover, invoking promissory estoppel as a theory of contract formation would raise the possibility that the offerree would be limited to reliance damages rather than expectation damages as his measure of recovery.[14] However, if the promisee has the choice of arguing the post-written contract reliance upon the oral promise rather than the pre-written contract acceptance of the oral offer as the relevant act of contract formation, this would result in the parol evidence rule limitations no longer applying to the oral agreement.[15] This situation creates an incentive for the promisee to choose to have his reliance regarded as the relevant contract-forming act if he is permitted to do so.

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14. "The remedy granted for breach [for contracts based on promissory estoppel] may be limited as justice requires." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

15. Such a case would occur unless the courts have adopted the minor contract formation timing rules change that I have described (but not recommended) in connection with the oral straddle agreement scenario discussed above in Part II.A. of the text, stating that the relevant date for parol evidence rule application purposes of the formation of an oral agreement based on a pre-written contract oral promise and subsequent post-written contract reliance should be the date of the promise. This rule change would subject this group of oral agreements to the parol evidence rule regardless of which of the promisee's acts is regarded as the relevant act of contract formation.

The possibility of the promisee evading the limitations of the parol evidence rule in this situation, however, is already adequately precluded by general principles of contract formation law. If an offeree completes two distinct acts in sequence—each one alone being sufficient to form a contract—the contract would then be regarded as formed by the first act, and the second act would be considered redundant and would have no legal consequences. The promisee does not have the right to retract the initial act of contract formation in order to put himself in a position to later reform the contract by similar or different means. Therefore, this second situation does not present any opportunities for evasion of the parol evidence rule limitations that would call for the implementation of new legal doctrine.

C. An Oral Promise that Is Reasonably and Foreseeably Relied Upon Prior to the Formation of a Written Contract, and Then the Offer which Contains that Promise Is Orally Accepted After that Written Contract Is Formed

A possibility quite similar to the one just discussed would be where an oral promise that also constitutes an offer is reasonably and foreseeably relied upon, forming an oral agreement under promissory estoppel principles, where both the promise and the reliance occur prior to the execution of a written contract, and where the offer is then orally accepted by the promisee after the execution of the written contract. Once again, if the promisee is free to choose which of his actions are to be regarded as the contract-forming event, he has an incentive to choose the latter act of acceptance in an attempt to have the oral agreement characterized as a subsequent oral modification so as to avoid the limitations of the parol evidence rule.[16]

However, this possibility is also precluded by general principles of contract law under which the oral agreement would be formed by the initial act of reliance, making the later acceptance redundant and of no legal consequence. Absent the promisor first agreeing to such a change, this situation would also be regarded as a pre-written contract oral agreement that is subject to the parol evidence rule. There are no opportunities here presented for evasion of the parol evidence rule limitations that would call for new legal doctrines.

16. This approach for evading the parol evidence rule would again be precluded if the courts adopt the minor contract formation timing rules change that I have described (but not recommended) in connection with the straddle scenario discussed above in Part II.A. of the text.

D. A Subsequent Oral Modification of a Written Contract Followed by a Written Amendment to that Contract

Finally, we must consider what would happen if *both* an oral offer to modify a written contract and the oral acceptance of the offer (or the foreseeable reliance upon the promise that would substitute for acceptance) take place *after* the execution of the written contract, but *prior* to the execution of a subsequent written amendment that does not address the specific terms of the oral agreement, and which contains reaffirmation language to the effect that those terms of the contract that are not modified by the written amendment remain in force.[17] In such a situation, the court would have to consider whether the parol evidence rule would then apply to that oral agreement.

First, it is clear that under such circumstances the oral agreement is not subject to the parol evidence rule on account of the execution of the original written contract, since that oral agreement is without question a subsequent oral modification with regard to that written contract. The only real question posed is whether the subsequent written amendment, rather than the original written contract, should now be regarded as the operative written contract for parol evidence rule purposes. If so, this would then make the oral agreement a pre-contractual agreement. As a pre-contractual agreement, courts would then have to determine whether the new written contract should be interpreted so that the oral agreement is subject to the parol evidence rule limitations with regard to the question of its inclusion into that new written contract.

As to the first of these questions, it is clear that a written contractual amendment which states that contract terms which are not modified are considered reaffirmed should now be regarded as the new final written agreement for parol evidence rule purposes. Under these circumstances, the prior oral agreement would clearly be subject to the parol evidence rule, except to the extent to which the amendment's reaffirmation of the contractual terms that are not modified is interpreted to include the terms of the prior oral agreement as well as the terms of the prior written agreement. If that written amendment is interpreted as reaffirming the effectiveness of the oral agreement as well as the terms of the original written contract, then the oral agreement in question would be incorporated by reference as part of the new contract rather than being a prior oral agreement whose incorporation into the

17. Typical language that is included in such written amendments is an "Entire Amendment" clause, which states something along the lines of: "Except as provided herein in this amendment, this amendment shall effect no further alteration, modification, amendment or change in the agreement and the agreement shall remain in full force and effect." Such language leaves it unclear whether the "agreement" there referred to includes only the terms of the initial written contract, or also includes the terms of subsequent oral modifications.

contract is not yet established and whose legal effect would depend upon the outcome of a subsequent parol evidence rule inquiry.

This interpretive question is difficult to resolve. In some instances, the reaffirmation of unamended contractual terms contained in the written amendment may be explicitly limited to those terms contained in the original written contract. Where this is the case, this would clearly subject the prior oral agreement to parol evidence rule limitations and an inquiry into whether it had been thereby precluded. In other instances, the reaffirmation may explicitly incorporate into the contract the terms of an oral agreement reached after the original written contract was executed, thus exempting it from parol evidence rule review and including it in the new contract. In many if not most instances, however, the written amendment's reaffirmation clause is likely to only reaffirm the unmodified terms of the "agreement" or the "contract" in summary fashion and leave it unclear as to whether the intent of the clause is to reaffirm only the unmodified original written contract terms, or also to reaffirm any subsequent oral modifications of that original contract as well. In such cases of ambiguity, a more exhaustive interpretive effort by the court will be required.

The proper framework for conducting this interpretive effort is not entirely clear. One prima facie reasonable approach suggested by standard principles of contract interpretation could be based upon the following logic: Presumably, when parties enter into written amendments of contracts, they are well aware of any subsequent oral modifications to the original contract terms. Therefore, absent any extrinsic evidence to the contrary, it would appear to be reasonable for a court to interpret any reaffirmation clause that declares generally that the "unmodified terms of our agreement shall have continuing force" to implicitly incorporate any subsequent oral modifications of the original contract. This then obviates the need for a parol evidence rule assessment of the legal effect of those modifications. Only where the reaffirmation clause is explicitly limited in some manner to the "unmodified terms of the initial written contract," or where other extrinsic evidence suggests such an intent, would it be appropriate to subject alleged oral modification of this original agreement to the parol evidence rule.

The difficulty with this approach, however, is that while it seems to adequately address the situations where such an intervening oral agreement was actually entered into, it overlooks the possibility that a person may falsely allege that a subsequent oral modification of the original written contract was made prior to a written contractual amendment. That person could then argue that the written amendment at issue reaffirmed "all of the terms of the agreement not here modified" and evidenced an intent by the parties to incorporate by reference the terms of the alleged oral agreement. Such broad reaffirmation language, however, may have been selected in light of the fact that there had been no post-contractual oral modification. In order to prevent such false

allegations, courts would need to require written amendments to specifically reference and reaffirm any prior oral agreements to modify the original written contracts in order to have those oral agreements be included in the final contract without being subjected to the parol evidence rule.

I favor that courts adopt the latter approach that purposefully construes ambiguous reaffirmation clauses in written contractual agreements against the inclusion of intervening oral agreements into the contract. This appears to me to be necessary to protect the integrity of written contractual modifications against false allegations of intervening oral agreements.

III. CONCLUSION

The conventional before-or-after classification of alleged oral modification of written contracts for the purpose of determining whether those alleged modifications are subject to the limitations imposed by the parol evidence rule leads to some conceptual difficulties that have not been adequately addressed by either the courts or by academic commentators.[18] In several possible situations that I have discussed, oral agreements are not so easily categorized as to their time of formation, especially if one views conventional contract formation timing rules being subject to modest alteration in light of the objectives that the parol evidence rule limitations are intended to achieve. In particular, under oral straddle agreements, an oral promise is made prior to the execution of a written contract, and survives the execution of the contract, and then an oral contract is formed after the execution of the written contract either by acceptance of an offer embodied in that promise or by foreseeable reliance upon that promise. In such a scenario, it becomes unclear whether the parol evidence rule should apply to this oral agreement.

A conventional application of contract formation principles will lead to such an oral straddle agreement being regarded as a subsequent oral modification of the written contract that is then not subject to the parol evidence rule. This arguably is an undesirable result that creates the opportunity for persons who are willing to falsely allege pre-written contract oral promises to avoid the preclusive effects of the parol evidence rule by also alleging post-contractual oral acceptance or reliance. This tactic then enables such persons to subject the alleged promisor to the substantial difficulty of disproving these allegations. Such an injustice undercuts the main purpose of the parol evidence rule, and suggests that a small modification of the contract formation timing rules is called for in order to address this situation.

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18. *See Thomas*, 456 S.E.2d at 574-75; *S. Atl. Prod. Credit Ass'n*, 361 S.E.2d at 169; *Mich. Nat'l Bank of Detroit*, 250 N.W.2d at 533; *Connell*, 188 A. at 464; *Wilson*, 315 S.E.2d at 134; *Hofeldt*, 658 N.W.2d at 787.

However, even if an exception was made to standard contract formation timing doctrines so as to regard oral straddle agreements as being pre-written contract agreements that are subject to the parol evidence rule, this alone would not be sufficient to prevent evasion of the parol evidence rule given that persons could avoid the new constraint simply by falsely alleging that the oral promise as well as the subsequent oral acceptance or reliance *both* took place after the execution of the written contract. I therefore recommend that courts *not* attempt to address this loophole by creating an exception to general contract formation timing doctrines that would permit them to regard alleged oral agreements, whose terms straddle the execution of a written contract, as being pre-written contract agreements for the purpose of applying the parol evidence rule limitations. I would support such an exception only if that exception was also accompanied by greater judicial willingness to enforce no-oral-modification clauses so as to also preclude this other means of evasion of the parol evidence rule.

I have also briefly considered three other possible situations where the proper classification of an oral agreement in the conventional before-or-after analytical framework is not immediately evident. For the first two situations, standard contract formation or interpretation principles appear to be fully adequate for circumscribing attempts to evade the parol evidence rule, and therefore no changes in existing legal doctrines are necessary. However, the final situation that I have discussed—where a written contractual amendment is made to a prior written contract when an alleged oral agreement was also entered into after the execution of the original written contract but before the execution of the written amendment—has led me to conclude that courts should interpret any reaffirmation of unmodified contractual terms language that is contained in the written amendment in order so as to subject the alleged oral agreement to the parol evidence rule with regard to that written amendment. The only situation in which I would not advocate this treatment is where the language of that written amendment unambiguously evidences the intent to incorporate the oral agreement into the contract.

Overall, my conclusion is that prior cases and commentary articulating the simple before-or-after classification of oral agreements for purposes of application of the parol evidence rule have not addressed several possible plausible situations that do not fit so neatly into that categorization framework. A closer consideration of those possibilities leads to the conclusion that no changes are called for in the conventional contract formation timing rules currently applicable to those situations, unless such changes are accompanied by broader judicial enforcement of no-oral-modification clauses. However, in circumstances involving written contractual amendments to prior written contracts, a purposeful interpretation of ambiguous contractual language that would favor subjecting intervening oral agreements to the limitations of the parol evidence rule is warranted.