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## Side Letters, Incorporation by Reference and Construction of Contractual Relationships Memorialized in Multiple Writings

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SIDE LETTERS, INCORPORATION BY REFERENCE AND CONSTRUCTION  
OF CONTRACTUAL RELATIONSHIPS MEMORIALIZED IN MULTIPLE  
WRITINGS

Royce de R. Barondes\*

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## I. INTRODUCTION

The tension between reference to standards and reliance on rules in the common law doctrine can yield a landscape, in even the most familiar of legal areas, having the complexity of an M.C. Escher print. This article examines one such area: the law governing construction of contracts memorialized in multiple documents.

By way of illustration, suppose a client engages a contractor. An agreement is signed. Months later, a second agreement, containing an integration clause, is signed. A dispute thereafter arises. The client claims the building does not conform to specifications in the first agreement. The contractor makes a powerful argument in reply: The pertinent specifications are in the first agreement but not included in the second agreement. Because the second agreement contains a merger clause, the parol evidence rule bars introduction of evidence of the specifications in the first.

The contractor's argument, simple and elegant, loses. How can a court reach that result? It is by this perspective-altering conclusion—the earlier document is treated as one agreement with the subsequent writing: “Where several instruments are made as part of one transaction they will be read together, and each will be construed with reference to the other; and this is so although the instruments may have been executed at different times and do not in terms refer to each other . . . .”<sup>1</sup> By treating as simultaneous documents that are not, the parol evidence rule remains intact, but the prior writing is not barred by the subsequent integration.

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<sup>1</sup>Neville v. Scott, 127 A.2d 755, 757 (Pa. Super. Ct. 1957). See *infra* note 211 and accompanying text; see also *infra* Part IV.

Significant business relationships are often memorialized in multiple documents—sometimes in the form of multiple simultaneous documents, on other occasions with an intentional sequencing of the documents. There can be good reasons for using multiple writings. It turns out, however, that a number of principles of contract construction and enforcement are not well adapted to this style of contracting. This article analyzes some of the prominent problems.

This examination addresses multiple documents executed simultaneously as well as multiple documents executed at different times. The context presents different issues, depending on the relative timing of the documents (whether simultaneous or not)—application of the parol evidence rule being an obvious example.

Where the writings are sequential, the parties may have amended their deal, or an intermediate document may be necessary or desirable in order to negotiate a complex transaction. As to simultaneous writings:

- A side letter may be used to deviate from the terms provided by a form agreement one party typically uses.<sup>2</sup>
- The parties may desire to partition their rights to facilitate subsequent transfer of a portion of those rights to a third party.<sup>3</sup>
- Partitioning the transaction into separate components, each reflected in a separate agreement, may make the process of documenting the transaction more tractable.<sup>4</sup>
- A party may seek to incorporate some terms that it generally uses into each transaction (e.g., a master agreement including generic (omitting transaction-specific) terms).<sup>5</sup>

Although drafting often involves the use of side letters,<sup>6</sup> there is very little scholarship addressing interpretative issues arising from that style. By way of illustration, a Lexis search of law reviews and journals reveals only a few academic works addressing the term “side letter” and citing the Restatement (Second) of Contracts,<sup>7</sup> although this style of documenting

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<sup>2</sup> See, e.g., *Int'l Milling Co. v. Hachmeister, Inc.*, 110 A.2d 186, 188, 192 (Pa. 1955).

<sup>3</sup> See, e.g., *Rhythm & Hues, Inc. v. Terminal Mktg. Co.*, No. 01 Civ. 4697(AGS), 2002 WL 1343759 (S.D.N.Y. June 19, 2002).

<sup>4</sup> Cf. *infra* note 184 (referencing agreements that expressly negate reference to other documents for interpretative purposes).

<sup>5</sup> See, e.g., *Wilson Mfg. Co. v. Fusco*, 258 S.W.3d 841 (Mo. Ct. App. 2008).

<sup>6</sup> See *infra* note 142 and accompanying text.

<sup>7</sup> Online Database Search, LEXISNEXIS, <http://lexis.com> (follow “Search” hyperlink; then follow “Legal” hyperlink; then follow “Law Review and Journals” hyperlink; then follow “US

transactions is very common.<sup>8</sup> The ubiquity of this drafting practice warrants greater analysis of the way in which interpretative principles are applied in this context.

This article will examine the legal principles applicable to contractual relationships memorialized in multiple writings.

First, it examines principles governing contracts that expressly incorporate by reference another writing. That is a good place to start, because, as it turns out, some authority treats a document as incorporating another by reference with little more basis than that the two are executed at the same time as part of the same transaction. So, we first discuss express incorporation by reference, and we later build on the pertinent principles in discussing implied incorporation by reference.

One inclined to sharp dealing might seek to obtain surreptitiously contractual rights by incorporating by reference advantageous terms. As Part II.C. shows, there are a number of strands of authority that, as a matter of contract construction—*i.e.*, not relying on nebulous principles of unconscionability—limit the effectiveness of that strategy. And that authority is not limited to modern cases.<sup>9</sup> Some of the authority goes back

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Law Reviews and Journals, Combined” then search “‘side letter’ & (restatement pre/10 contracts)”; and then follow “Search” hyperlink) (last visited Sept. 23, 2012) (identifying thirteen documents). Of the thirteen documents, most are not academic articles addressing the issue. *Id.* The results include:

- two opinions reproduced in the *Delaware Journal of Corporate Law*;
- four notes or comments;
- three documents in which the character string appears only once, and the reference is not to a “side letter”, e.g., one sentence ends with the word “side” and the next sentence begins “letter”; and
- four articles in which the phrase appears only once.

*Id.* The most extensive discussion of interpretation of side letters is in a comment examining arbitration provisions in collective bargaining agreements, in which the term appears five times. Rachel M. Bowe, Comment, *The Scope of Arbitration Clauses in Collective Bargaining Agreements & The Superficial Divide: Clarifying the Circuit Confusion*, 31 *HAMLIN L. REV.* 234 (2008). The comment’s reference to the phrase is in discussing its use in a total of two opinions. *Id.* at 252–53, 262–63 (discussing *United Steelworkers of Am. v. Cooper Tire & Rubber Co.*, 474 F.3d 271 (6th Cir. 2007) and *Cornell Univ. v. UAW Local 2300*, 942 F.2d 138 (2d. Cir. 1991)).

<sup>8</sup> See *infra* note 142 and accompanying text.

<sup>9</sup> See, e.g., *Delancey v. Ins. Co.*, 52 N.H. 581, 587 (1873); *Beach v. Supreme Tent of Knights of Maccabees of the World (Beach II)*, 69 N.E. 281 (N.Y. 1904).

over 100 years, to a time where one might expect formalism to have ruled supreme in the law of contracts.<sup>10</sup>

It bears mention at the outset that this article does not directly address one species of contract memorialized in multiple writings—a so-called “rolling contract” theory under which an understanding is formed (which could involve some writing) contemplating one party’s later delivery of additional terms, after which delivery the recipient would have some time to rescind and return.<sup>11</sup> The authority discussed in this article primarily either precedes the rolling contract theory as introduced in *ProCD, Inc. v. Zeidenberg*<sup>12</sup> and *Hill v. Gateway 2000, Inc.*,<sup>13</sup> or does not involve that type of contract formation (*i.e.*, does not involve a purported conscious choice to form a contract under terms to be delivered in the future by one party, with the other having some right to rescind and return, in the case of objection). That form of rolling contract theory presents a number of issues similar to those addressed in this article. A need for adequate prominence of terms—whether existing terms incorporated by reference or terms later-delivered—is addressed in cases considering that species of rolling contract<sup>14</sup> as well as the authority discussed in this article.<sup>15</sup> Of course, one interested in assuring over-arching consistency within a doctrinal area would seek to find harmony in approach in analogous circumstances.

This article then in Part III turns to judicial application of various interpretative bromides to contractual relationships memorialized in multiple writings, illustrating how they can impede implementing the parties’ evident intent. Those bromides include:

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<sup>10</sup> See, e.g., *DeLancey*, 52 N.H. 581; *Beach II*, 69 N.E. 281.

<sup>11</sup> Authority discussing the controversial analysis is voluminous. See John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35 (2012), for an eminent commentator’s recent contribution to that literature.

<sup>12</sup> 86 F.3d 1447 (7th Cir. 1996).

<sup>13</sup> 105 F.3d 1147 (7th Cir. 1997).

<sup>14</sup> *E.g.*, *Schnabel v. Trilegiant Corp.*, No. 11–1311–CV, 2012 WL 3871366, at \*13 (2d Cir. Sept. 7, 2012) (stating, in connection with an agreement between a consumer and a merchant with which the consumer did not have a preexisting relationship, “But that someone has received an email does not without more establish that he or she should know that the terms disclosed in the email relate to a service in which he or she had previously enrolled and that a failure affirmatively to opt out of the service amounts to assent to those terms.”).

<sup>15</sup> See *infra* notes 68–77 and accompanying text.

- construing multiple writings as one agreement;<sup>16</sup>
- construing an agreement so that no provision is surplusage;<sup>17</sup>  
and
- favoring a “specific” provision over a “general” one.<sup>18</sup>

Lastly, in Part IV, this article briefly examines the interplay between the parol evidence rule and the principle that multiple writings are construed as a single instrument. Cases that use the principle of construing non-simultaneous writings as one agreement to avoid the parol evidence rule do not provide guidance for when that use of the principle is appropriate.<sup>19</sup> Unconstrained application would eviscerate the parol evidence rule. After reviewing pertinent authority, this article provides a guiding principle. In some cases, an initial agreement contemplates subsequent agreements, and the initial agreement can reasonably be perceived as evidencing an intent that its terms will govern following that subsequent agreement. In such a case, use of this principle does not eviscerate the parol evidence rule and appears to implement the parties’ intent. One can envision parties writing an agreement that expressly incorporates some future document. This context is similar, except the language need not be express. The basis for the treatment might be the language of the parties’ first agreement, a course of dealing or a trade practice.

By way of illustration, a seller may have form terms that he wishes to use, but that the buyer finds inadequate in one regard, e.g., as to the quality of the goods. The transacting might begin with a side letter in which the buyer and seller agree that, notwithstanding any subsequent use of the seller’s ordinary form, the goods will conform to specifications in the side letter. Such an understanding could properly be viewed as causing the side letter and a subsequent form to be viewed as one agreement, with the side letter not barred by the parol evidence rule. That is a simplified version of the outcome in *International Milling Co. v. Hachmeister, Inc.*, discussed in Part IV.<sup>20</sup>

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<sup>16</sup> See *infra* Part III.B.

<sup>17</sup> See *infra* Part III.C.

<sup>18</sup> See *infra* Part III.D.

<sup>19</sup> See, e.g., *infra* notes 310–314 and accompanying text.

<sup>20</sup> 110 A.2d 186, 188, 192 (Pa. 1955).

## II. INCORPORATION BY REFERENCE

In examining interpretative principles governing incorporation by reference, this Part first discusses the language that gives rise to incorporation. Use of incorporation by reference in drafting contracts can be problematic. The technique can create inadvertent ambiguities or inconsistencies. This Part second briefly sketches those issues. This Part then discusses principles that courts have used to limit the effectiveness of attempts to incorporate documents by reference.

### A. Language of Incorporation

Where a court gives effect to the incorporation by reference, the court treats the language of one document as if it were reproduced in the other document.<sup>21</sup> Perhaps most familiar modern illustration of incorporation by reference would be terms and conditions incorporated into a written document from a web site.<sup>22</sup> Absent some defect in the incorporation, “where a contract expressly refers to and incorporates another instrument in specific terms which show a clear intent to incorporate that instrument into the contract, both instruments are to be construed together.”<sup>23</sup>

Although the internet presents a modern vehicle for collecting incorporated terms, the law of contracts has long addressed incorporation by reference of terms memorialized by other means.<sup>24</sup> Our purpose here is to examine traditional contract doctrine, as opposed to anomalies arising from internet-related methods of contracting. However, our review of traditional doctrine, and doctrine applied in traditional contexts, can inform our understanding of the extent to which the law applicable to transactions using modern technology.

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<sup>21</sup> See, e.g., *Wasson v. Schubert*, 964 S.W.2d 520, 524 (Mo. Ct. App. 1998) (“It is well established that matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract in *haec verba*.”); *Booker v. Everhart*, 240 S.E.2d 360, 363 (N.C. 1978) (“To incorporate a separate document by reference is to declare that the former document shall be taken as part of the document in which the declaration is made, as much as if it were set out at length therein.”); 17A C.J.S. *Contracts* § 402 (2011) (“Matters incorporated into a contract by reference are as much part of the agreement as if they had been set out in the contract verbatim.”).

<sup>22</sup> *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 267–68 (5th Cir. 2011).

<sup>23</sup> *Id.* at 267.

<sup>24</sup> See, e.g., *infra* notes 98–111 and accompanying text.



There is case law addressing what gives rise to incorporation by reference. As one might expect, the case law is not completely harmonious.<sup>25</sup> Some opinions reflect what might be characterized as excessive formalism, holding language that seems to be designed to effect incorporation does not produce the result.<sup>26</sup> And, on the other hand, in a variety of circumstances, a document may be treated as if it incorporates expressly, although it makes no mention of, a second document.<sup>27</sup>

A number of cases state that merely referencing a second document often is not sufficient to incorporate the second document by reference.<sup>28</sup> For example, the court in *Dunn Industrial Group, Inc. v. City of Sugar Creek* holds a guarantor is not bound by an arbitration provision in an

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<sup>25</sup> Compare *Affinity Internet v. Consol. Credit Counseling Servs., Inc.*, 920 So. 2d 1286, 1287–89 (Fla. Dist. Ct. App. 2006) (holding that “subject to” language in contract was insufficient to incorporate arbitration provisions on the web site terms), with *Rhythm & Hues, Inc. v. Terminal Mktg. Co.*, No. 01 Civ. 4697(AGS), 2002 WL 1343759, at \*5–6 (S.D.N.Y. June 19, 2002) (incorporating a loan agreement despite it not being mentioned in the lease).

<sup>26</sup> See, e.g., *Affinity Internet*, 920 So. 2d at 1287–89; *CooperVision, Inc. v. Intek Integration Techs., Inc.* 794 N.Y.S.2d 812 (Sup. Ct. 2005).

<sup>27</sup> See, e.g., *Rhythm & Hues, Inc.*, 2002 WL 1343759, at \*5–6.

<sup>28</sup> E.g., *Rinard v. E. Co.*, 978 F.2d 265, 269 (6th Cir. 1992) (finding reference in ERISA plan to trust under which assets held insufficient to incorporate into plan trust provisions under which excess funds could be delivered to the employer); *Excess Risk Underwriters, Inc. v. Lafayette Life Ins. Co.*, 328 F. Supp. 2d 1319, 1333 (S.D. Fla. 2004) (complex case involving reinsurance); *Constr. 70, Inc. v. Bond Safeguard Ins. Co.*, No. 1 CA–CV 10–0137, 2011 WL 553239 at \*3 n.2 (Ariz. Ct. App. Feb. 17, 2011) (finding reference to construction contract insufficient to incorporate into surety of payment limit in contract of scope of surety required); *Republic Bank v. Marine Nat’l Bank*, 53 Cal. Rptr. 2d 90, 92 (Ct. App. 1996) (“These alternative definitions reveal the fallacy in Marine’s position. It is treating the word ‘incorporate’ as if it were just another name for ‘attach.’ It isn’t. Yes, one can staple a master lease to a sublease and refer to it in the text of the sublease to make sure all parties to the sublease are aware of the master lease. Yes, having it so stapled makes it easier to refer to. But stapling, physical attachment or even textual reference do not begin to encompass the meaning of the word *incorporation*, with its denotation of putting something into a body, not just next to it.”); *Temple Emanu-El of Greater Fort Lauderdale v. Tremarco Indus., Inc.*, 705 So. 2d 983, 984 (Fla. Dist. Ct. App. 1998) (finding contractor’s agreement to provide manufacturer warranty, which warranty contemplated arbitration of disputes, inadequate to impose on customer duty to arbitrate dispute with contractor); *Frierson v. Int’l Agric. Corp.*, 148 S.W.2d 27, 35 (Tenn. Ct. App. 1940).

An interesting case addressing incorporation for purposes of meeting a statutory requirement is *Unclaimed Property Recovery Serv., Inc. v. UBS PaineWebber Inc.*, 870 N.Y.S.2d 361, 362 (App. Div. 2009) (not incorporating list of abandoned property in contract to recover unclaimed property to meet statutory requirements the agreement specify the nature of the property and identify the holder).

underlying agreement the guaranty references, distinguishing circumstances in which the guaranty expressly incorporates the underlying agreement by reference, in which case the guarantor would be required to arbitrate the dispute.<sup>29</sup>

*Affinity Internet, Inc. v. Consolidated Credit Counseling Services, Inc.* illustrates formalism in deciding whether there is an effective incorporation by reference.<sup>30</sup> The opinion holds that stating a contract is “subject to” terms on a web page is insufficient to cause arbitration provisions on the web site to apply—it is insufficient to incorporate the terms on the web page into the contract.<sup>31</sup> *CooperVision, Inc. v. Intek Integration Technologies, Inc.*, provides another illustration.<sup>32</sup> The opinion finds a statement in a contract for implementing software that it and other contracts “represent the entire contract” between the parties was insufficient to conclude that a forum selection clause in one of the listed contracts was incorporated into, and governed a dispute under, the implementation agreement.<sup>33</sup>

These cases suggest hesitation in giving effect to incorporation by reference. However, the case law is not consistent in that hesitation. Some authority does not require a document to reference an extrinsic writing to incorporate it by reference.<sup>34</sup> *Rhythm & Hues, Inc. v. Terminal Marketing*

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<sup>29</sup> 112 S.W.3d 421, 435–36 (Mo. 2003) (per curiam).

<sup>30</sup> 920 So. 2d at 1287–89.

<sup>31</sup> *Id.* at 1287–89 (holding insufficient reference made in contract stating “subject to all of [the service provider’s] terms, conditions, user and acceptable use policies located at <http://www.skynetweb.com/company/legal/legal.php>”).

On the other hand, that a document is incomplete may be a basis for incorporating a separate document even without express language of incorporation by reference. *See Behr v. Blue Cross Hosp. Serv., Inc., of Mo.*, 715 S.W.2d 251, 254–55 (Mo. 1986) (considering advertising brochure treated as part of contract when it “contains provisions found nowhere else which are essential to a complete contract”).

<sup>32</sup> 794 N.Y.S.2d 812 (Sup. Ct. 2005).

<sup>33</sup> *Id.* at 817 (finding forum selection clause in software license agreement not incorporated by reference into, and therefore not limiting cause of action under, implementation agreement, where implementation agreement references, “This Agreement, the Order Acknowledgment in Schedule A, Software License Agreement, and Warehouse Analysis document represent the entire contract between [the parties] as to the subject matter of the Agreement.”). *See also Valero Mktg. & Supply Co. v. Baldwin Contracting Co.*, No. H-09-2957, 2010 WL 1068105, at \*5 (S.D. Tex. Mar. 19, 2010) (finding the extent of statement that “[a]ll prices quoted above are subject to Valero’s General Terms and Conditions for Petroleum Product Purchases /Sales” limited to prices; forum selection not incorporated).

<sup>34</sup> No. 01 Civ. 4697(AGS), 2002 WL 1343759, at \*5–6 (S.D.N.Y. June 19, 2002).

Co., discussed below, contemplates treating a loan agreement as incorporated into a lease, even though the lease does not mention the loan agreement.<sup>35</sup>

Courts often hold a document's delivery is not a condition for it to be incorporated by reference.<sup>36</sup> Yet, for a cross-reference to be effective in incorporating another document by reference, the other document must be adequately identified.<sup>37</sup> A court may require greater specificity in a cross-

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<sup>35</sup>2002 WL 1343759, at \*5–6. *See infra* notes 185–193 and accompanying text.

<sup>36</sup>*See, e.g.,* Conner v. Manchester Assur. Co. of Manchester, Eng., 130 F. 743, 745 (9th Cir. 1904) (insured bound by terms incorporated into insurance policy, stating, “The plaintiffs in error accepted an instrument which contained a reference to another instrument in which were embodied the limitations, and which were made a part of the contract. They were presumed to know they [sic] contents of the paper which they received, and if they had read it they would have observed that it referred to and adopted the provisions of the other instrument. They had the right to demand an inspection of that instrument, and, if inspection had been refused, to decline to enter into the contract.”); Sparteck CMD, LLC v. Int’l Auto. Components Grp. N. Am., Inc., No. 08–13234, 2009 WL 440905, at \*5 (E.D. Mich. Feb. 23, 2009); Ginsberg v. Myers, 183 N.W. 749, 750 (Mich. 1921) (plumbing and heating contractor bound by specifications it alleged it never received); W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 7 P.3d 861, 867 (Wash. Ct. App. 2000).

<sup>37</sup>*E.g.,* PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1201 (2d Cir. 1996) (statute of limitations in rules of one possible arbitral forum not incorporated by reference into contract allowing for arbitration in multiple fora); Northrop Grumman Info. Tech., Inc. v. United States, 78 Fed. Cl. 45, 47–48 (Fed. Cl. 2007) (document stating Government, as lessee, agrees that it has provided required information concerning the property to the lessor insufficient to incorporate the letter by reference); Dow Corning Corp. v. Weather Shield Mfg., Inc., 790 F. Supp. 2d 604, 611–12 (E.D. Mich. 2011) (dispute regarding what constituted the “specifications and data sheets” for a good); Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 983 A.2d 604, 618 (N.J. Super. App. Div. 2009) (law firm engagement contract states client will be bound by law firm’s “standard billing practices and firm policies”; terms inadequately identified to be incorporated by reference); Chiacchia v. Nat’l Westminster Bank USA, 507 N.Y.S.2d 888, 889–90 (App. Div. 1986) (“The doctrine of incorporation by reference requires that the paper to be incorporated into a written instrument by reference, must be so referred to and described in the instrument that the paper may be identified beyond all reasonable doubt.” (citing *In re Bd. of Comm’rs of Wash. Park*, 52 N.Y. 131, 134 (1873))). In *Chiacchia*, the court modified summary judgment in favor of a bank. 507 N.Y.S.2d at 890. The bank alleged it was not liable for theft of cash from safety deposit box where a document titled “Rules for Your Safety Deposit Box Service” provided the box should not be used for the storage of cash and the rental agreement stated the customer “agrees to the rules and regulations of the Bank in force at this date.” *Id.* at 889–90. Some authority allows incorporation of documents to be subsequently prepared or revised. *See* *Lamb v. Emhart Corp.*, 47 F.3d 551, 559 (2d Cir. 1995). If one party has unfettered discretion to change the incorporated term, the provision would be illusory and unenforceable. *In re C & H News Co.*, 133 S.W.3d 642, 646–47 (Tex. App.—Corpus Christi 2003, no pet.) (arbitration agreement incorporating terms in an employee handbook, subject to amendment by one party, illusory). However, *Lamb* would give

reference to allow the extrinsic writing to be incorporated for this interpretative purpose than for a different purpose, such as whether there is a writing sufficient to satisfy the statute of frauds.<sup>38</sup>

Incorporation by reference may be used as a tool to obtain contractual rights without expressly bargaining for them. Even if a party reads a form proffered by the other, that diligence may not extend to asking for and further reviewing something incorporated by reference. A significant amount of authority as a matter of contract formation, *i.e.*, not relying on principles of unconscionability, limits effectiveness of incorporation by reference in that type of context. Pertinent case law is discussed in Part II.C, below.

### *B. Problematic Consequences of Drafting with Incorporation*

Incorporating one document into another is a potentially problematic method of contract drafting. It can create inconsistency or ambiguity that one would expect would not arise were the pertinent provisions more expressly detailed in a single writing (*i.e.*, without, or limiting, incorporation by reference).<sup>39</sup> For example, *Meridien Hotels, Inc. v. LHO*

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effect to incorporation of a document to be prepared in the future where there are “ascertainable standard” governing it: “When incorporated terms are to be decided by one party in the future, or when one party has the power to alter or amend the terms of the agreement, there must be an ascertainable standard for the promulgation of the new terms that is set forth in the original agreement and that can ‘provide a substitute for a present knowledge of and assent to the subsequently adopted provisions.’” *Lamb*, 47 F.3d at 559 (quoting *Hous. Auth. v. McKenzie*, 412 A.2d 1143, 1146 (Conn. Super. Ct. 1979)). Assorted authority is collected in 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:25 (4th ed. 2012).

*Spartech CMD, LLC* is an interesting case involving a series of five transactions. 2009 WL 440905. Four involved a paper exchange of a document that included an arbitration provision. *Id.* at \*1. The fifth was done electronically without a communication of the arbitration provision. *Id.* The court holds arbitration not required as to the fifth transaction. *Id.* at \*5–6.

<sup>38</sup>*United Cal. Bank v. Prudential Ins. Co. of Am.*, 681 P.2d 390, 412 (Ariz. Ct. App. 1983) (citing *Crabtree v. Elizabeth Arden Sales Corp.*, 110 N.E.2d 551, 553 (N.Y. 1953)). See generally RESTATEMENT (SECOND) OF CONTRACTS § 132, cmt. b (1979) (stating multiple writings not referencing each other may nevertheless be read together); 10 WILLISTON & LORD, *supra* note 37, § 29:31 (discussing satisfaction of the statute of frauds with multiple writings).

<sup>39</sup>See *Century Indem. Co. v. Certain Underwriters at Lloyd’s, London, Subscribing to Retrocessional Agreement Nos. 950548, 950549, and 950646*, 584 F.3d 513, 554–55 (3d Cir. 2009) (“[T]he scope of incorporation-by-reference clauses in practice can lead to uncertainties when the clauses are translated from the underlying contract to the incorporating one.”); Carl J. Circo, *Small Construction Contracts: Big Issues*, PROB. & PROP., November/December 1997 at

*Financing Partnership I, L.P.* involves an assignment and assumption of an agreement for managing a hotel.<sup>40</sup> LaSalle acquired ownership of the property in 1997.<sup>41</sup> Meridien operated the hotel at that time.<sup>42</sup> In 1998, the arrangement was restructured, with an affiliate of Meridien leasing the hotel from LaSalle. As part of that arrangement, LaSalle assigned to the new Meridien affiliate LaSalle's rights under the management agreement.<sup>43</sup> The new affiliate evidently assumed LaSalle's duties under the management agreement.<sup>44</sup> The assignment expressly incorporated the terms of the lease, in conclusory language that did not detail the rights and duties sought to be created by incorporating by reference the lease: "WHEREAS this Agreement is made in connection with the execution of a certain Lease between Assignor [LaSalle] and Assignee [Leasco], dated as of the date hereof, with respect to the Premises (the "Lease") the terms, conditions, and provisions of which are hereby incorporated herein by reference . . . ."<sup>45</sup> In

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33, 34–35 ("The scope of work in many contracts is ambiguous because the contract documents include a confusing array of proposals, modified proposals, contractor 'clarifications' and miscellaneous correspondence that led to the agreed price. In most cases, the contract should clearly restate the cumulative agreement that these documents embody, rather than incorporating by reference, or simply having as exhibits, potentially conflicting, incomplete or extraneous correspondence and memoranda.").

*Paige Capital Management, LLC v. Lerner Master Fund, LLC*, No. 5502–CS, 2011 WL 3505355 (Del. Ch. Aug. 8, 2011), is illustrative of the problems that may arise from bifurcating an agreement between multiple documents—problems that are not limited to circumstances where one agreement incorporates another by reference. The dispute centers on whether limits on withdrawals of investments in a hedge fund structured as a limited partnership were overridden by a terms of a separate revenue sharing agreement (which was described by a principal as being like a side letter). *Id.* at \*4. The court finds they were overridden, even though the revenue sharing agreement expressly recites it shall not be deemed to amend the partnership agreement. *Id.* at \*19, \*35.

<sup>40</sup> 255 S.W.3d 807, 826–27 (Tex. App.—Dallas 2008, no pet.).

<sup>41</sup> See Brief of Appellants at 3, *Meridien Hotels, Inc.*, 255 S.W.3d 807 (No. 05–06–00489–CV), 2007 WL 1985047, at \*3.

<sup>42</sup> See *Meridien Hotels, Inc.*, 255 S.W.3d at 826–27.

<sup>43</sup> Brief of Appellants, *supra* note 41, at \*3.

<sup>44</sup> The opinion does not clearly indicate what duties were assumed, or who was assuming them. See *Meridien Hotels, Inc.*, 255 S.W.3d at 826. It simply references the name of the agreement, "Assignment, Assumption and Modification of Management Agreement". *Id.* From the context of the transaction, it would appear that the assumption is necessarily of the affiliate of the lessor's duties under the extant management agreement, although the opinion is not explicit on the point. See *id.*

<sup>45</sup> *Id.* at 826–27 n.11 (quoting the assignment, assumption and modification of management agreement).

the litigation, the lessor argued that, by incorporating the lease into this assignment and assumption agreement, the manager of the hotel, Meridien, had agreed to become liable for a breach of the lease by the tenant, its affiliate.<sup>46</sup>

It is not a mere formality for a firm to assume obligations of a special-purpose affiliate. A basic reason to create a special-purpose entity is to segregate rights and liabilities within the special purpose entity.<sup>47</sup> One would not expect that construct to be pierced casually. It seems very likely the court, in affirming the trial court's determination that the manager had not assumed the lease obligations, implemented what the parties would have indicated they intended, at the time the assignment and assumption was executed, had the matter been expressly addressed.<sup>48</sup> The point is not that the case is wrongly decided. Rather, it is that the cavalier drafting style, simply incorporating another document by reference, allows parties to elide the process of detailing precisely what they intended, creating ambiguity that may, or may not, be properly resolved in subsequent litigation.<sup>49</sup>

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<sup>46</sup> *Id.* at 826–27.

<sup>47</sup> See generally, e.g., James Bryce Clark & Maura B. O'Connor, *Judicial Responses to SPE Structures: Less Than Meets the Eye, but More to Come*, in COMMERCIAL REAL ESTATE FINANCING 2010: HOW TO HANDLE DEFAULTS, DISTRESS, MATURITIES, AND STACKS OF DEBT, 197 (PLI Real Estate Law & Practice, Course Handbook Ser. No. 23198), available at 575 PLI/Real 197 (Westlaw) (discussing special purpose entities as a means for partitioning assets and liabilities).

<sup>48</sup> See *Meridien Hotels, Inc.*, 255 S.W.3d at 827.

<sup>49</sup> See *id.* There are other illustrations. E.g., *Dow Corning Corp. v. Weather Shield Mfg., Inc.*, 790 F. Supp.2d 604, 612 (E.D. Mich. 2011) (question for the trier of fact whether reference that “[p]roducts are supplied per the specifications and data sheets” operated to incorporate limits on warranty allegedly on the incorporated documents). *OBS Company, v. Pace Construction Corp.* allows a subcontract's reference to terms of a prime contract to create ambiguity in the subcontract. 558 So. 2d 404, 406 (Fla. 1990). The subcontract references the prime contract in the following language:

With respect to its work, Subcontractor agrees to be bound to the Contractor by all the items of the Agreement between the Contractor and the Owner and by the Contract Documents and to assume toward the Contractor and the Owner all of the obligations and the responsibilities that the Contractor by those instruments assumes toward the Owner. Subcontractor has reviewed and inspected the Contract Documents.

*Id.* at 406 n.1. The court relies on this reference to the prime contract to create ambiguity as to whether the prime's receipt of final payment was a condition to the obligation to make final payment to the subcontractor; the express language of the subcontract itself making receipt of final payment from the customer a condition. *Id.* at 406. *St. Augustine Pools, Inc. v. James M. Barker, Inc.* illustrates a similar problem where a subcontract states it is “subject to” the prime

Similar ambiguity can arise when the parties attempt to incorporate another document for a limited purpose—the boundaries of the limited scope of incorporation can be inadequately specified.<sup>50</sup>

### *C. Limits on Incorporation by Reference*

To state one document incorporates another by reference literally means that the two documents are to be construed as one. It may be viewed as an election to have a strong form of this interpretative principle apply. However, even where that election is made expressly, it may not be given effect.

The limits may arise from administrative failure in documenting the transaction.<sup>51</sup> There is some authority finding not incorporated a document referenced as attached but not attached, although there is contra authority.<sup>52</sup>

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contract. 687 So. 2d 957, 958 (Fla. Dist. Ct. App. 1997). The court affirms the trial court's determination that the subcontract, which expressly references claims under the subcontract being heard by a judge, did not incorporate arbitration provisions from the prime contract. *Id.*

<sup>50</sup>*See, e.g.,* Republic Bank v. Marine Nat'l Bank, 53 Cal. Rptr. 2d 90, 92 (Ct. App. 1996) (addressing whether a sublease, in incorporating master lease, incorporated attorney fee provision); MPACT Constr. Grp., LLC v. Superior Concrete Constructors, Inc., 802 N.E.2d 901, 907 (Ind. 2004) (dispute concerning whether terms of prime contract incorporated into subcontract included arbitration provisions).

<sup>51</sup>*See, e.g.,* Ingersoll-Rand Co. v. El Dorado Chem. Co., 283 S.W.3d 191, 196–97 (Ark. 2008) (document purports to incorporate Dresser-Rand Company's Terms of Sale and Conditions for Parts And Equipment stated as printed on the reverse of a letter, letter was faxed (without reverse); affirming trial court's determination as a matter of law that separate document received at the same time, titled, 'Terms and Conditions of Sale—Field Services and Repairs,' was not part of the contract); Landmark Structures, Inc. v. F.E. Holmes & Sons Constr. Co., 552 N.E.2d 1336, 1342–43 (Ill. App. Ct. 1990) (trial court may properly find no assent to terms referenced on reverse but not reproduced there, and that such terms were not part of the contract).

*McCarthy Well Co., v. St. Peter Creamery, Inc.*, 410 N.W.2d 312, 315–16 (Minn. 1987), not involving incorporation by reference, also limits enforceability of obscurely displayed contract language (not relying on unconscionability principles). Additionally, consumer protection statutes may limit the typography. *See, e.g.,* N.Y. C.P.L.R. § 4544 (CONSOL. 2003) (consumer transaction or residential lease requiring eight point type); N.Y. GEN. OBLIG. LAW § 5-702 (CONSOL. 2006) (residential leases and leases of personal property for household purposes to be written "in a clear and coherent manner using words with common and every day meanings" and with appropriate divisions and captions).

<sup>52</sup>*Compare* BGT Group, Inc. v. Tradewinds Engine Servs., LLC, 62 So. 3d 1192, 1193–95 (Fla. Dist. Ct. App. 2011) (holding terms referenced as attached but not attached, and not previously delivered to the other party, were not incorporated, and seller's terms and conditions, containing arbitration provision, not incorporated where seller's price quotation and subsequent invoice, which both indicated the terms were "subject to" attached seller terms and conditions,

Attempts to create contract forms in a way designed to mislead, and judicial disapproval of that process, are longstanding. *DeLancey v. Insurance Co.* addresses, with disapproval, a course of practice designed to deny insurance coverage by providing applications facilitating errors by prospective insureds that would eliminate coverage.<sup>53</sup> The colorful language is familiar to many law students: “Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it.”<sup>54</sup>

The drafting technique of incorporation by reference may be used by a party to obtain the other’s unknowing assent to onerous provisions. It is modernly, of course, easy to identify documents that are incorporated by reference into a writing by providing a URL, and one suspects extrinsic terms deposited on an internet site are often not reviewed.<sup>55</sup> Less obvious to the modern reader is that this type of scheme long predated the internet.<sup>56</sup> Judicial principles restricting this sharp dealing also are longstanding.<sup>57</sup>

One line of cases, primarily construing California law, states that, in order to incorporate extrinsic terms, the “incorporated document must be

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which were not attached), *with Weatherguard Roofing Co., v. D.R. Ward Constr. Co.*, 152 P.3d 1227, 1230 (Ariz. Ct. App. 2007) (holding incorporated a document stated as attached even if it was not (although whether it was attached was disputed)).

<sup>53</sup> 52 N.H. 581, 587 (1873).

<sup>54</sup> 52 N.H. at 588, *quoted in* E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 478 (7th ed. 2008).

<sup>55</sup> *See, e.g.*, *Spartech CMD, LLC v. Int’l Auto. Components Grp. N. Am., Inc.*, No. 08–13234, 2009 WL 440905, at \*5 (E.D. Mich. Feb. 23, 2009); *Schwartz v. Comcast Corp.*, 256 F. App’x 515, 520 (3d Cir. 2007) (subscriber terms were available to customers on web site).

<sup>56</sup> *See, e.g.*, *Scott’s Valley Fruit Exch. v. Growers Refrigeration Co.*, 184 P.2d 183, 189 (Cal. Ct. App. 1947).

<sup>57</sup> *See, e.g.*, *Noll v. eBay, Inc.*, 282 F.R.D. 462, 467 (N.D. Cal. 2012) (denying eBay summary judgment in claim by seller for overcharges; whether fee provisions would be incorporated by reference a factual question not capable of being determined at the current procedural stage (citing, *inter alia*, *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 30–31 (2d Cir. 2002))).

A separate species of sharp dealing in contract formation long addressed by, and restrained by, the common law involves aggressive tender of a check annotated to evidence it is tendered as payment in full. As to the historical common law treatment, Williston notes, “Moreover, a creditor has a defense in an action on the claim where the debtor knows that he is dealing with a careless person and purposely obtains the indorsement of a check containing a receipt in full, of which the creditor has no knowledge.” 15 SAMUEL WILLISTON & WALTER H. E. JAEGER, *A TREATISE ON THE LAW OF CONTRACTS* § 1854, at 548 (3d ed. 1972) (citing, *inter alia*, *Olson v. Shuler*, 221 N.W. 941 (Iowa 1928)).



known or easily available to the contracting parties,”<sup>58</sup> although reported cases typically find the requirement met.<sup>59</sup> One notable exception is *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.*, where the court affirms the trial court's determination that liability limits are not effectively incorporated into a warehouse receipt, noting the infrequency with which the terms to be incorporated were communicated to customers.<sup>60</sup>

A number of cases also recite a requirement that incorporation must not result in “surprise or hardship,” although this is typically not found a basis for avoiding incorporation.<sup>61</sup> Dicta indicates the status of the party against whom enforcement is sought may be relevant.<sup>62</sup>

Authority limiting sharp dealing implemented with incorporation by reference goes back over one hundred years. An annotation states a rule allowing incorporation but then limits its application in circumstances “savoring of fraud”:

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<sup>58</sup> See *Scott's Valley Fruit Exch.*, 184 P.2d at 189. See also *Noll*, 282 F.R.D. at 467 (denying eBay summary judgment in claim by seller for overcharges; whether fee provisions would be incorporated by reference a factual question not capable of being determined at the current procedural stage (citing, *inter alia*, *Specht*, 306 F.3d at 30–31)); *Loomis, Inc. v. Cudahy*, 656 P.2d 1359, 1372 (Idaho 1982); 17A C.J.S. *Contracts* § 402 (2011). There is a similar limit on incorporating liability limits to the disadvantage of a shipper, as a matter of federal common law. See, e.g., *Gemnet Express, Inc. v. Federal Express Corp.*, No. 06 Civ. 2648(Df), 2009 WL 928299, at \*6 (S.D.N.Y. Mar 30, 2009).

<sup>59</sup> See, e.g., *Shany Co., v. Crain Walnut Shelling, Inc.*, No. S-11-1112 KJM EFB, 2012 WL 1979244, at \*7 (E.D. Cal. June 1, 2012) (denying preliminary injunction sought by party who sought to avoid arbitration, stating “Although Crain did not offer to provide the terms and conditions on request, it identified the document by name, which suggests it was easily available had Shany requested it.”); *Lucas v. Hertz Corp.*, No. C 11-01581 LB, 2012 WL 2367617, at \*3 (N.D. Cal. June 21, 2012) (terms printed on car rental folder easily available).

<sup>60</sup> 184 P.2d at 189–90.

<sup>61</sup> *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 448 (3d Cir. 2003) (finding enforcement of arbitration provision would not result in hardship, stating, “Even in a commercial transaction, a provision will not be incorporated by reference if it would result in surprise or hardship to the party against whom enforcement is sought.”); *Int'l Ass'n of Machinists & Aerospace Workers v. ISP Chems., Inc.*, 261 F. App'x 841, 848 (6th Cir. 2008) (quoting *Standard Bent Glass Corp.*, 333 F.3d at 447); *Northrop Grumman Info. Tech., Inc. v. U.S.*, 78 Fed. Cl. 45, 48 (Fed. Cl. 2007) (citing *Standard Bent Glass Corp.*, 333 F.3d at 447); *Power Paragon, Inc. v. Precision Tech. USA, Inc.*, No. 7:08CV00542, 2009 WL 700169, at \*9 (W.D. Va. Mar. 17, 2009) (same); *Nova Corp. v. Joseph Stadelmann Elec., Contractors, Inc.*, No. 07-CV-1104 (PGS), 2008 WL 746672, at \*3, (D.N.J. Mar. 18, 2008) (quoting *Standard Bent Glass Corp.*, 333 F.3d at 447).

<sup>62</sup> *Standard Bent Glass Corp.*, 333 F.3d at 447 n.10 (“If the matter here involved a non-merchant individual as the product buyer, or if the reference to arbitration had been buried, the analysis might very well be different.”).

The decisions are unanimous that, in the absence of fraud or circumstances favoring of fraud, one entering into a contract which refers for some of its terms to an extraneous document, outside of the contract proper, is bound, also, thereby, notwithstanding he omits to inform himself as to the contents of that document or the nature of those terms and conditions, when it was possible for him to have done so.<sup>63</sup>

After reviewing assorted cases, the annotation concludes: "As above intimated in several decisions, the rule shown, while apparently unbending in the absence of fraud or any element of that nature, becomes nullified by any apparent attempt to overreach or deceive by means of embodying the conditions of the contract in an extraneous document."<sup>64</sup>

Two contexts where courts long ago policed this sharp dealing are initially discussed here: certificates of insurance not matching incorporated policies and no-action provisions in indentures. This Part then addresses miscellaneous contexts where courts have reached similar results, either in contexts suggesting the court is concerned the cross-reference does not provide one party with adequate notice of the provisions to be incorporated or simply because the incorporated material is not adequately identified.

### 1. Insurance Certificates.

An insured may receive a certificate of insurance where detailed terms are memorialized in a policy.<sup>65</sup> The two may be, or may appear, inconsistent.<sup>66</sup> One expects typically in that case the policy would be less favorable to the insured than the certificate. The policy may not have been physically present at the time of contracting, or it may be it was present but not fully reviewed.<sup>67</sup>

Over a hundred years ago, the New York Court of Appeals addressed that circumstance in *Beach v. Supreme Tent of Knights of Maccabees of the*

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<sup>63</sup> Annotation, *Effect of Party's Ignorance of Contents of Extraneous Paper upon Attempt to Incorporate It into Contract by Reference*, 70 L.R.A. 106, 106 (1906).

<sup>64</sup> *Id.* at 108–09.

<sup>65</sup> NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 3.03A[1] (Jeffrey E. Thomas & Francis J. Mootz, III eds., 2012).

<sup>66</sup> *See id.* § 3.03A[2].

<sup>67</sup> *See id.*

*World*.<sup>68</sup> A fraternal benefit organization issued disability insurance to a member.<sup>69</sup> The certificate for the insurance provided, "In case of permanent or total disability, or upon attaining the age of seventy years, he will be entitled to receive one-half of said endowment, as provided in the laws of the order."<sup>70</sup> When the insurance was issued, in 1887, the society's organizational documents provided the disability determination was based on performance of one's ordinary profession.<sup>71</sup> The definition was thereafter revised, limiting disability to an inability to engage in any profession.<sup>72</sup> The court held the change did not apply to the employee because the adverse term was not sufficiently prominent:

[O]bligations assumed by the defendant in its certificate of membership should not be impaired by provisions of the constitution and laws of the order to which the attention of the member might never be called, or at least they should not be cut down under the reservation of the power to amend. It is quite easy for fraternal organizations, such as the defendant, if they deem the provisions for benefits to their members tentative only, and desire to have them subject to such modification as the business of the orders may require, to express that in the certificate. So, in the present case, if the certificate had provided that the payments therein specified should be subject to such modification as to amount, terms, and conditions of payment and contingencies in which the same were payable as the endowment laws of the order from time to time might provide, the amendments would be applicable to existing members. But I think that nothing less explicit than this appearing in the certificate itself should be effectual for such a purpose. Fairness to persons joining the order required such plain dealing.<sup>73</sup>

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<sup>68</sup> (*Beach II*), 69 N.E. 281 (N.Y. 1904).

<sup>69</sup> *Id.* at 282.

<sup>70</sup> *Id.*

<sup>71</sup> *Beach v. Supreme Tent Knights of Maccabees of the World*, 77 N.Y.S. 770, 771 (A.D. 1902), *aff'd*, 69 N.E. 281 (N.Y. 1904).

<sup>72</sup> *Beach II*, 69 N.E. at 282.

<sup>73</sup> *Id.* at 283.

The court in *Imperial Shale Brick Co. v Jewett* reaches a similar conclusion.<sup>74</sup> A certificate indicated insurance on a cargo of bricks was issued by a company, although the policy itself indicated the insurance was the financial responsibility of nineteen individuals, who were only severally liable for proportionate parts of the insurance.<sup>75</sup> The opinion notes, “The open policy No. 4007, referred to in the certificate, was then in the defendants’ office in the city of Buffalo, one hundred and eighty miles from Cleveland. It had not been seen by the plaintiff, and its contents were unknown to it. No representation was made to the plaintiff.”<sup>76</sup> The court does not allow the undisclosed terms in the policy to limit liability:

The defendants contend that the certificate is no more than an agreement by the company, if company the defendants were, that it has insured the plaintiff under the open policy, that is, under the separate nineteen contracts therein contained, and, therefore, the plaintiff’s sole recourse is to the nineteen contracts. We reject this contention, because it would give to the authors of this certificate the benefit of a subtlety in phrase and methods apparently contrived to mislead the plaintiff and deprive it of the sort of insurance the defendants led it to understand they sold it by the contract they delivered to it.<sup>77</sup>

Our purpose here is to identify a variety of circumstances in which courts have given effect to more prominent documents as compared to those that are less prominent, and not allowed a party to eviscerate its prominently disclosed obligations by less prominent language. This is one of those cases.<sup>78</sup> There certainly is an ebb and flow of the law in various areas. This area is no exception, and our purpose here is not to address modern treatment of insurance certificates.<sup>79</sup>

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<sup>74</sup> 62 N.E. 167 (N.Y. 1901).

<sup>75</sup> *Id.* at 168.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 169.

<sup>78</sup> *Id.*

<sup>79</sup> See generally NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 65, § 3.03A[2] (“A standard certificate of insurance does not alter the terms of the parties’ indemnity agreement or underlying contract. A standard certificate of insurance does not alter or amend the terms of the policies to which it refers. . . . For that matter, a standard certificate of insurance is not a contract of any sort.” (footnote omitted)).

## 2. Certificated Debt Securities and No-action Clauses.

A potentially significant part of the context of these decisions involving insurance and certificates for insurance is that there is a document designed to provide a summary of prominent terms, and the detailed document contains something in conflict.<sup>80</sup> That may be the most compelling circumstance in which one would not allow some remotely memorialized terms to apply. A similar context involves *no-action clauses* in indentures.

By way of background, publicly-issued debt securities (bonds, notes and debentures) are, subject to limited exceptions, required to be issued under an indenture, an agreement in which an issuer appoints a trustee to act for the benefit of the securityholders.<sup>81</sup> The securityholders themselves are not parties to the indenture.<sup>82</sup>

It is well understood that the issuance of bonds creates collective-action problems.<sup>83</sup> Individual securityholders may not have an adequate incentive to monitor issuer compliance with covenants. The appointment of a trustee may mitigate the impact of these collective action problems.<sup>84</sup>

A security, designed to be traded, is often memorialized in a one-page certificate.<sup>85</sup> This document may identify basic terms of the contractual relationships. However, significant parts of the relationships may merely be identified by cross-reference.<sup>86</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> 15 U.S.C. § 77eee(b) (2006) (refusing registration absent issuance under an indenture).

<sup>82</sup> *See, e.g., Fleet Nat'l Bank v. Trans World Airlines*, 767 F. Supp. 510, 517 (S.D.N.Y. 1991) (concluding noteholders are intended beneficiaries of indenture).

<sup>83</sup> Royce de R. Barondes, *An Economic Analysis of the Potential for Coercion in Consent Solicitations for Bonds*, 63 FORDHAM L. REV. 749, 752 (1994).

<sup>84</sup> *See id.* at 759–60.

<sup>85</sup> *See, e.g., American Bar Association, Section on Business Law, Revised Model Simplified Indenture*, 55 BUS. LAW. 1115, 1166–67 (2000) [hereinafter American Bar Foundation, *Revised Model Simplified Indenture*] (setting forth the “Face of Security” and “Back of Security”). Modernly, securities are typically held in *street name*, meaning the securities are held by a brokerage firm, or its nominee, and the securityholder is merely a beneficial owner. THOMAS LEE HAZEN & JERRY W. MARKHAM, *BROKER-DEALER OPERATIONS UNDER SECURITIES AND COMMODITIES LAW* §§ 13:2, 13:12 (1995). Thus, in practice the securityholder may not receive, and not actually rely on, what is reproduced on the certificate.

<sup>86</sup> *See, e.g., American Bar Foundation, Revised Model Simplified Indenture, supra* note 85, at 1166 (including face of security stating, “See . . . the Indenture referenced for additional provisions of this Security.”); U.C.C. § 8-202 (1994) (stating purchaser for value without notice takes subject to terms contained in referenced extrinsic document).

With this background, we can now examine the details of a no-action clause. The clause limits the ability of individual securityholders to pursue claims.<sup>87</sup> Modernly, it will be in an indenture,<sup>88</sup> although a similar provision may be included in a different document, *e.g.*, a mortgage (or deed of trust).<sup>89</sup> The details vary among indentures. But, in general, a no-action clause will provide that certain claims cannot be pursued by individual securityholders, and can only be pursued by the trustee, unless a request is made, by persons holding in the aggregate at least specified percentage of the securities, that the trustee pursue the claim and the trustee fails to do so.<sup>90</sup> However, the Trust Indenture Act provides a no-action provision cannot limit the ability of a securityholder to bring a claim seeking payment of principal or, subject to an exception not normally applicable, interest.<sup>91</sup>

A long line of cases under New York law addresses the extent to which a no-action clause is effective where it is not expressly identified in the certificate, but only obliquely cross referenced.<sup>92</sup> For at least one hundred years, beginning with the opinion in *Rothschild v. Rio Grande Western Railway Co.*, courts have held unenforceable a no-action clause in an underlying document but not identified in the security itself.<sup>93</sup> *Rothschild* involves a no-action clause that purports to limit bondholder suits for interest in default.<sup>94</sup> The case arose before the Trust Indenture Act was enacted, which would make unenforceable most such provisions applying to a scheduled payment on public debt securities.<sup>95</sup> Modernly, a claim subject to such a provision would typically be a non-payment default.<sup>96</sup> Subsequent authority under New York law confirms the answer provided in

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<sup>87</sup> See, *e.g.*, American Bar Foundation, *Revised Model Simplified Indenture*, *supra* note 85, at 1137–38.

<sup>88</sup> *Id.*

<sup>89</sup> See, *e.g.*, *Rothschild v. Rio Grande W. Ry. Co.*, 32 N.Y.S. 37, 37 (Gen. Term. 1895), *aff'd*, 58 N.E. 1091 (N.Y. 1900) (*per curiam*).

<sup>90</sup> See, *e.g.*, American Bar Foundation, *Revised Model Simplified Indenture*, *supra* note 85, at 1137–38 (requiring 25%); *id.* at 1138 (excluding from no-action provision claims for principal and interest after the due dates in Section 6.07).

<sup>91</sup> 15 U.S.C. § 77ppp (2006). See also *Barondes*, *supra* note 83, at 751 n.10 (noting indentures do not typically include the optional provision allowing postponement of interest).

<sup>92</sup> See *infra* note 97.

<sup>93</sup> 32 N.Y.S. at 41.

<sup>94</sup> *Id.* at 39.

<sup>95</sup> See *supra* note 91 and accompanying text.

<sup>96</sup> See *supra* note 91 and accompanying text.

*Rothschild*, identifying, as articulated in *Van Gemert v. Boeing Co.*, a “duty of reasonable notice.”<sup>97</sup>

### 3. Additional Cases Involving Reference Problematic for Lack of Notice.

In addition to these types of contract forms, insurance certificates and securities certificates not referencing no-action clauses, an assortment of miscellaneous provisions have provided contexts in which courts have found a cross-reference ineffective.

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<sup>97</sup>*Van Gemert v. Boeing Co.*, 520 F.2d 1373, 1383 (2d Cir. 1975) (“The duty of reasonable notice arises out of the contract between Boeing and the debenture holders, pursuant to which Boeing was exercising its right to redeem the debentures. An issuer of debentures has a duty to give adequate notice either on the face of the debentures, [*Abramson v. Burroughs Corp.*, [1971-72 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,456 (S.D.N.Y. April 27, 1972) (Lumbard, C. J., sitting by designation)], or in some other way, of the notice to be provided in the event the company decides to redeem the debentures. Absent such advice as to the specific notice agreed upon by the issuer and the trustee for the debenture holders, the debenture holders’ reasonable expectations as to notice should be protected.”); *Morgan Stanley & Co., Inc. v. Archer Daniels Midland Co.*, 570 F. Supp. 1529, 1539 n.2 (S.D.N.Y. 1983) (“Such limitations on the rights of bondholders to seek legal relief are not enforceable, however, where the face of the bond does not give adequate notice of the restriction.”); *Friedman v. Airlift Int’l, Inc.*, 355 N.Y.S.2d 613, 614–15 (A.D. 1974) (“Restrictions against suit in an indenture are not effective unless the face of the bond gives adequate notice of the restriction. While the text of the bond, including the designedly almost illegible small print on the back of the bond, contains numerous references to the indenture, only two of these have any reference at all to payment of principal or interest at maturity. The first is that ‘the interest payable hereon’ is ‘subject to certain exceptions provided in the Indenture.’ The other is reference to the indenture ‘for a description of the rights, limitations of rights, obligations, duties and immunities thereunder of the Trustee, the Company and the holders of the Debentures.’ Neither of those clauses affects the obligation to pay principal or interest on maturity. A reference to another document cannot contradict the promise to pay unless the exception is stated specifically. The law is clearly and comprehensively set out in *Cunningham*[]. There are really two distinct agreements, one embraced in the debenture bond and the other in the indenture. The indenture provides certain rights of collection in the event of certain contingencies and also sets up procedural limitations on the enforcement of those rights. The bond itself is intended to be a negotiable instrument. Any limitation on the obligation to pay at maturity appearing on its face would render it non-negotiable. It would appear that defendant has circulated its negotiable promises to pay and now seeks to deny their negotiability. As a matter of law the references in the bond to the indenture do not accomplish this.”) (citing *Cunningham v. Pressed Steel Car Co.*, 265 N.Y.S. 256, 259 (A.D. 1933), *aff’d* 189 N.E. 750 (N.Y. 1934); *Berman v. Consol. Nev.-Utah Corp.*, 230 N.Y.S. 421, 424 (Sup. Ct. 1928) (no-action clause not referenced in bond itself not enforceable)).

*Sohns v. Beavis* involves an auction of property.<sup>98</sup> The court reverses the trial court's dismissal of the complaint seeking return of a deposit, and grants judgment absolute in favor of the prospective buyer.<sup>99</sup> Headnotes to the case identify the following background: An auctioneer delivered to the plaintiff, a few days before the sale, an advertisement stating real property being auctioned was restricted as to nuisances.<sup>100</sup> The advertisement did not reference other restrictions.<sup>101</sup> Just before the auction, the following terms of sale were read aloud: "The property is sold by a good title in fee simple, and will be conveyed by usual warranty deed free and clear of all incumbrances with restrictions as to buildings and against nuisances."<sup>102</sup> The plaintiff, who won the auction, testified he did not hear it, because he was not present when the sale began.<sup>103</sup>

After winning the auction, the plaintiff signed, without having first read, a document stating he agreed to comply with "the terms and conditions as announced at the sale."<sup>104</sup> A few minutes later he signed a second document to which the terms of sale were attached.<sup>105</sup> The plaintiff did not become aware of the restrictions until he subsequently engaged a lawyer.<sup>106</sup> The plaintiff did not close the sale, and brought a claim seeking return of his deposit.<sup>107</sup>

It appears that before he bound himself, the buyer inquired as to the nature of the restrictions, and he was advised by the clerk to whom he paid the money that "these restrictions are all right. They are only for private houses, and you are all right."<sup>108</sup> The restrictions, which the court describes as "not within reason or precedent, and would not have been regarded as possible even by the most prudent and cautious,"<sup>109</sup> allowed the initial

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<sup>98</sup>93 N.E. 935, 935 (N.Y. 1911).

<sup>99</sup>*Id.* at 935-37.

<sup>100</sup>*Id.* at 935.

<sup>101</sup>*Id.* at 936.

<sup>102</sup>*Id.*

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

<sup>109</sup>*Id.*



owner of multiple parcels to release building restrictions non-uniformly (releasing one or more owners but not others).<sup>110</sup>

The court concludes the extrinsic provisions are not enforceable against the buyer, using the following language:

We think that the restrictions, so imperfectly described in the terms of sale, did not give fair notice of the restrictions afterward put in the deed tendered to the plaintiff; that under the circumstances surrounding the sale and the assurance given right after the sale he had a reasonable time to investigate; that upon discovery of the actual facts he had the right to rescind the transaction and sue for the recovery of the amount paid down together with the reasonable expenses incurred in examining the title.<sup>111</sup>

A series of New York cases protects subcontractors from improvident or unexpected consequences that might otherwise arise by incorporating the prime contract into the subcontract. *Bussanich v. 310 East 55th Street Tenants* states, "Under New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor."<sup>112</sup> The court affirms the trial court's determination that the prime contractor's duty in the prime contract to obtain certain insurance did not, through incorporation by reference, obligate the subcontractor to do the same.<sup>113</sup>

*Peabody v. Dewey* holds an agreement to obtain a loan referencing the lender's usual form did not incorporate a provision in that form requiring payment in gold.<sup>114</sup> The initial agreement stated, in particular:

We hereby engage your services to procure for us a loan of \$250,000 for five years, with privileges of prepayment as below stated, at six per cent, interest per annum, payable half yearly, and principal and interest payable at such place as the lender may appoint. As security for such loan, we

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<sup>110</sup> *Id.* at 937.

<sup>111</sup> *Id.*

<sup>112</sup> 723 N.Y.S.2d 444, 445 (App. Div. 2001).

<sup>113</sup> *Id.*

<sup>114</sup> 39 N.E. 977, 978–79 (Ill. 1894).

will give a joint and several principal note, and interest notes, and a mortgage or trust deed (in your usual form), conveying in fee simple, free of incumbrance. . . .<sup>115</sup>

The form in use by the lender for the preceding nine months stated payments were “[d]ue . . . ; in the gold coin of the United States . . . .”<sup>116</sup> The borrowers, who had dealt with the lender before that, were unaware of the change in the form.<sup>117</sup> The court concludes the borrowers were not liable for failure to proceed, affirming the outcome of a bench trial.<sup>118</sup>

It is easier to state the outcome than to summarize the court’s rationale. One could argue the borrowers had a duty to read the referenced documents, and by not doing so, they became liable for the terms they had not read. The court clearly rejects that argument, but it does not actually express a rationale for rejecting this argument.<sup>119</sup> The analysis seems to be based on a conclusion that the referenced terms were in some way in conflict with the terms shown to the borrowers, suggesting a need for prominence of terms that seem inconsistent with the purposes of the prominent document:

To say that, by agreeing to give notes and mortgage or trust deed in the other parties’ usual form to secure them, they bound themselves to pay in gold coin of the United States, etc., because that unusual condition was printed in those forms, but unknown to them, is most unreasonable, and can find no support in the law of contracts. Any one signing this application would reasonable understand the words in parentheses to refer to the form of the mortgage or trust deed, and not to the particular kind of money in which the notes were to be payable. In the agreement counsel for appellants treat those words as synonymous with ‘upon the terms and conditions set forth in your usual form’; and they liken it to cases in which a written contract refers to and makes the terms and conditions of another instrument a part of it. Manifestly there is no analogy between that class of cases and this. It is undoubtedly the duty of a party to

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<sup>115</sup> *Id.* at 977.

<sup>116</sup> *Id.* at 978.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 979.

<sup>119</sup> *Id.* at 978.

acquaint himself with the terms of a contract to which he is a party before he enters into it, and, if other instruments or agreements are made a part of the contract, he is bound to know the terms and conditions of such instrument or agreement; but, as seen, no such agreement is here shown. In our view of this record, before the plaintiffs below could recover the burden was on them to show, by proof other than the written agreement and forms used by them at the time, that the defendants, or Dewey, who signed the application, knew that their forms contained a provision for payments in a particular kind of money, and entered into the agreement with that understanding.<sup>120</sup>

*Weiner v. Mercury Artists Corp.* involves a one-page contract between a summer resort and an orchestra, which incorporated by reference union rules, a 207-page booklet containing a “somewhat vague provision for arbitration.”<sup>121</sup> The court, indirectly emphasizing the lack of prominence of the pertinent provision, holds “the provision of the contract relating to incorporation of the printed booklet was not sufficiently clear to bind plaintiffs to . . . arbitrate.”<sup>122</sup> This approach might be viewed as an extension of the principle, discussed above, that an incorporated document must be adequately identified.<sup>123</sup> Even if literally identified, the lack of prominence may make the identification inadequate.

It is not intended to suggest that all the authority can be easily harmonized. Thus, although some authority seems to limit enforceability of extrinsic provisions where doing so would seem to result in an unreasonable imposition, there certainly is other authority to the effect that terms not delivered may nevertheless be incorporated.<sup>124</sup>

#### 4. Conclusions.

Authority limiting the effectiveness of an attempt to incorporate by reference adverse terms is long-standing. Some of the authority, such as that

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<sup>120</sup> *Id.* at 978–79.

<sup>121</sup> 130 N.Y.S.2d 570, 571 (App. Div. 1954).

<sup>122</sup> *Id.* (commenting on the rules as follows: “[I]n which somewhere between pages 62 and 66 of this bulky document, there is a wordy and at least as to the parties involved, a somewhat vague provision for arbitration . . . .”)

<sup>123</sup> See *supra* note 37 and accompanying text.

<sup>124</sup> See *supra* note 36 and accompanying text.

involving no-action clauses and insurance certificates, involves circumstances where there is a brief document, not containing the adverse terms, designed to summarize terms for a party. Other cases involve onerous terms the court finds unsuitable to be incorporated. Underlying these cases is an unwillingness to give effect to inadequately noticed adverse terms.

## II. APPLICATION OF INTERPRETATIVE PRINCIPLES TO AGREEMENTS MEMORIALIZED IN MULTIPLE DOCUMENTS

This article turns in this Part to interpretative principles applied to transactions memorialized in multiple documents. Numerous cases state a “cardinal” principle in contract interpretation is to implement the intent of the parties, where it can be ascertained.<sup>125</sup> This Part primarily addresses two other principles:

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<sup>125</sup> *E.g.*, *Larry D. Barnes, Inc. v. United States*, 45 F. App'x 907, 908–09 (Fed. Cir. 2002) (“It is a cardinal rule of contract construction that the joint intent of the parties is dominant if it can be ascertained.”); *Hibiscus Assocs. Ltd. v. Bd. of Trs. of Policemen & Firemen Retirement Sys.*, 50 F.3d 908, 919 (11th Cir. 1995) (“The cardinal rule of contract law is that a court should strive to effectuate the intent of the parties.”) (citing Florida authority); *Booker v. Robert Half Int'l., Inc.*, 315 F. Supp. 2d 94, 105 (D.D.C. 2004) (“A cardinal rule of contract interpretation is that wherever possible the parties’ intent shall be given full effect.”); *Superl Sequoia Ltd. v. C.W. Carlson Co.*, No. 07-CV-640-BBC, 2008 WL 2940734, at \*7 (W.D. Wis. July 22, 2008); *Cappell v. Bd. of Trs. of Univ. of Med. & Dentistry of N.J.*, No. 93–1852, 1994 WL 548208, at \*6 (D.N.J. Oct. 3, 1994); *Lightwave Commc'ns, LLC v. Broadview Networks, Inc.* (*In re Lightwave Commc'ns, LLC*), No. 08–11877–TJC, 2010 WL 445212, at \*3 (Bankr. D. Md. Jan. 28, 2010) (citing *Tull v. Turek*, 147 A.2d 658, 662 (Del. 1958)); *Von v. George* (*In re Estate of George*), No. G032711, 2004 WL 870473, at \*2 (Cal. Ct. App. Apr. 23, 2004) (not officially published); *Flynt v. Life of S. Ins. Co.*, 718 S.E.2d 343, 347 (Ga. Ct. App. 2011) (“Under Georgia law . . . the cardinal rule of contract construction is to determine the intent of the parties.”); *Peak v. Adams*, 799 N.W.2d 535, 544 (Iowa 2011); *McBride Elec., Inc. v. Putt's Tuff, Inc.*, 685 P.2d 316, 320 (Kan. Ct. App. 1984); *Amend v. McCabe*, 664 So. 2d 1183, 1187 (La. 1995); *Shay v. Aldrich*, 790 N.W.2d 629, 637 (Mich. 2010) (quoting *McIntosh v. Groomes*, 198 N.W. 954, 955 (Mich. 1924)); *Renco Grp., Inc. v. Certain Underwriters at Lloyd's, London*, 362 S.W.3d 472, 477 (Mo. Ct. App. 2012); *U.P. Terminal Fed. Credit Union v. Emp'rs Mut. Liab. Ins. Co.*, 109 N.W.2d 115, 118 (Neb. 1961); *Perkins v. N.Y. Cent. R.R. Co.*, 24 N.Y. 196, 203 (1862); *B.W. Rogers Co. v. Wells Bros., Inc.*, No. 17–11–25, 2012 WL 605519, at \*10 (Ohio Ct. App. Feb. 27, 2012); *In re Kaufman*, 37 P.3d 845, 853 (Okla. 2001); *Gray v. Gray*, 286 P.2d 138, 141 (Or. 1955); *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 413 S.E.2d 866, 868 (S.C. Ct. App. 1992); *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006); *Crystal Recreation, Inc. v. Seattle Ass'n of Credit Men*, 209 P.2d 358, 363 (Wash. 1949). *Cf.* *Tech-Built 153, Inc. v. Va. Sur. Co.*, 898 A.2d 1007, 1009 (N.H. 2006) (summarizing prior authority as holding “fundamental inquiry in interpreting contracts centers on determining intent of parties at time of agreement”); *Kennedy v. Erkman*, 133

- Where a contract is memorialized in multiple writings, the writings are to be construed as one.<sup>126</sup>
- A construction that results in some language being surplusage, which is also sometimes referenced as a cardinal principle, is disfavored.<sup>127</sup>

As discussed below, the former principle is applied in some contexts to treat the parties as if they had expressly incorporated by reference all the documents into one single writing. This Part illustrates circumstances in which both interpretive principles either yield results likely inconsistent with the parties' evident intent or make contract drafting more difficult.

### A. Illustrative Transactions

#### 1. Multiple Complete Documents.

Before turning to the detailed legal analysis, it is helpful to provide some illustrations of circumstances in which understandings are memorialized in multiple writings. There may be multiple writings each of

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A.2d 550, 552 (Pa. 1957) (“The primary rule of construction of an agreement is that the intent of the parties is controlling.”); *Huml v. Vlazny*, 716 N.W.2d 807, 820 (Wis. 2006) (“The lodestar of contract interpretation is the intent of the parties.”).

The goal of implementing the parties' intent may be circumscribed by reference to intent as reflected in the language used. *E.g.*, *Mazziotti v. Allstate Ins. Co.*, 695 A.2d 1010, 1014 (Conn. 1997) (“The cardinal rule of interpretation is the discovery of the intent and meaning of the parties from the language used. . . .” (quoting *Dwy v. Conn. Co.*, 92 A. 883, 887 (Conn. 1915), *superseded in part by statute*, CONN. GEN. STAT. ANN. § 52-572e (West 2010)); *Evansville-Vanderburgh Sch. Corp. v. Moll*, 344 N.E.2d 831, 837 (Ind. 1976) (“The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties, as expressed in the language used, and to give effect to that intention, if it can be done consistent with legal principles.” (quoting *Walb Const. Co. v. Chipman*, 175 N.E. 132, 134 (Ind. 1931)). *See also* *Foothill Capital Corp. v. E. Coast Bldg. Supply Corp.*, 259 B.R. 840, 844 (E.D. Va. 2001); *Buenz v. Frontline Transp. Co.*, 882 N.E.2d 525, 528–29 (Ill. 2008); *Idbeis v. Kan. Spine Hosp., L.L.C.*, No. 97,179, 2008 WL 4291443, at \*3 (Kan. Ct. App. Sept. 19, 2008); *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997); *Richman v. Gehring Ranch Corp.*, 37 P.3d 732, 735 (Mont. 2001); *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 831 (Tex. 2009).

<sup>126</sup>*E.g.*, *Kroblin Refrigerated Xpress, Inc. v. Pitterich*, 805 F.2d 96, 107 (3d Cir. 1986).

<sup>127</sup>*Cowen & Co. v. Tecnoconsult Holdings Ltd.*, No. 96 CIV. 3748 (BSJ), 1996 WL 391884, at \*5 (S.D.N.Y. July 11, 1996) (“In addition, this interpretation comports with a ‘cardinal principle of contract construction’ which is to give effect to all of the provisions and to render them consistent with each other.”); *Cappell*, 1994 WL 548208, at \*6 (“A cardinal rule of contract construction requires the Court to give effect to all portions of the contract.”).

which could stand on its own. For example, operation of a hotel may be documented by a lease of the premises and a separate agreement governing management of the premises.<sup>128</sup> Or there may be a main document that is supplemented in some fashion, perhaps with a side letter.<sup>129</sup>

Where there are multiple documents, applicable principles of contract construction may cause the multiple documents to be construed as a single integrated document, even if the documents themselves do not explicitly so provide.<sup>130</sup> *Rhythm & Hues, Inc. v. Terminal Marketing Co.* illustrates the problems that can arise from treating multiple simultaneous writings as a single, complete contract.<sup>131</sup> It may be helpful, before turning to the facts of the case, to provide some background, involving “hell-or-high-water” lease payment obligations.

A lease can provide one component of a set of transactions designed to effect a financing. These transactions are an alternative to simply borrowing money. To illustrate, let’s say a firm needs money. A different firm, a financial firm, can provide the funds. To create the initial transaction equivalent to a loan, the firm needing money can sell property that it owns to the first financial firm and simultaneously lease back the property. If the lease is for the useful life of the property, or there is a cheap buy-out option, this set of transactions is equivalent to a loan. The lessee gets cash immediately, makes future periodic payments, and continues to use the property.

Loans, and their equivalents, are often resold. To facilitate the first financial firm’s transfer of the right to receive periodic payments to a second financial firm,<sup>132</sup> the lease may provide that the lease payments are unconditional (not dependent on the performance of the property, etc.).<sup>133</sup> If

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<sup>128</sup> *E.g.*, *Meridien Hotels, Inc. v. LHO Fin. P’ship I, L.P.*, 255 S.W.3d 807 (Tex. App—Dallas 2008, no pet.) (assignment of agreement for hotel management incorporating the lease).

<sup>129</sup> *E.g.*, *Mercedes-Benz USA LLC v. Concours Motors, Inc.*, No. 07-C-0389, 2010 WL 55473, \*3 (E.D. Wis., Jan. 4, 2010).

<sup>130</sup> *See, e.g.*, *Rhythm & Hues, Inc. v. Terminal Mktg. Co.*, No. 01 Civ. 4697(AGS), 2002 WL 1343759, at \*5-6 (S.D.N.Y. June 19, 2002).

<sup>131</sup> *Id.*

<sup>132</sup> The lease also may so provide even if there is not an intent to transfer right to receive lease payments. Where the lessee has selected the property leased, defects in its performance may well be allocated to the lessee as opposed to the financial firm.

<sup>133</sup> *See, e.g.*, *Rhythm & Hues, Inc.*, 2002 WL 1343759, at \*5 (stating, “‘Lessee’s obligation to pay Lessor is absolute and unconditional,’ and that the lessee ‘shall not be entitled to any abatement, reduction, set-off, counterclaim, defense or deduction with respect to any Rent or other sum payable hereunder.’” (quoting Lease from The Terminal Marketing Company, Inc. to Rhythm

the lease payments are made unconditional, a third party—a second financial firm considering buying the right to receive lease payments—only needs to review the lessee's credit, generally, and the relative value of the leased property.

Such a claim is at issue in *Rhythm & Hues, Inc. v. Terminal Marketing Co.*<sup>134</sup> The transaction at issue involves a financing firm that extended a line of credit.<sup>135</sup> The borrower/lessee alleged that its arrangements were memorialized by a lease (containing a hell-or-high-water provision) of property first deeded to the future lessor from the future lessee and a separate line of credit.<sup>136</sup> The right to the hell-or-high-water payments was assigned,<sup>137</sup> and the borrower/lessee claimed its duty to pay under the lease was subject to its rights under the line of credit.<sup>138</sup>

The hell-or-high-water payment obligation, at least by its express terms, facilitated the financing, by allowing the lessor to sell the lease payments to another lender, again without necessitating investigation of the underlying transaction.<sup>139</sup> The question then arose whether the simultaneous line of credit documents would be construed as one instrument with the lease obligations, thereby subjecting the lease payment obligations to defenses under the line of credit.<sup>140</sup> As discussed below, the court denies summary judgment sought by an assignee of the lease payments, on the basis that other simultaneous documents referencing a line of credit are to be construed as one with the lease containing the hell-or-high-water provision, limiting the unconditional nature of those payment obligations.<sup>141</sup>

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& Hues, Inc. (May 9, 2000))).

<sup>134</sup> *Id.* at \*1.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at \*6.

<sup>137</sup> *Id.* at \*4.

<sup>138</sup> *Id.* at \*6. As part of giving the lessee rights equivalent to those it would have had under a traditional loan, the lessee had a bargain purchase option. Letter agreement re. Lease # 3855 from The Terminal Marketing Company, Inc., to Rhythm & Hues, Inc. (May 9, 2000) (\$100 purchase option after all payments made).

<sup>139</sup> *Rhythm & Hues, Inc.*, 2002 WL 1343759, at \*4.

<sup>140</sup> *Id.* at \*6.

<sup>141</sup> See *infra* notes 185–193 and accompanying text.

## 2. Side Letters.

### *a. Side Letter Changing Standardized Terms.*

A side letter is often used by parties where there is a form agreement one party typically uses that does not match the terms the parties contemplate in this particular transaction, or the terms for these particular parties.<sup>142</sup> It typically takes the form of a letter sent by one party and signed (manifesting assent) by the other, indicating one or more terms in a separate, referenced document are modified in some way.<sup>143</sup>

Technological development may obscure administrative realities of just a few decades ago. In the absence of inexpensive desktop publishing, having form documents printed provided a cost-effective solution in various contexts. To vary from these terms in a particular transaction, the parties might provide typed, attached riders. Reflecting the purpose of the rider, to deviate from a printed form, one rule of contract construction provides that typed language takes precedence over printed language.<sup>144</sup> Alternatively, the parties might execute the form contract and simultaneously execute a side letter. For example, *International Milling Co. v. Hachmeister, Inc.*

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<sup>142</sup>Marcia E. Facey, *Real Estate Opportunity Funds: A Unique Vehicle For Overseas Investment*, PROB. & PROP. May–June 2009, at 33 (side letters used in most foreign real estate investment funds); Steven G. Frost, *Side Letters—Recent Developments and an Ohio Court of Appeals Decision*, 6 J. TAX’N FIN. PRODUCTS., no. 2, 2006, at 5, 5 (in hedge fund investments); I. Richard Ploss, *Reviewing the Client’s Assets and Objectives in Developing an Estate Planning Strategy*, in BEST PRACTICES FOR STRUCTURING TRUSTS AND ESTATES, 2012 EDITION: LEADING LAWYERS ON DRAFTING A FLEXIBLE PLAN, PROTECTING THE CLIENT’S ASSETS, AND LEVERAGING TAX STRATEGIES, at \*9 (2011), available at 2011 WL 6431200 (directions to trustee concerning administration in estate planning practice); Richard G. Smead, *Contracting for Transportation Special Emphasis On Generator Loads*, in NATURAL GAS TRANSPORTATION AND MARKETING, at I.A.4. (Rocky Mtn. Min. L. Special Inst. 2001D), available at 2001D–RMMLF–INST 5 (Westlaw) (“In addition, a practice for a long time in the industry [for pipeline service] was to execute ‘side letters,’ agreements that modified or interpreted the actual service agreement, to the satisfaction of both parties.”). See generally Elisa Erlenbach Maas, *Side Letters in an Investment Fund*, in LIMITED LIABILITY ENTITIES: 2012 UPDATE (A.L.I.-A.B.A. A.L.I. C.L.E., July 26, 2012), available at VCU0728 ALI-ABA 43 (Westlaw) (discussing use of side letters in investment funds).

<sup>143</sup>*E.g.*, *Mercedes–Benz USA LLC v. Concours Motors, Inc.*, No. 07–C–0389, 2010 WL 55473 (E.D. Wis. Jan. 4, 2010).

<sup>144</sup>*E.g.*, *Pluff v. Sheehy Constr. Co.*, No. C7-88-1017, 1988 WL 44265, at \*2 (Minn. Ct. App. Oct. 11, 1988) (“[H]andwritten or typewritten provisions of a contract will, in the case of conflict, prevail over printed (typeset) provisions . . . .”); RESTATEMENT (SECOND) OF CONTRACTS § 203, cmt. f (1979).



involves a somewhat unappetizing dispute concerning the quality of flour being sold.<sup>145</sup> The buyer sought quality specifications beyond those referenced in the seller's customary form.<sup>146</sup> The seller's representative agreed to memorialize the additional specifications in a side letter, in lieu of annotating the terms of the form.<sup>147</sup> The reason for using a side letter, instead of annotating the form, referenced by the seller's representative, was "these milling contracts . . . are uniform all over the country and they didn't want to violate the normal contract."<sup>148</sup>

*b. Side Letter Altering Duration.*

A side letter also may be used where it is difficult to accommodate all the parties' agreements in a single document.<sup>149</sup> For example, the parties may contemplate multiple undertakings that vary in duration. A side letter may be used to collect understandings with a different duration.

One illustration arose in connection with the negotiation of a franchise agreement for a Mercedes-Benz dealership.<sup>150</sup> The parties contemplated a term for the franchise, as well as an undertaking by the dealer to upgrade the physical facilities.<sup>151</sup> The latter would take longer to complete than the term of the franchise, *i.e.*, the franchise would come up for renewal before the new facilities could be completed.<sup>152</sup> Such a circumstance could cause the parties to include their understanding concerning facility upgrades in a side letter.<sup>153</sup>

A more curious example is provided by *General Re Corp. v. Foxe*, which involves a business deal concerning employment terms that are somewhat difficult for a lawyer to categorize.<sup>154</sup> The employment was for a

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<sup>145</sup> 110 A.2d 186, 188 (Pa. 1955).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *See, e.g.*, Mercedes-Benz USA LLC v. Concours Motors, Inc., No. 07-C-0389, 2010 WL 55473, \*2 (E.D. Wis. Jan. 4, 2010).

<sup>150</sup> *Id.*

<sup>151</sup> *See id.*

<sup>152</sup> *Id.* at \*2-3.

<sup>153</sup> *See* Mercedes-Benz USA, LLC's Opposition to Concours Motors, Inc.'s Motion for Summary Judgment at pt. I.A.2, at 6, *Mercedes-Benz*, 2010 WL 55473 (No. 07-CV-389), 2009 WL 5081279, at pt. I.A.2.

<sup>154</sup> 678 N.Y.S.2d 459, 461 (Sup. Ct. 1998).

two-year term.<sup>155</sup> However, the business deal was that the employee was to participate in a bonus pool covering a time period after the guaranteed employment.<sup>156</sup> A lawyer's mind may boggle at this attempted legal construct. How can an employee be granted participation in a bonus pool for a period when the employee is not assured to be employed? It is not clear. The business folks acknowledged this inconsistency: "[W]e cant [sic] put that[, the third-year bonus pool,] in the contract or it in effect becomes a three-year contract rather than the two years we've agreed upon."<sup>157</sup> The parties evidently avoided allowing the lawyers to participate in this aspect of the documentation, one writing:

[T]here are further understandings with General Re Corporation regarding your terms of employment. As you know, some of these points cannot easily be put into the form of a contract and agreed upon by lawyers. I have put them in the form of this signed "side letter," so that they are binding upon General Re.<sup>158</sup>

*c. Side Letter Implementing Confidentiality of Certain Terms.*

A side letter may be used to collect terms that one or both parties wish to keep confidential. This could be benign,<sup>159</sup> but it need not be. For example, a party's agent might collect in a side letter unauthorized terms or ones that senior employees of that party would not approve.<sup>160</sup> A side letter might be used to give a buyer rights not referenced in a normal contract of sale where the complete terms would adversely affect the seller's accounting of the transactions.<sup>161</sup> Or a borrower might seek to have certain

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<sup>155</sup> *Id.* at 460–61.

<sup>156</sup> *Id.* at 461.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 461 n.3 (quotation marks omitted).

<sup>159</sup> *E.g.*, Jennifer Sevigney Durand, et al., *Separation Agreements*, in MASS. DIVORCE L. PRAC. MANUAL 13-1, 13-11 (MCLE, Inc. 3rd ed. 2012) (confidentiality of documents to be kept out of divorce file).

<sup>160</sup> *See, e.g.*, *Unisys Corp. v. Pergament Distributions, Inc.*, No. 86 CV-4304(ERK), 1991 WL 29965, at \*1 (E.D.N.Y. Feb. 15, 1991).

<sup>161</sup> *See* Kenneth G. Yormark, *The Income Statement*, in BASICS OF ACCOUNTING FOR LAWYERS 2012: WHAT EVERY PRACTICING LAWYER NEEDS TO KNOW, at 171, 178 (PLI Corporate Law & Practice Course Handbook Series no. 1958, 2012), available at 1823 PLI/Corp 133 (Westlaw) (describing side letters as a method for altering normal contracting terms in ways that would change accounting concerning revenue recognition).

terms omitted from documents that would be reviewed by its lender. For example, *T.A. Loving Co. v. Latham* involves a borrower who sought to show a lender a construction contract containing a cap on its liability, although agreeing with the contractor that, between them, the fee would not be so capped.<sup>162</sup>

### B. Construe as One Agreement

Assorted authority is to the effect that “where two writings are executed at the same time and are intertwined by the same subject matter, they should be construed together and interpreted as a whole. . . .”<sup>163</sup> This may be understood as requiring interpretation as if the language of each writing were set forth in one single instrument.<sup>164</sup> For example, *BWA Corp. v.*

<sup>162</sup>201 S.E.2d 516 (N.C. Ct. App. 1974).

<sup>163</sup>*Kroblin Refrigerated Xpress, Inc. v. Pitterich*, 805 F.2d 96, 107 (3d Cir. 1986). *See also*, e.g., *Shehadi v. Ne. Nat’l Bank of Pa.*, 378 A.2d 304, 306 (Pa. 1977) (“It is a general rule of law that where one contract refers to and incorporates the provisions of another both shall be construed together. The Pennsylvania cases indicate that even where there is no specific reference to a prior agreement or prior agreements, several contracts shall be interpreted as a whole and together.”) (quoting *Wilson v. Viking Corp.*, 3 A.2d 180, 182–83 (Pa. Super. Ct. 1938)); *Countryside Orthopaedics, P.C. v. Peyton*, 541 S.E.2d 279, 286 (Va. 2001) (failure to pay purchase price under stock purchase agreement treated as prior breach excusing failure to pay severance under employment agreement). *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1979) (“[A]ll writings that are part of the same transaction are interpreted together.”). This authority is long-standing. *E.g.*, *Makepeace v. President of Harvard Coll.*, 27 Mass. (10 Pick.) 298, 307 (1830).

There is also statutory language to that effect in a number of jurisdictions. CAL. CIV. CODE § 1642 (West 2011) (“Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.”); 18 GUAM CODE ANN. § 87108 (1992) (same); MONTANA CODE ANN. § 28-3-203 (West 2012) (same); N.D. CENT. CODE § 9-07-07 (2006) (same with punctuation changes); OKLA. STAT. ANN. tit. 15, § 158 (West 1993). This statutory language was set forth in the Field Code. COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK § 807, at 247 (David Dudley Field et al., Commissioners, 1865).

<sup>164</sup>*E.g.*, *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 53 (2d Cir. 1993) (“Generally, separate writings are construed as one agreement if they relate to the same subject matter and are executed simultaneously.”); *Torrence v. Shedd*, 112 Ill. 466, 475 (1884) (stating a deed “and the contemporaneous contract between [the parties] relating to the same subject matter, must be treated as but parts of the same transaction, and consequently should receive the same construction as if their several provisions were embodied in the same instrument.”); *Gonzalez v. Consumer Portfolio Servs., Inc.*, No. CL04-00092, 2004 WL 2334765, at \*1 (Va. Cir. Ct. Sept. 2, 2004) (“[T]he law is clear that where two or more documents are executed at the same time or contemporaneously between the same parties and in reference to the same subject matter, they are to be regarded as a single transaction and be construed as if their multiple provisions were in the

*Alltrans Express U.S.A., Inc.*,<sup>165</sup> involves a landlord who consented to a commercial tenant's sublease, where the sublessee in a separate letter agreed to pay directly to the landlord certain increases in electricity costs. Applying this interpretative principle, the court treats a subsequent assignment and assumption of the sublessee's obligations under the sublease as including an assumption of the obligation to pay the increased electricity costs—an assumption of an obligation in a document separate from that containing the duties expressly assumed.<sup>166</sup> For ease of exposition, this interpretative approach will be referenced as the *strong form* of the construe-as-one principle.

Alternatively, this interpretative principle may merely be understood as requiring that each writing is to be interpreted in light of the other simultaneous writings.<sup>167</sup> Although a case may reference both flavors of this interpretative principle without distinguishing between them,<sup>168</sup> they may produce markedly different outcomes. Illustrations of cases applying this principle follow.

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same instrument.”); *Bolling v. Hawthorne Coal & Coke Co.*, 90 S.E.2d 159, 167 (Va. 1955) (stating, before concluding lease and purchase option constitute, collectively, conditional sale, “It is conceded that the two instruments constitute one and only one contract relating to the same subject matter. They must be regarded as parts of one transaction and receive the same construction as if their several provisions were in one and the same instrument.”).

<sup>165</sup> 493 N.Y.S.2d 1, 3 (App. Div. 1985) (“In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument.”).

<sup>166</sup> *Id.*

<sup>167</sup> *Crown Books Corp. v. Bookstop, Inc.*, No. 11255, 1990 WL 26166, at \*1 (Del. Ch. Feb. 28, 1990) (“I conclude that . . . in construing the legal obligations created by that document, it is appropriate for the court to consider not only the language of that document but also the language of contracts among the same parties executed or amended as of the same date that deal with related matters . . .”).

<sup>168</sup> *E.g.*, *Ashall Homes Ltd. v. ROK Entm't Grp. Inc.*, 992 A.2d 1239, 1250 n.56 (Del. Ch. 2010) (“In the absence of anything to indicate a contrary intention, writings executed at the same time and relating to the same transaction are construed together as a single contract, as though they were as much one in form as they are in substance, in order to determine the intent, rights, and interests of the parties.” (quoting 17A C.J.S. *Contracts* § 315, at 337 (1999)); *id.* (quoting *Crown Books Corp.*, 1990 WL 26166, at \*1).

### 1. Treat as One Agreement: Defaults.

A number of cases present the issue of whether a default under one agreement constitutes a default under a separate agreement. That may involve causing a default under one agreement to constitute a default under the other (a cross-default), or it may involve finding express cure rights in one agreement incorporated into another agreement that is silent on those cure rights. If the separate agreements are treated as a single contract under this principle, the answer would be “Yes.”

To illustrate and analyze the issues, this article will now review a few cases from New York (its state courts or the Southern District of New York or the Second Circuit). The outcomes are inconsistent; some cases find cross-defaults implied (or treat the agreements as one for purposes of determining whether a default has been cured); others do not. Creating a cross-default in some of the cases seems quite problematic—inimical to giving effect to the evident sense of the pertinent relationship. Given the ease with which a cross-default can be drafted (and the same would apply to incorporating cure rights),<sup>169</sup> it would seem the cases finding a cross-default would generally not reflect the parties’ evident intentions.

One illustration involves deferred payment obligations made in connection with entering-into a larger agreement. *Carvel Corp. v. Diversified Management Group, Inc.*, applying New York law, involves a distributorship agreement in which Diversified was to act as Carvel’s distributor in a specified territory, servicing new and future franchisees.<sup>170</sup> As part of entering into the distributorship agreement, Diversified delivered promissory notes aggregating \$1.3 million.<sup>171</sup> On the basis of this theory of construing multiple writings as a single agreement, the court evidently read-into the promissory notes cure rights set forth in the distributorship agreement but not set forth in the promissory notes themselves.<sup>172</sup>

However, New York courts do not invariably interpret as one agreement multiple simultaneous agreements.<sup>173</sup> *Applehead Pictures LLC v. Perelman*

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<sup>169</sup> See *infra* text accompanying notes 185–186.

<sup>170</sup> 930 F.2d 229 (2d Cir. 1991).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 233 (“Thus we conclude that Carvel is not entitled to recovery on the promissory notes without reference to the distributorship agreement.”).

<sup>173</sup> E.g., *Schron v. Troutman Saunders LLP*, 945 N.Y.S.2d 25 (App. Div. 2012). *Schron*, also involving New York law, provides another example where the court does not find implied cross-defaults. *Id.* at 29. The case involves a client convinced by its lawyer and an investment bank to

thoughtfully declines to treat as one integrated agreement separate agreements executed at the same time.<sup>174</sup> In connection with execution of a separation agreement, a precursor to a divorce between financier Ronald Perelman and actress Ellen Barkin, the operating agreement governing a film production limited liability company formed by the two and Barkin's brother was amended to eliminate Perelman's participation in the company's management.<sup>175</sup> The court concludes Barkin's alleged breach of the separation agreement is not a basis for terminating Perelman's obligations to contribute to the LLC:

Generally, "all contemporaneous instruments between the same parties relating to the same subject matter are to be read together and interpreted as forming part of one and the same transaction." Nevertheless, "separate written agreements involving different parties, serving different purposes and not referring to each other [are] not intended to be interdependent or somehow combined to form a unitary contract." As this Court stated . . . , "Manifestly, one agreement may follow from and even have as its raison

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purchase a business. *Id.* at 26. The client did business through various affiliates. *Id.* As part of the deal, a portion of the real estate acquired in the transaction was then leased to a firm owned by sibling of the lawyer, and that firm was to receive a loan from a buyer affiliate. *Id.* A separate affiliate of the buyer simultaneously obtained an option to buy the lessee, in an agreement containing a merger clause. *Id.* at 26–27.

The court holds the parol evidence rule bars introduction of evidence that the loan was not made and that default was a basis for invalidating an exercise of the option. *Id.* at 29. The opinion states, "the [buyer/client]-controlled parties to each agreement were different (an equity entity and a funding entity), and the agreements contained no cross references to each other. Thus, the loan agreement and the option agreement were not interdependent and should not be read as a unitary obligation even though they were executed at the same time." *Id.* at 28–29.

The documents were executed at the same time. *Id.* at 29. They were clearly part of the same transaction. Can it really make a difference that the recitals did not indicate that the lessee had simultaneously entered into a loan agreement from an affiliate of the option-holder, *i.e.*, that the documents did not expressly cross-reference each other? It is good drafting practice to include in recitals a history of the parties' transactions. This serves an administrative purpose—to inform future readers of the context. In documenting a complex transaction, thoughtful lawyers memorialize the context, understanding the original participants may not be present when questions arise subsequently. If the absence of a cross-reference is, in fact, relevant, this approach creates a trap for unwary lawyers. By making a diligent effort to document the background of the transactions, the operative terms may be affected.

<sup>174</sup> 913 N.Y.S.2d 165, 172 (App. Div. 2010).

<sup>175</sup> *Id.* at 168.

d'être another and yet be independently enforceable". Additionally, "in the absence of some clear indication that the parties had a contrary intention, contracts manifesting separate assents to be bound are generally presumed to be separable."<sup>176</sup>

Reference to the parties' evident purpose illuminates the propriety of the outcome. Ongoing management and operation of the business venture would have been much more difficult had the court reached the opposite conclusion, effectively creating a cross-default between the separation agreement and the limited liability company operating agreement. Performance of a separation agreement can often be highly contentious, given the highly personal nature of the subject. Creating a cross-default between that document and a limited liability company operating agreement would introduce significantly greater uncertainty as to operation of the company. Finding implied an obligation fostering uncertainty and delay, being inimical to best business operation, is very likely not joint wealth maximizing. Hence, the outcome is likely representative of what reasonable parties would have bargained for and represents a thoughtful outcome.

*Rudman v. Cowles Communications, Inc.* involves the acquisition of a publishing business.<sup>177</sup> In connection with the acquisition, the seller entered into a separate employment agreement.<sup>178</sup> The seller alleged the employment agreement was thereafter breached, and that constituted a breach of the acquisition agreement, entitling the seller to rescission.<sup>179</sup> The court disagreed, referencing the fact that the contracts were signed on different days and were formally between different parties.<sup>180</sup>

*Rudman* cites, with the *but compare* signal, *Bethea v. Investors Loan Corp.*<sup>181</sup> *Bethea* holds a conditional sales contract for a freezer "inseparable" from a contract for ongoing purchase of food, notwithstanding the seller's assignment of the freezer contract for value.<sup>182</sup>

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<sup>176</sup> *Id.* at 172 (citations omitted).

<sup>177</sup> 280 N.E.2d 867 (N.Y. 1972).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 871.

<sup>180</sup> *Id.* at 873-74.

<sup>181</sup> *Id.* at 873; *Bethea v. Investors Loan Corp.*, 197 A.2d 448 (D.C. 1964).

<sup>182</sup> *Bethea*, 197 A.2d at 450.

Hence, bankruptcy of the food seller and its default excused non-payment for the freezer.<sup>183</sup>

These latter two cases seem properly decided, when viewed from the perspective of the parties' evident purposes. As to the latter case, the consumer who has arranged for both a freezer and a food supply contract could be expected to consider himself as having acquired a package of non-severable rights. Each is of significantly less value without the other. Transaction costs for a consumer would be relatively high, and it does not seem likely to maximize the parties' joint value to allocate to the buyer the cost of arranging a replacement for part of the bargained-for performance, paying for it and suing for the difference.

As to the former case, the result seems sensible. It is, frankly, simple to provide expressly that a default under one agreement is a default under another agreement, *e.g.*, "A party's material breach of [another agreement] shall constitute a material breach of this agreement." Cross-defaults are common. In contracts between sophisticated parties, given the ease with which the parties could expressly provide a cross-default, it would seem more likely that, in general, treating simultaneous documents as one for purposes of a default would be likely not to implement the parties' intent. That would seem particularly clear where there are express provisions involving defaults.

Moreover, the result seems sensible as a business matter. It is obviously impracticable to unwind an acquisition of a business made long ago. Given that, it seems unlikely parties would expressly bargain for rescission of the acquisition for a breach of the employment agreement. However, the court's reference to the fact that the agreements were formally between different parties is not helpful. The result should have been obtained even had the parties been the same, because it is easy to create a cross-default, and implementing a cross-default in this case—finding a remedy for a perceived breach of the acquisition agreement by virtue of a breach of a post-acquisition employment agreement—seems unlikely to be practicable.

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<sup>183</sup> *Id.* Assorted authority limits the ability to enforceably deprive a consumer of the right to assert defenses after an assignment of right to receive payment from the consumer. See Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.1–.3 (Westlaw through June 21, 2012). See also 4 WILLIAM D. HAWKLAND & LARY LAWRENCE, UNIFORM COMMERCIAL CODE SERIES § 3–302:8 (Frederick H. Miller ed., 1999); Jeff Sovem, *Paradigm and Paradox in New York Consumer Credit Law: After Holder in Due Course*, 6 ANN. REV. BANKING L. 119, 133–36 (1987) (discussing defenses).



One component of detailing a complicated relationship is to divide it into separate discrete units that can be separately analyzed. Treating the separate agreements as a single agreement is inherently inconsistent with giving effect to that approach, making contractual drafting more complicated. Illustrating that preference, in many contracts, draftsmen take the time to indicate expressly that the document is to be construed without reference to other documents.<sup>184</sup> An omission of such a provision does not mean the draftsmen consciously sought not to create such a contractual partitioning. Rather, this is one detail of many that is desirable but may not be included because the cost of documenting a transaction with this level of detail is burdensome relative to the size of the transaction.

A prime illustration of a problematic application of the construe-as-one principle is *Rhythm & Hues, Inc. v. Terminal Marketing Co.*,<sup>185</sup> which addresses a hell-or-high-water lease payment obligation that was assigned. The court denies summary judgment sought by the assignee on the basis that other simultaneous documents referencing a line of credit are to be construed as one with the lease containing the hell-or-high-water provision.<sup>186</sup> The lessee claimed it need not pay, because notwithstanding the absolute terms of the lease payment obligation (and the deed conveying the property to the lessor from the lessee—the first step in a sale-and-leaseback), the lease was executed in connection with creation of a line of credit.<sup>187</sup> The lessee alleged the lessor had not delivered the loan proceeds—there had not been a draw made on the line of credit—and,

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<sup>184</sup> For example, a search of contracts filed by public companies with the Securities and Exchange Commission, as part of their public reporting of their material contracts and the like, in the month of June 2012 for the phrase “No adverse interpretation of other agreements” finds 1,316 documents. Online Database Search, LEXISNEXIS, <http://lexis.com> (follow “Search” hyperlink; then follow “News and Business” hyperlink; then follow “SEC Filings – Full Text and Abstracts” hyperlink; then search “date(>05/31/2012) & date(<7/1/2012) & “no adverse interpretation of other agreements” & EXHIBIT-TYPE((exhibit or contract or indenture or trust))”); and then follow “Search” hyperlink) (last visited Oct. 19, 2012) (Note the process of filing documents can produce multiple filings of the same document over time, as successive drafts are prepared.) Illustrative of the kind of provision this search identifies is the following: “No Adverse Interpretation of Other Agreements. This Indenture may not be used to interpret another indenture, loan, security or debt agreement of the Company or any Subsidiary thereof. No such indenture, loan, security or debt agreement may be used to interpret this Indenture.” Indenture among CNH Capital LLC, each of the Guarantors and Wells Fargo Bank, National Association, for 6.250% Notes due 2016, Series A, 6.250% Notes due 2016, Series B, § 11.09 (Nov. 4, 2011).

<sup>185</sup> No. 01 Civ. 4697(AGS), 2002 WL 1343759, at \*5 (S.D.N.Y. June 19, 2002).

<sup>186</sup> *Id.* at \*6, \*8.

<sup>187</sup> *Id.* at \*2.

therefore, the lessee need not pay the assignee.<sup>188</sup> There was not a claim the assignee had actual notice of this circumstance.<sup>189</sup>

A fundamental point of this form of transaction is to create payment obligations that can be assigned to third facilitate financing without having to examine the details of the relationship between the lessor and the lessee. The agreement expressly states: “Lessee acknowledges and agrees . . . (ii) that Lessee’s obligation to pay Lessor all amounts due hereunder is

<sup>188</sup> *Id.* at \*3.

<sup>189</sup> There is, as is often the case, one caveat arising from the complex facts. The lease form was not completely filled-out. *See* Lease between Terminal Marketing Company and Rhythm and Hues, Inc., at 1 (May 9, 2000) (on file with the Baylor Law Review). A box lists a rental payment has a blank after the phrase “Commencement Date:.” *Id.* The top of the form looks like this:

LESSEE & LOCATION OF EQUIPMENT

Name **Rhythm and Hues, Inc.**

Address **5404 Jandy Place**

City **Los Angeles State CA Zip Code 90066**

EQUIPMENT DESCRIPTION		
SEE EQUIPMENT LIST ATTACHED		
EQUIPMENT LOCATION		
No. of Months	RENTAL PAYMENT AMOUNT	FIRST RENTAL PAYMENT
<u>30</u>	<p><u>30</u> Monthly Payments of <b><u>\$57,066.47</u></b> Plus Sales Tax of <b><u>\$0.00</u></b> Total <b><u>\$57,066.47</u></b></p> <p>Commencement Date:</p>	<p>Check For This Amount Must Accompany Lease Application</p> <p><b><u>\$0.00</u></b></p>

*Id.*

Although application of the construe-as-one principle would not seem adequate to deny the assignee summary judgment, the lack of a commencement date may make the document sufficiently ambiguous to deny summary judgment. *See id.* It may reflect a mistake, and the document purports to effect a lease immediately, or it may be that it was intended to indicate the lease was not effective. If the bill of sale, conveying the leased property from the future lessee to the future lessor, was effective immediately—and it does not have such a blank—it would be anomalous for the lease not to have been effective immediately. But the matter, being one relying on judgment in interpreting facts, is one not well-suited to disposition on summary judgment.

absolute and unconditional, and (iii) Lessee shall not be entitled to any abatement, reduction, set-off, counterclaim, defense or deduction with respect to any Rent or other sum payable hereunder.”<sup>190</sup> It further states:

This Lease may be assigned by Lessor without notice to Lessee, in which event the assignee shall be entitled to exercise all rights and powers, but shall not be chargeable with any obligations or liabilities, of Lessor hereunder and all reference hereunder and all references herein to Lessor shall refer, instead, to such assignee. Lessor, or Lessor’s assignee, may also grant a security interest in the Equipment and this Lease. THE ASSIGNEE’S RIGHTS OR THE RIGHTS OF THE HOLDER OF A SECURITY INTEREST IN THIS LEASE SHALL BE FREE FROM ALL DEFENSES, SETOFFS OR COUNTERCLAIMS WHICH LESSEE MAY BE ENTITLED TO ASSERT.<sup>191</sup>

The lease makes no reference to a credit agreement, and it does not state payment on the lease is subject to the lessor delivering funds to the lessee.<sup>192</sup> Reading the agreements as a single agreement in this way prevents the parties’ creation of the intended kind of relationship: creation of an unconditional promise that can be assigned to one who need not investigate beyond the value of the collateral. That converts a principle of contract interpretation to one that simply invalidates certain types of contractual relationships. The law does, in a number of ways, invalidate such an unconditional payment obligation in connection with consumer transactions.<sup>193</sup> A basis for invalidating them outside the consumer context is not apparent.

## 2. Treat as One Agreement: Arbitration.

The law governing arbitration is *sui generis*,<sup>194</sup> given the presence of the Federal Arbitration Act.<sup>195</sup> So, although our discussion of traditional

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<sup>190</sup> *Id.* § 5.

<sup>191</sup> *Id.* § 14.

<sup>192</sup> *See generally id.*

<sup>193</sup> *See supra* note 183.

<sup>194</sup> *See, e.g.,* Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 45–46 (2d Cir. 1993) (finding Federal Arbitration Act preempts contrary state common law governing whether the parties agreed to arbitrate).

principles of contract will generally elide much authority governing arbitration, one anomalous case involving arbitration provision merits mention, because it provides an interesting illustration of a generally-applicable fact pattern that may negate application of the construe-as-one principle.<sup>196</sup>

As noted above, *General Re Corp. v. Foxe*, involves a side letter providing an employee participation in a bonus pool covering a period of time beyond the employment term in the employment agreement reviewed by the parties' lawyers.<sup>197</sup> The side letter expressly notes a choice not to put the terms in the base agreement—and referencing the impracticability of doing so:

[T]here are further understandings with General Re Corporation regarding your terms of employment. As you know, some of these points cannot easily be put into the form of a contract and agreed upon by lawyers. I have put them in the form of this signed 'side letter,' so that they are binding upon General Re."<sup>198</sup>

On this basis, the court determines mandatory arbitration provided in the employment agreement does not govern a dispute under the side letter.<sup>199</sup>

The case stands for the proposition that an express contemporaneous manifestation that the instruments are to create separate documents should negate application of the construe-as-one principle.<sup>200</sup> It is not clear the business folks understood, at the time the contracts were entered-into, the consequences of this election. That is because it is not obvious why they should have intended for this aspect of the dispute not to be subject to arbitration.

One might expect parties to be favorably inclined toward arbitration, finding desirable potential confidentiality or speed of decision-making. Or one might anticipate the parties' preferring litigation and judicial review of

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<sup>195</sup> Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

<sup>196</sup> See generally, e.g., Stuart M. Boyarsky, *Deference to a Reference: Incorporating Arbitration Where It Ought Not Be*, 11 FLA. COASTAL L. REV. 387 (2010) (discussing these principles in the context of arbitration); and *Bowe*, *supra* note 7 (same), for a discussion of these principles in the context of arbitration.

<sup>197</sup> 678 N.Y.S.2d 459, 460–61 (Sup. Ct. 1998).

<sup>198</sup> *Id.* at 461 n.3.

<sup>199</sup> *Id.* at 465–66.

<sup>200</sup> *Id.* at 465.

outcomes. On occasion, one can see an intentional bifurcation, where some disputes are arbitrated and others are not.<sup>201</sup> A reason for such a bifurcation in this case is not patent. It would appear the outcome was the random product of the parties eschewing legal advice. Perhaps the case provides a cautionary note for those inclined to exclude counsel from negotiation of part of a relationship otherwise involving participation of counsel.

### 3. Treat as One: Different Parties.

Treating multiple documents as creating a single contract has been applied where there is not an identity in the parties to the agreements, making one party bound by an agreement it did not execute.<sup>202</sup> *This Is Me, Inc. v. Taylor* involves arrangements by which an actress was engaged to act in play, which was to be videotaped.<sup>203</sup> The engagement was memorialized in multiple documents:

- A standard Actor's Equity document, providing the actress' salary for the Broadway run of the play, not guaranteeing the length of the production,<sup>204</sup>
- An agreement relating to the video production and also guaranteeing the actress the difference between her salary under the run-of-the-play agreement and \$750,000,<sup>205</sup> and
- A so-called security agreement, requiring:  
[T]he producer to "promptly pay to the Actors any and all sums due," including sums due under employment agreements "made in relation to the Play," and [that] defines "producer" broadly to "include[ ] the individual, firm, partnership or

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<sup>201</sup> Such a case can arise in connection with franchisors who act as lessors, if the lessor retains the right to expedited judicial disposition of alleged lease breaches, while other disputes are to be arbitrated. This bifurcation may be realized by a lessor where it appears, ex post, the lessee did not knowingly consent. *See, e.g., Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 975-78 (2d Cir. 1996) (involving franchise agreement requiring arbitration, lease not requiring arbitration, and cross-default in lease to franchise agreement, allowing franchisor to litigate claims, even for breach of the franchise agreement, but relegating franchisee to arbitration).

<sup>202</sup> *See generally Boyarsky, supra* note 196 (discussing this issue in the context of agreements to arbitrate).

<sup>203</sup> 157 F.3d 139, 140 (2d Cir. 1998).

<sup>204</sup> *Id.* at 141.

<sup>205</sup> *Id.*

corporation or any combination thereof producing or controlling the production of said Play.”<sup>206</sup>

The Actor’s Equity document incorporated by reference standards under which the individual producers were personally liable for the payment obligations of the firm signing as producer.<sup>207</sup> The pertinent question the opinion addresses is whether the Actor’s Equity document is incorporated by reference into the agreement relating to video production and, more importantly, the salary guaranty.<sup>208</sup>

The drafting style seems to have reflected an express desire not to have certain parts of the equity standards (a bond) apply to the salary guaranty:

Conflicting evidence was offered to explain this drafting history, but the jury was free to credit testimony that the producers wanted to keep the pay or play guarantee out of the run of the play contract that would be filed with Actors’ Equity in order to reduce the bond required under the Equity rules.<sup>209</sup>

To be clear, this would appear to be the construction of the drafting history that the appellate court found *most* supportive of the claim that the agreements should be construed as one. This testimony, however, would seem to militate against construing the documents as one. It seems to reflect a conscious choice to bifurcate the arrangements, as in *General Re Corp v. Foxe*.<sup>210</sup>

The pertinent jury instructions provided:

New York law requires that all writings which form part of a single transaction and are designed to effectuate the same purpose be read together, even though they were executed on different dates and were not all between the same parties. It is for you to determine whether the Actors’ Equity run of the play contract, the Actors’ Equity security agreement and the contractual obligation to pay [the actress] \$750,000 were each intended to be binding on all the same parties, and were intended to impose the same

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<sup>206</sup> *Id.* at 142.

<sup>207</sup> *Id.* at 143.

<sup>208</sup> *Id.* at 142.

<sup>209</sup> *Id.* at 143.

<sup>210</sup> See *supra* notes 197–200 and accompanying text.

obligations on each of the parties, even though they were set forth in different documents.<sup>211</sup>

The appellate opinion reinstates the jury verdict, stating, “We conclude that there was sufficient evidence . . . for the jury, as properly instructed, to find [the producers] were personally liable on the pay or play guarantee.”<sup>212</sup> The opinion recites:

The jury found [the producer personally] . . . liable . . . for “the unpaid balance of the \$750,000 she[, the actress,] was to receive for performing in the [play],” but the district court granted judgment as a matter of law dismissing the complaint on the grounds that (1) only the video agreement contained the pay or play guarantee; (2) that agreement unambiguously bound only [a corporation]; and (3) the Security Agreement could not be “reasonably read to require anything more than the payments due under the Run-of-the Play[sic] Contract that it was designed to secure.”<sup>213</sup>

One could say that parties should not be able to contract out of the equity rules requiring personal liability—that such attempts violate some public policy. That is not, however, the evident basis for reversing the trial court.<sup>214</sup> Rather, the governing principle implemented by the appellate court, in favorably referencing the jury instructions, is the strong form of the construe-as-one principle, as applied to writings having different parties.<sup>215</sup>

One primary purpose for entering into side letters and the like is to avoid the application of terms set forth in some other document. That appears to be the reason here referenced for the style of documentation.<sup>216</sup> The appellate court’s decision makes it more difficult for parties to tailor the terms of a particular transaction (*i.e.*, avoid application of some set of common terms).

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<sup>211</sup> *This Is Me, Inc.*, 157 F.3d at 143.

<sup>212</sup> *Id.* at 143, 146.

<sup>213</sup> *Id.* at 142.

<sup>214</sup> *See id.* at 143.

<sup>215</sup> *See id.*

<sup>216</sup> *See supra* note 209 and accompanying text.

*In re Application for Water Rights v. Northern Colorado Water Conservancy District* is another case construing as one contracts having different parties.<sup>217</sup> The United States and a then newly-formed water district entered an agreement in which the United States would construct a water project, in exchange for the district's agreement to make certain payments.<sup>218</sup> The contract generally required the water to be delivered by the United States to the water district.<sup>219</sup> The contract further provided return flow, meaning water flow after its initial use, was "reserved and intended to be retained for the use and benefit of the District."<sup>220</sup> However, the contract further provided: "The District agrees that the United States may dispose of to the Town of Estes Park, Colorado, for domestic purposes up to but not to exceed 500 acre-feet of water per annum, the perpetual use of which the District is acquiring under the provisions of this contract."<sup>221</sup> The town was not then a member of the water district (it became one 29 years later).<sup>222</sup>

A year after entering into the agreement with the water district, the United States agreed to provide certain water from the project to the town for "domestic purposes," without expressly reserving the right to the return water flow.<sup>223</sup>

The court uses the principle of reading multiple documents together to incorporate a limit on the water use in the contract between the United States and the water district into the subsequent contract between the United States and the town:

When necessary to ascertain the agreement of the parties, separate instruments that pertain to the same transaction should be read together even though they do not expressly refer to each other, and even though they are not executed by the same parties. In this way each document can provide assistance in determining the meaning intended to be expressed by the others. Internal references in one document to another, while not essential, often are helpful

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<sup>217</sup> 677 P.2d 320, 327 (Colo. 1984).

<sup>218</sup> *Id.* at 323.

<sup>219</sup> *Id.* at 324.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 323.

<sup>223</sup> *Id.* at 323–24.



in the processes of interpretation. The canon of construction requiring that documents be construed together when necessary to ascertain the agreement of the parties has particular force where, as in the case of the project contract . . . and the town contract, the initial document requires execution of the second to accomplish the purpose of the first.

As the trial court noted, there are several indirect references in the town contract to the project contract. It could hardly have been otherwise, because the . . . project provides all of the water that is made available to Estes Park under the town contract. Under the foregoing principles of construction, it is appropriate to look to the project contract to assist in determining the nature of the rights intended to be transferred to Estes Park under the town contract. As we have seen, under . . . the project contract, those rights were limited to a single use in the town's municipal system.

Furthermore, when the town contract was made, the United States had available for transfer to Estes Park only those rights reserved for such purpose by . . . the project contract. The town's rights are necessarily limited by the terms of the project contract reservation through and on which the town's claim for water is based.<sup>224</sup>

The opinion only addresses indirectly the extent of cross-reference in the town contract to the contract with the water district.<sup>225</sup> One gets the sense that is because the inadequacy of the cross-reference is something of an impediment to supporting the court's outcome. The opinion states there are "indirect references" in the town contract to the contract between the United States and the district, and then concludes, "Under the foregoing principles of construction, it is appropriate to look to the project contract to assist in determining the nature of the rights intended to be transferred to Estes Park under the town contract."<sup>226</sup> On this basis, the court affirms the

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<sup>224</sup> *Id.* at 327 (footnote and citations omitted).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

trial court's determination that the limits on use of the water in the district contract limit the rights the town was granted under its contract.<sup>227</sup>

The United States, in the court's view, agreed with the district to limit the use of the water that could be delivered to the town. The United States could have expressly bargained for the town to similarly limit its use of the water. It did not. The court's outcome puts on the town the burden to review a contract to which it is a party to determine whether its promisor has undertaken to do something it has agreed not to do. It is not clear why the court should put this burden on the town. It is, one would expect, less costly to require a party to ascertain on its own whether it has formed contracts that would prevent its performance of its literal obligations (and whose terms are not being simultaneously re-negotiated).

The case does not provide a limiting principle, so it leaves unresolved the extent to which a party's contractual duties will be limited by inconsistent promises that party has made to other parties. Are, for example, the duties of a distributor in a contract with a retailer subject to implied limits in some extrinsic contract between the distributor and the manufacturer?<sup>228</sup> Perhaps it is simply a special rule for the United States.

Lastly, the approach makes drafting a burdensome exercise. A party has to negate implied limits on its expressly articulated rights. The town's counsel has to identify the possible circumstances that can create an implied exception to rights expressly granted, and then expressly indicate each of those circumstances does not, in fact, limit the expressly granted rights.

A different tack—one not allowing an extrinsic document to create rights against a non-party—is taken in *Forge v. Smith*.<sup>229</sup> In the case, a tenant alleges it obtained an implied easement over an adjacent parcel owned by the landlords.<sup>230</sup> A construction contract between the tenant and the husband of one of two owners allegedly contemplated such an easement.<sup>231</sup> Although a jury found an express easement, the court affirms the trial court's grant of judgment to the landlords notwithstanding the verdict.<sup>232</sup> The court reaches this conclusion, notwithstanding its reference,

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<sup>227</sup> *Id.* at 327–28.

<sup>228</sup> *See id.* at 327–28 (referencing that a course of performance may be sufficient to justify the court's outcome).

<sup>229</sup> 580 N.W.2d 876 (Mich. 1998).

<sup>230</sup> *Id.* at 881.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 879, 883.

with approval, to the principle of construing multiple documents are to be “read together.”<sup>233</sup>

A guaranty inherently is executed in a transaction involving multiple contracts—the guaranty and the underlying, guaranteed contract. Some authority treats guaranties as *sui generis* for these interpretative principles:

A guaranty agreement may be construed together with any contemporaneously executed agreements dealing with the same subject matter as an aid in ascertaining the intention of the parties. Those agreements, however, do not constitute a single contract, and the liability of the guarantor remains primarily dependent on the guaranty agreement itself.<sup>234</sup>

#### 4. Relief from Inequitable Consequences of Formalism.

Although this interpretative principle can produce results that seem inconsistent with giving effect to the parties’ intent, in other cases the principle can be used to give effect to the parties’ evident intent. One illustration is *Texas Co. v. Northup*.<sup>235</sup> The case involves multiple contracts, including a distributorship agreement, a lease of property from the distributor to the manufacturer, and a license from the manufacturer back to the distributor allowing possession of the premises.<sup>236</sup> The lease rate was nominal.<sup>237</sup> The court uses the principle to hold the manufacturer’s termination of the distributorship agreement and the license also terminated the lease.<sup>238</sup> In that the lease, standing alone, would have resulted in possession at essentially no consideration, the result seems likely consistent with the purposes the parties had in mind.<sup>239</sup>

The outcome may seem similar to cases finding implied cross-defaults. The crucial factor is whether the separate agreements are free-standing, in that they appear each to provide corresponding pairs of consideration

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<sup>233</sup> *Id.* at 881.

<sup>234</sup> *Dunn Indus. Grp. Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 434 (Mo. 2003) (citations omitted).

<sup>235</sup> 153 S.E. 659 (Va. 1930).

<sup>236</sup> *Id.* at 660.

<sup>237</sup> *Id.*

<sup>238</sup> *See id.* at 664.

<sup>239</sup> *Id.*

between the parties. In this case, one of the documents is not free-standing; it does not contain a pair of equivalent performances.

#### 5. Alternative Interpretative Approach—Referencing Other Documents for Context.

Some approaches to construing multiple documents as one are more nuanced and subtle, albeit perhaps less deterministic. Illustrative is *Crown Books Corp. v. Bookstop, Inc.*<sup>240</sup> The case involves interpretation of a stockholders' agreement—an agreement governing rights among corporate stockholders, e.g., as to election of directors.

The stockholders' agreement, which had an express ten-year term,<sup>241</sup> had been entered-into in connection with a sale of stock made by a stock purchase agreement.<sup>242</sup> A stockholder claimed the firm could not be acquired in a merger without the consent of all stockholders.<sup>243</sup> The theory was that the acquisition would end the term of the stockholders' agreement.<sup>244</sup> The argument concluded that because the stockholders' agreement had an express term, the acquisition would be inconsistent with the stockholders' agreement, thus requiring consent of each party to the stockholders' agreement.<sup>245</sup>

The court references the contemporaneous stock purchase agreement in rejecting that argument.<sup>246</sup> It notes that the stock purchase agreement contemplates consequences of a merger, and expressly identifies certain parties as having approval rights for the acquisition.<sup>247</sup> Hence, according to the opinion, the existence of certain express rights in connection with a merger negates an implied right of each shareholder to veto a merger.<sup>248</sup>

This approach is more easily harmonized with attempting to construe a contract together with the intent and the purposes of the parties. It is not

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<sup>240</sup>No. 11255, 1990 WL 26166 (Del. Ch. Feb. 28, 1990).

<sup>241</sup>*Id.* at 725.

<sup>242</sup>*Id.*

<sup>243</sup>*Id.*

<sup>244</sup>*Id.*

<sup>245</sup>*Id.* at 727–28.

<sup>246</sup>*Id.* at 728.

<sup>247</sup>*Id.* at 728–29.

<sup>248</sup>*Id.*

surprising that it is authored by a court, the Delaware Chancery Court, having a reputation for sophistication in assessing corporate disputes.<sup>249</sup>

Assorted other authority takes an interpretative approach for multiple documents that focuses on implementing the evident purpose of the transactions. For example, *Central City Ltd. Partnership v. United Postal Savings Ass'n* involves an amendment to a guaranty.<sup>250</sup> The guaranty originally provided the guarantor's liability ended upon the guaranteed principal amount falling below \$2.48 million.<sup>251</sup> Following default, the guarantor agreed to a deed in lieu of foreclosure, in connection with an amendment to the guaranty.<sup>252</sup> The amendment provided for application of sale proceeds to obligations under the guaranteed note.<sup>253</sup> After that sale, the principal amount was below the \$2.48 million threshold.<sup>254</sup> The creditor claimed the guarantor remained liable for a deficiency because more than \$2.48 million in principal remained due at the time the note matured.<sup>255</sup> The court rejects that argument, focusing on the purpose of the transactions—the last \$2.48 million being an amount not subject to the guaranty:

Where a contract is not ambiguous, we ascertain the intent of the parties by giving the language used its natural, ordinary and common sense meaning. We also look to the entire contract and consider the object, nature and purpose of the agreement. Where an agreement of parties is evidenced by several documents which refer to each other, are closely related and constitute one complicated interdependent transaction, the intent of the parties and the meaning of those documents must be determined from the entire transaction and not simply from isolated portions of a particular document.<sup>256</sup>

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<sup>249</sup> See, e.g., Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1077–78 (2000).

<sup>250</sup> 903 S.W.2d 179, 180–81 (Mo. Ct. App. 1995).

<sup>251</sup> *Id.* at 181.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 182.

<sup>256</sup> *Id.* at 182–83 (citations omitted).

A third illustration is provided by *Norcomo Corp. v. Franchi Construction Co.*, which involves real estate development financing.<sup>257</sup> The land, initially owned by the developer, was sold to a financing firm for \$550,000, which leased it back to the developer for a period of up to 28 years.<sup>258</sup> That \$550,000, by itself insufficient to finance the development, was supplemented by the proceeds of a \$3.9 million non-recourse loan.<sup>259</sup> The lease provided the lessee's interest could be assigned without the lessor's consent, but the lessee would remain liable.<sup>260</sup> However, a side letter provided:

Notwithstanding the second to last sentence of Section 13.01, in the event you assign your interest in the Lease in accordance with the provisions of Article 13 thereof you shall be released from all liability in respect of rent reserved and future obligations to observe and perform the terms, covenants and conditions contained in the Lease and all actions, proceedings, claims and demands in respect of any future breach of any such terms, covenants and conditions.<sup>261</sup>

After it became clear the arrangements would not be successful, the lessee assigned the lease to a firm that could not be expected to fulfill its financial obligations.<sup>262</sup> The lessor claimed the assignment should not terminate the lessee's liability, because, in light of the assignee's resources, the assignment was not bona fide.<sup>263</sup> The court relies on the non-recourse nature of the loan, *i.e.*, referenced related documents, for purposes of concluding the assignment was intended to implement a non-recourse arrangement under the lease, in reversing a judgment in a bench trial finding assignee liability for obligations arising following the assignment:

We agree with the trial court that the deed of trust/note and the lease are separate documents and each must be interpreted and enforced according to its own terms. The

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<sup>257</sup> 587 S.W.2d 311 (Mo. Ct. App. 1979).

<sup>258</sup> *Id.* at 314.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 315.

<sup>261</sup> *Id.* (quotation marks omitted).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

provisions of one are not to be impliedly incorporated into the other. However, these documents, along with others, constituted one complicated interdependent transaction. The documents contain references to each other, and obviously are closely related. The intent of the parties and the meaning of those documents must be determined from the entire transaction and not simply from isolated portions of a particular document.<sup>264</sup>

If one is persuaded by reference to documents extrinsic to the lease that the lessee was expected not to incur personal liability, this result is entirely sensible.

### *C. Surplusage*

One commonly applied principle of contract construction is that a construction that causes some provision to be “surplusage” (alternatively referenced as “redundant” or “meaningless” or “superfluous”) is disfavored.<sup>265</sup> This principle, frankly, seems somewhat at odds with what is involved in negotiating a large, complicated contract.

During the iterative process of revising contractual language during negotiation, changes can easily be made that interact with other provisions. This principle puts on the draftsman a duty to keep track of interactions between numerous provisions. The draftsman needs not only to assure that the terms are consistent but, also, that nothing has been added in clarification that makes some other language redundant. These problems are particularly acute where there is some lengthy form base or master agreement that is integrated with a separate document containing transaction-specific terms.<sup>266</sup> Nevertheless, this principle has been applied in such a context.

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<sup>264</sup> *Id.* at 317.

<sup>265</sup> RESTATEMENT (SECOND) OF CONTRACTS § 203, cmt. b (1979) (“Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous.”).

<sup>266</sup> See, e.g., *First Am. Bank of Va. v. J.S.C. Concrete Const., Inc.*, 523 S.E.2d 496, 498–500 (Va. 2000) (base construction agreement addressing lien waivers, supplemented by subsequent work orders for individual components of the work, having varying terms concerning liens; construing the documents as one).

### 1. Document Date as Surplusage.

Consider, for example, *Wilson Manufacturing Co. v. Fusco*.<sup>267</sup> An employer has a generic six and one-half page form setting forth certain common terms of employment, with a blank to be filled in for the employee's name, addressing matters such as trade secrets.<sup>268</sup> The base agreement does not have a place to fill in employee-specific terms, e.g., financial terms and duties.<sup>269</sup> Rather, the base agreement states, "[The employer] agrees to employ Agent under the terms and conditions set forth herein and in Exhibit 'A', which is attached hereto and incorporated herein for reference, for such salary and other compensation as set forth therein."<sup>270</sup> The form agreement begins, "THIS AGREEMENT, Entered into this 12th day of May, 1994, by and between WILSON MANUFACTURING COMPANY . . . ." <sup>271</sup>

A document titled "Schedule 'A'" (which is the referenced "Exhibit [sic] 'A'") has the financial terms, identifies an "effective date" of April 18, 1994, a one-year term of employment<sup>272</sup> and states, immediately before signatures on behalf of the employer and the employee, typed in the same font as the body of the two-page schedule, "Approved this 12th day of May, 1993."<sup>273</sup> The last date appears to have a typographical error—it appears it should be "1994".<sup>274</sup>

The interpretation that immediately comes to mind is an oral understanding was reached in April 1994, and it was subsequently memorialized in these two documents, after any required internal approval within the employer, a few weeks later. Somewhat surprisingly, the opinion references dates on the two documents in applying this interpretative principle, to conclude that some parts of the terms in the attachment (actually titled *Schedule "A"*) were not incorporated into the base agreement:

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<sup>267</sup> 258 S.W.3d 841, 846 (Mo. Ct. App. 2008).

<sup>268</sup> See Brief of Respondent/Cross-Appellant at A-2, *Wilson Mfg. Co.*, 258 S.W.3d 841 (Nos. ED 89661, ED 89912), 2007 WL 4791789.

<sup>269</sup> See *id.*

<sup>270</sup> *Id.* at A-2, at 2.

<sup>271</sup> *Id.* at A-2, at 1.

<sup>272</sup> *Id.* at A-2, at 8.

<sup>273</sup> *Id.* at A-2, at 9.

<sup>274</sup> See *id.*



This construction gives full force and effect to both the Agreement and Schedule A. The first clause of Schedule A established when Schedule A became effective. A written contract becomes binding when it is finally executed or delivered, unless a different intent appears. By stating that Schedule A was to become effective on April 18, 1994, the parties indicated their intent to have Schedule A become binding on that date rather than on the date they signed Schedule A. On the other hand, the Agreement begins with the sentence, "*THIS AGREEMENT*, entered into this 12th day of May 1994." (emphasis added) The Agreement concludes with a statement that it was executed on the same date. It contains no language indicating that the parties intended it to become effective on any date other than [sic] the date of execution. Thus, the Agreement became binding on May 12, 1994, and Schedule A became binding on April 18, 1994. In construing whether the parties intended to incorporate into the Agreement the one year duration of Schedule A, we are bound to give a construction that attributes a reasonable meaning to all of the provisions, rather than one that leaves some provisions without function or sense. The language in the Agreement establishing that it became binding on May 12, 1994 would be meaningless if the term "this Agreement," as used in the first sentence of Schedule A reciting that its "effective" date was April 18, 1994, referred to the Agreement and not to Schedule A. The only reasonable construction is that in the Agreement the parties used the term "THIS AGREEMENT" to refer to the Agreement, and in Schedule A the parties used "this Agreement" to refer to Schedule A, and the parties did not intend in either document to refer to the other document or both documents in combination.<sup>275</sup>

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<sup>275</sup> *Wilson Mfg. Co.*, 258 S.W.3d at 846.

To summarize, the court indicates:

- the reference to a date for the base (form) document; and
- a statement in the base document of the date the document was executed would be surplusage if the effective date in Schedule A were incorporated into the base document.<sup>276</sup>

This outcome is not thoughtful.

The language in the base (form) document does not expressly address an effective date.<sup>277</sup> That language is not inconsistent with a different effective date. Moreover, the dates in the base form continue to perform a function—that of identifying the base document—even if the effective date given in the attachment is considered incorporated into the form document. So, preserving some function for the date in the base form did not require failing to incorporate the provisions in the schedule setting forth a term of the agreement.

In addition, simply reviewing the schedule reveals the court's approach is hyper-technical. The schedule itself has a different date immediately above the signature block.<sup>278</sup> If the dates in the form document are inconsistent with the term stated in the attachment, a date in the attachment would be similarly inconsistent with the term stated in the attachment.<sup>279</sup>

Particularly where a contractual relationship is memorialized in multiple documents (especially in the case of an oft-used base form and a transaction-specific document), there may be duplicative language. The point of having a base form is so that one need not alter its terms. If there is an important detail that the parties want to make sure is clear, the party who is not the author of the base form may want to make sure it is memorialized as part of the deal (perhaps in a document negotiated separately and without reference to the base form). No good reason comes to mind why the parties

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<sup>276</sup> *Id.*

<sup>277</sup> See Brief of Respondent/Cross-Appellant, *supra* note 268, at A-2.

<sup>278</sup> *Id.* at A-2, at 9.

<sup>279</sup> The court's construction also fails to give effect to punctuation. The form document states, "[The employer] agrees to employ Agent under the terms and conditions set forth herein and in Exhibit 'A', which is attached hereto and incorporated herein for reference, for such salary and other compensation as set forth therein." *Id.* at A-2, at 2. The court's interpretation reads out the last comma. From this punctuation, the term "for such salary" relates to the "agree[ment] to employ Agent"; the term does not modify of the incorporation by reference. See *id.*

Although courts will, from time to time, reference punctuation in reaching interpretative results, doing so can be hyper-technical where the result is in conflict with the evident purpose. The point here is that this somewhat technical argument supports the evident purpose.

should be forced, in order to give effect to it, to go about deleting language not literally inconsistent but merely duplicative that is in the base document.

The court's analysis is illustrative of the tedious application of interpretative bromides criticized in *American Realty Trust v. Chase Manhattan Bank, N.A.*: "General rules of construction, therefore, should not be applied mechanistically, with the result that the intention of the contracting parties is thwarted."<sup>280</sup>

## 2. Inconsistent Choice-of-Law Provisions.

A second illustration of the erroneous application of this interpretative principle in a transaction memorialized by multiple documents is provided by *Foster Wheeler Energy Corp. v. An Ning Jiang MV*.<sup>281</sup> The case involves multiple documents having inconsistent choice-of-law provisions.<sup>282</sup> The court ultimately seeks to harmonize the two provisions by construing one as being applicable only to the extent to which it would apply of its own force (*ex proprio vigore*).<sup>283</sup>

That, frankly, does not plausibly represent the parties' evident intent. I suppose one could want the law of one jurisdiction to apply to part of a transaction and the law of another jurisdiction to apply to the remainder. But if that is what one wanted, one would expressly write that in contiguous language. One would not consciously seek to achieve that result patently by putting unqualified choice-of-law provisions referencing different jurisdictions in different documents. The most plausible conclusion is they made a mistake. Instead of a forced construction based on not having some language surplusage, the court should have concluded the documents do not manifest a choice of law, and should have relied on the default.<sup>284</sup>

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<sup>280</sup> 281 S.E.2d 825, 831 (Va. 1981).

<sup>281</sup> 383 F.3d 349 (5th Cir. 2004).

<sup>282</sup> *Id.* at 352–53.

<sup>283</sup> *Id.* at 357.

<sup>284</sup> See also *Daugherty v. Diment*, 385 S.E.2d 572 (Va. 1989). *Daugherty* also appears to reflect a mistake in drafting. *Id.* It involves an installment sales land contract. *Id.* at 573. A note representing part of the purchase price provided that, on transfer of the buyer's interest, the note became due (a "due on sale" provision). *Id.* However, the purchase contract itself provided the buyer's rights could be freely assigned. *Id.* The court held the two provisions did not conflict, the buyer could freely assign; there were merely consequences (the payment was accelerated). *Id.* at 574–75. If one represented the seller and there was an express understanding on the matter, would

### 3. Amendment Providing Alternative Remedial Provisions.

*Dunn Industrial Group, Inc. v. City of Sugar Creek* provides a third illustration.<sup>285</sup> The parties entered an agreement providing for arbitration of disputes.<sup>286</sup> After a dispute arose, the parties entered an agreement providing that each “agree[s] to first attempt to resolve [certain] items . . . by negotiation; however, either party, at any time, may resort to their respective contract remedies or remedies as provided by law.”<sup>287</sup> The court references the surplusage bromide in construing this agreement, holding the trial court erred in failing to compel arbitration.<sup>288</sup>

That is not sensible. An amendment to a contract inherently involves making one or more provisions of an extant contract no longer operative—surplusage. Application of this interpretative principle to try to continue to give effect to a provision in an agreement that is being amended may not implement the evident intent of the parties in amending the original contract. The principle should not be applied in this way.

#### *D. Specific vs. General Provision*

Another commonly applied principle of contract interpretation is that, where there is a conflict between a general provision and a specific provision, the latter controls.<sup>289</sup> The choice to memorialize a transaction with a base agreement and a supplement may naturally implicate this principle. The preparation of general provisions that are amended or refined in a supplement is what this style of documentation is about. The terms of the supplement may inherently be more specific. However, as is the case with other interpretative bromides, this one may be applied mechanically in

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one leave the drafts in this state? No; one would expressly provide some reference in the free assignability provision, indicating the assignment triggered the due-on-sale provision.

<sup>285</sup> 112 S.W.3d 421 (Mo. 2003).

<sup>286</sup> *Id.* at 427.

<sup>287</sup> *Id.* at 429.

<sup>288</sup> *Id.* at 428 (“Additionally, each term of a contract is construed to avoid rendering other terms meaningless.”).

<sup>289</sup> *See, e.g.,* Paige Cap. Mgmt., LLC v. Lerner Master Fund, LLC, No. 5502 CS, 2011 WL 3505355, at \*21 (Del. Ch. Aug. 8, 2011) (applying the principle in connection with a revenue sharing agreement addressing the subject of a limited partnership agreement for a hedge fund); RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1979).

a way that would appear to diverge from the parties' intent. *Lippo v. Mobil Oil Corp.* presents an illustration.<sup>290</sup>

*Lippo* involves a franchise for a Mobil gasoline station.<sup>291</sup> The documents relevant to our analysis are a Retail Dealer Contract, under which the dealer's sale of other brands of gasoline is prohibited, and a supplement.<sup>292</sup> (Parts of the entire relationship are memorialized in additional documents, including a lease.)<sup>293</sup> The paragraph of the master contract prohibiting sale of misbranded gasoline (numbered 6) goes on to state, "Any violation of the provisions of this paragraph by Buyer shall give Seller the right to immediately terminate this contract."<sup>294</sup> A portion of the supplement (paragraph 4A) provides that the Retail Dealer Contract and the lease may be terminated by either party if the other defaults and the default remains uncured ten days after written notice.<sup>295</sup> The court concludes the cure right applies to breaches arising from sale of misbranded gasoline:

Mobil asserts that paragraph 6 is a (specific) "no cure" provision while article 4A is a (general) "always cure" provision. But we read article 4A as a definition of "violation" and a general provision for termination upon further notice after a "violation," that is, after an uncorrected default. Paragraph 6 is not a specific "no cure" provision, but rather a specific form of termination

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<sup>290</sup> 776 F.2d 706 (7th Cir. 1985).

<sup>291</sup> *Id.* at 707–08.

<sup>292</sup> *Id.* at 710.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* The Supplement, in paragraph A of Article 4, provides in part:

The parties hereby agree that should either party default in the performance of any duty, responsibility or obligation imposed by this supplemental agreement, the Service Station Lease or the Retail Dealer Contract, and such default continue uncorrected for ten (10) days after written notification of such default (or if the default cannot be corrected within ten (10) days, if the work of correcting same has not been commenced within such period) then the party aggrieved by such default may forthwith upon additional written notice to the other party given, terminate the Service Station Lease and the Retail Dealer Contract, and cease doing further business with the other party as of the date of said notice, unless a longer time be required by law. In the event a longer period is required by law, the parties shall cease doing further business at the end of the minimum period required by such statute.

*Id.* at 711.

(immediate instead of with further notice) for certain violations. Thus paragraph 6 does not conflict with the ten day correction period provision in article 4A. That is a definition of “violation.” Rather, it conflicts with the general termination provision of article 4A (and a similar one in paragraph 12 of the Retail Dealer Contract) that requires further notice. Therefore the provision of paragraph 6 is only an exception to the termination-only-upon-further-notice provision of article 4A; it is not an exception to the correction provision. Thus Lippo had a right to cure his default. Because he did cure his default . . . it never became a violation, and Mobil had no right to terminate under either the specific or general termination provisions.<sup>296</sup>

It is entirely customary to have bargained-for cure rights. An indenture for debt securities provides a common illustration. For example, the Revised Model Simplified Indenture includes a section governing defaults, providing some events allow acceleration only after notice whereas others, more significant, allow acceleration immediately.<sup>297</sup> A distributor’s sale of misbranded goods would seem to go to the heart of a distribution agreement and would normally, one suspects, be advertent; this could easily be expected to allow immediate termination. That supports the interpretation the court rejects.<sup>298</sup>

The court’s discussion is, frankly, poorly written. When practicing lawyers create a defined term, they use the defined term. If they wish to amend the definition in a supplement, the amendment would use the defined term. That is not how the documents are structured. The term “violation” appears in the base document but does not appear in paragraph 4A of the supplement.<sup>299</sup>

A final perspective on the case outcome arises by putting oneself in the position of a party drafting the pertinent provisions. Let’s say that there is a

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<sup>296</sup> *Id.* at 714.

<sup>297</sup> See American Bar Foundation, *Revised Model Simplified Indenture*, *supra* note 85, § 6.01 (providing payment defaults constitute Events of Default, regardless of lack of notice, but requiring notice for non-payment defaults to become Events of Default).

<sup>298</sup> See *Lippo*, 776 F.2d at 714.

<sup>299</sup> See *id.* at 710.

base Retail Dealer Contract and one is going about the process of drafting the Supplement on behalf of the dealer. Consider the following alternatives:

- The draftsman seeks to provide in the supplement that there always is a cure right (*i.e.*, the draftsman is attempting to provide that each party has the right to notice and cure before any default is treated as a basis for the other terminating the contract).
- The draftsman seeks, through the supplement, to add a basis for terminating the agreement (*i.e.*, in all cases, an uncured default continuing ten days after notice would allow termination, without restricting the termination rights arising from sale of misbranded gasoline).

Which of the two seems more similar to the language of 4A?

This court interprets 4A as reflecting the former.<sup>300</sup> If that is what your author had in mind, his initial, top-of-the-head, draft for the supplement might begin something like:

It shall be a condition to any party's termination of the Retail Dealer Agreement and the Lease on account of any default (violation) by the other party that the party seeking to terminate those agreements shall have provided written notice of the default (violation) and that default (violation) shall have remained uncured for ten days.

On the other hand, if the goal were to provide additional rights to terminate—an express right to terminate after a fixed, specified number of days (*i.e.*, an attempt to identify by contract the nature of delay that would result in a breach being material)—because the Retail Dealer Agreement did not have such a right, an initial, top-of-the-head draft might begin:

If a party shall breach any obligation under the Retail Dealer Agreement or the Lease and that breach shall remain uncured ten days following that party's receipt of written notice from the non-breaching party, the non-breaching party may elect to treat the breach as material, cease performing and sue for total breach.

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<sup>300</sup> See *id.* at 714.

The purpose of this exercise is to compare these two drafts to the actual contract,<sup>301</sup> and see which is more similar. The language in the actual supplement seems much more akin to the latter. If the goal were, as the court indicates, to provide a right to cure before any default resulted in a material breach, one would expect the language to focus on a condition to an ability to exercise rights.

### *E. Conclusions*

The problems with a mechanical application of an interpretative bromide, such as interpreting a document so that nothing is surplusage, are magnified where the principles are applied in the context of a relationship memorialized in multiple writings. The nature of the drafting style makes highly suspect the application of the principle that documents are to be construed so that nothing is surplusage. Applying that principle to contracts memorialized in multiple documents makes it very difficult for a draftsman to implement the desired intent.

Application of the strong form of the construe-as-one principle also can easily produce results apparently at odds with the parties' evident intent. Given the ease with which a party can draft a cross-default, a court should be very reluctant to use this principle to create a cross-default between agreements, each of which has a corresponding pair of equivalent consideration.

## IV. PAROL EVIDENCE RULE

Application of the principle that multiple documents should be construed as one is not limited to issues of contract interpretation. The principle is also at times referenced by courts for purposes of applying the parol evidence rule. A less controversial application of the principle allows a writing to be introduced into evidence notwithstanding the existence of a simultaneous writing that appears fully integrated<sup>302</sup>—even one that has a

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<sup>301</sup> *Id.* at 710.

<sup>302</sup> *Mayberry v. Ememessay, Inc.*, 201 F. Supp. 2d 687, 692 (W.D. Va. 2002); *Kelso v. McGowan*, 604 So. 2d 726, 731 (Miss. 1992) (“[W]here two or more writings are executed contemporaneously, the instruments are deemed to constitute a single agreement for parol evidence purposes.”) (citing 17 Am. Jur. 2d Contracts, § 388 (1991); 4 Samuel Williston, A Treatise on the Law of Contracts § 628 at 904 (3d ed. 1961)); *Speirs v. Jahnsen*, 255 P. 117, 118 (Wash. 1927) (simultaneous delivery albeit different dates).



merger clause.<sup>303</sup> Or multiple writings may be construed as one for purposes of finding that the two, collectively, constitute a fully integrated agreement.<sup>304</sup>

However, the principle of construing multiple documents as one is applied by some courts to interpret documents executed *at different times*.<sup>305</sup> The use of the principle in applying the parol evidence rule would seem to create a roadmap for evasion of the core principles underlying the parol evidence rule. The following cases illustrate using this approach to avoid the limits of the parol evidence rule.

*Neville v. Scott* involves an agreement to construct real estate.<sup>306</sup> A construction contract containing specifications was followed three months later by a contract for conveying the property to the client, containing an integration clause.<sup>307</sup> Notwithstanding the integration clause, on the basis of the strong form of the construe-as-one principle, the court holds the specifications contained in the prior document were not eliminated by the subsequent document.<sup>308</sup> The court notes, “Where several instruments are made as part of one transaction they will be read together, and each will be construed with reference to the other; and this is so although the

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On the other hand, a court may reach the same result by taking what appears to be the opposite approach: concluding that the two agreements are separate (one agreement collateral to the agreement with a merger clause), and one does not bar the other. *E.g.*, *Ritter v. Grady Auto. Grp., Inc.*, 973 So.2d 1058, 1065 (Ala. 2007) (“Because the arbitration agreement is a collateral agreement, distinct from the purchase contract, the merger clause in the purchase contract does not invalidate the arbitration agreement. The two contracts are separate: one governs the sale of the vehicle, and the other governs the resolution of disputes between the dealer and the buyer.”).

<sup>303</sup> *E.g.*, *N. Am. Sav. Bank v. Resolution Trust Corp.*, 65 F.3d 111, 114 (8th Cir. 1995) (construing as one a loan participation agreement containing an integration clause and a side letter concerning reimbursement of losses arising from buyer’s purchase of the participating interest).

<sup>304</sup> *Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 771 n.5 (1st Cir. 1997) (stating, as to an offer letter and an accompanying form employment agreement, “An integrated agreement may take the form of two documents, provided it ‘appears to be a contract complete within itself, couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement.’ Moreover, ‘[w]hile the effect of an integration clause is to make the parol evidence rule clearly applicable, it is not required.” (quoting *Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Invs.*, 951 F.2d 1399, 1406 n.6 (3d Cir. 1991); *Fountain Hill Millwork Bldg. Supply Co. v. Belzel*, 587 A.2d 757, 760 (Pa. Super. 1991)) (internal citations omitted)).

<sup>305</sup> See *supra* note 211 and accompanying text.

<sup>306</sup> 127 A.2d 755 (Pa. Super. 1957).

<sup>307</sup> *Id.* at 756–57.

<sup>308</sup> *Id.* at 757.

instruments may have been executed at different times and do not in terms refer to each other. . . .”<sup>309</sup>

*International Milling Co. v. Hachmeister, Inc.* involves a side letter concerning quality of goods to be sold, contemporaneous with the initial contracting.<sup>310</sup> However, there were multiple subsequent purchases, each in the form of a purchase order stating certain specifications followed by a form contract without those specifications and having a merger clause.<sup>311</sup> Some of, but not all, the form contracts referenced the purchase order.<sup>312</sup> So, for some contracts, there was a plausible issue that the cross-reference to the purchase order operated to rescue the specifications from the being banned under the parol evidence rule. But that was not the case for all the contracts.

The court relies on both the fraud exception to the parol evidence rule as well as a principle similar to the construe-as-one principle, in directing the trial court, on remand, to allow evidence of the specifications: “[W]here it can be shown by competent evidence that no single writing embodied or was intended to embody the whole of the parties’ understanding, the parol evidence rule has no application.”<sup>313</sup>

The court’s discussion of the issues skips over some steps. So, unfortunately, one has to make explicit part of the analysis. The court provides one answer for all the contracts. Thus, the cross-references to prior purchase orders could not have been the basis for the decision, because a cross-reference to prior specifications was not in all the contracts. Thus, the outcome is based on the principle that a court can allow a prior document to be introduced into evidence, notwithstanding a subsequent writing containing a merger clause, on the theory that what writings are considered as memorializing the agreement is not constrained by the literal terms of a merger agreement.

A California case reaches a similar conclusion concerning transactions in canned goods, where the court holds prior writings admissible if subsequent writings were executed pursuant to the prior writings and there is proof the parties intended the prior writings to be part of the contracts.<sup>314</sup>

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<sup>309</sup> *Id.*

<sup>310</sup> 110 A.2d 186 (Pa. 1955).

<sup>311</sup> *Id.* at 188–89.

<sup>312</sup> *Id.* at 189.

<sup>313</sup> *Id.* at 191.

<sup>314</sup> *Body-Steffner Co. v. Flotill Prods., Inc.*, 147 P.2d 84, 87 (Cal. Ct. App. 1944).

*Paine-Gallucci, Inc. v. Anderson* involves a construction contract proposal allocating costs in a fashion varying from the terms set forth in specifications incorporated into a later agreement.<sup>315</sup> The court indicates it is permissible to construe as one documents made at different times,<sup>316</sup> evading restriction on considering the earlier document one might think the parol evidence rule would require.<sup>317</sup>

*Standring v. Mooney* involves a deed, absolute on its face, issued under a contract of ten days before, providing for reconveyance if the property were not resold.<sup>318</sup> The court construes the deed as one with the contract of ten days before, allowing reference to the reconveyance obligation not set forth in the deed.<sup>319</sup> The opinion recites:

[The various documents] clearly were regarded by the parties as parts of the same general transaction. Under such circumstances, we consider strict contemporaneity unnecessary and therefore hold that all these instruments should have been read together in determining the relations of the parties to this action with respect to the property here involved.<sup>320</sup>

The court then proceeds to identify a traditional exception to the parol evidence rule “that parol testimony is admissible to show the circumstances under which a deed was made.”<sup>321</sup>

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<sup>315</sup>246 P.2d 1095, 1096 (Wash. 1952).

<sup>316</sup>*Id.* at 1097.

<sup>317</sup>*Id.* The opinion does not expressly reference the parol evidence rule, though it does cite as authority for the construe-as-one principle the court follows, *inter alia*, *Standring v. Mooney*, 127 P.2d 401 (Wash. 1942), which addresses a traditionally recognized exception to the parol evidence rule. *Paine-Gallucci, Inc.*, 246 P.2d at 1097. The court also notes the following benefit to application of this principle, in lieu of attempting to reform a writing for mistake:

Whenever the method of considering instruments together is used on order to determine what was the full and complete contract of the parties, the courts may avoid the necessity of determining veracity of witnesses, the weight to be given to their testimony, whether the evidence is clear, cogent and convincing and other difficult problems connected with the reformation of a written instrument.

*Id.* at 1098.

<sup>318</sup>*Standring*, 127 P.2d at 402–03.

<sup>319</sup>*Id.* at 404.

<sup>320</sup>*Id.*

<sup>321</sup>*Id.* (quoting *Brown v. City of Bremerton*, 125 P. 785, 786 (Wash. 1912)). *See, e.g., Schron*

Without a limiting principle, this application of the construe-as-one principle to documents delivered at different times would threaten to eviscerate the parol evidence rule. What is necessary to rationalize this area of the law of contracts is to identify a principle underlying the exception for absolute deeds intended to operate instead as security that can be consistently extended to these other cases such as *Neville*.<sup>322</sup>

The pertinent principle would appear to be this: Where the content of the documents raises a substantial question as to the latter document being a second step in a transaction in which the former terms were contemplated to survive, reference to the construe-as-one principle, to avoid application of the parol evidence rule, would seem warranted.<sup>323</sup> This is consistent with the historical treatment of deeds that are unconditional on their face. A deed, by itself, raises the possibility it is part of a transaction having other components. Absent another arrangement, it would simply constitute a gift (disregarding the perfunctory recitation of nominal consideration in some form deeds).

*Neville* can be rationalized on this principle.<sup>324</sup> One expects a contract to reconvey property on which a contractor is building improvements would involve some understanding of the specifications for the improvements.<sup>325</sup> Hence, it is sensible to allow reference to specifications memorialized in a prior writing.

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v. *Troutman Saunders LLP*, 945 N.Y.S.2d 25, 25 (App. Div. 2012) (excluding application of the principle to an option);13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 73.4, at 501 (Joseph M. Perillo ed., 2003) (“Occasionally, it is stated that after the delivery and acceptance of a deed of conveyance, testimony as to the terms of an antecedent oral contract of sale are excluded by the ‘parol evidence rule.’ A holding to that effect should be disapproved. The deed of conveyance is delivered as a part performance of the contract, in fulfillment of an obligation under the contract. Deeds, like promissory notes, are rarely assented to as a complete ‘integration’ of the contract between the parties. The conveyance may or may not be accepted by the purchaser as full satisfaction of some or all of the vendor’s promissory duties. It is rarely assented to by the purchaser as a complete written statement of the vendor’s duties and even less often assented to by the vendor as a complete statement of the duties assumed by the purchaser.”).

<sup>322</sup> *Neville v. Scott*, 127 A.2d 755 (Pa. 1956).

<sup>323</sup> See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 3.2(b), at 110 (6th ed. 2009) (“Thus, it is often stated that parol evidence is admissible to show the true nature of the transaction between the parties.”) (citing *Ky. Unemployment Ins. Comm’n v. Landmark Cmty. Newspapers of Ky., Inc.*, 91 S.W.3d 575 (Ky. 2002); *Mahoney v. May*, 297 N.W.2d 157 (Neb. 1980)).

<sup>324</sup> See 127 A.2d 755.

<sup>325</sup> *Id.* at 756.

More potentially difficult is a circumstance like *International Milling*, where a purchase order includes specifications not included in a subsequent contract with a merger clause (and some of which did not cross-reference the corresponding purchase order).<sup>326</sup>

And reaching the correct answer in that case should be consistent with a thoughtful approach to a case like *United California Bank v. Prudential Insurance Co. of America*.<sup>327</sup> *United California Bank* involves a loan commitment not including a requirement the borrower provide a first mortgage, although such a term was set forth in a prior loan application and the commitment referenced the application.<sup>328</sup> The loan commitment stated, "This offer is subject to Conditions # 1 through # 34 as set forth in the attached application riders submitted to Prudential with your Application for Mortgage Loan dated September 21, 1973 which are made a part of this offer."<sup>329</sup> The court holds the reference inadequate to engraft the first mortgage provision in the application into the subsequent loan commitment: "A reference to an earlier document for descriptive purposes will not operate to make the earlier document a part of the later agreement."<sup>330</sup>

In addressing this sort of question as to the proper contours of a legal rule, an initial step is to reference the purposes underlying the rule. The rule's contours should conform to those purposes.

Epstein et al. identify the purposes of the parol evidence rule as including an expectation that the subsequent writing "reflects the parties' minds at a point of maximum resolution" and a preference for more trustworthy evidence of the relationship.<sup>331</sup> We are here discussing the impact of the parol evidence rule on writings made at different times. The words potentially barred are not oral and are equally trustworthy. This part of the rationale would not limit application of the construe-as-one principle.

The second rationale, giving effect to the language used when the parties were most focused on the matter,<sup>332</sup> is more complex to apply. To

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<sup>326</sup> See *Int'l Milling Co. v. Hachmeister, Inc.*, 110 A.2d 186, 188 (Pa. 1955).

<sup>327</sup> 681 P.2d 390 (Ariz. App. 1983).

<sup>328</sup> *Id.* at 399.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 411.

<sup>331</sup> David G. Epstein et al., *Contract Law's Two "P.E.'s": Promissory Estoppel and the Parol Evidence Rule*, 62 BAYLOR L. REV. 397, 425-26 (2010) (quoting MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 98 (5th ed. 2006)).

<sup>332</sup> *Id.* (quoting MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 98 (5th ed. 2006)).

implement this rationale, then, writings reflecting understandings made at different times would not be construed as one where the latter writing contains a level of detail and specificity, as to the matter for which one party seeks to introduce the earlier writing, indicating the parties were at least as focused on the issue at the latter time as at the former and the parties intended to subsume the earlier agreement in the later one. In *International Milling*, the latter writing does not reflect an equal level of focus as to the specifications. Rather, it reflects language the former writing indicates should be inadequate to eliminate the additional specifications for the goods. What would be sufficient? Something in the later writing such as, “The specifications in this [later] writing are intended to substitute for those in [the earlier] writing.” Had there been a conscious choice at the later time period to limit the earlier specifications, one would expect the writing to state that. A provision merely stating the subsequent writing was a complete integration does not reflect that level of specific attention to the issue.

The prior writing, construed as one with a later agreement, could be an enforceable agreement, but implementing these purposes of the parol evidence rule would not require that. If it represented an understanding between the parties, implementing the purposes of the parol evidence rule would not be influenced by whether the understanding had been supported by consideration. Consider circumstances such as those of *International Milling*.<sup>333</sup> It is easy to envision cases in which an understanding as to higher-quality specifications is memorialized before there is a binding agreement to sell the goods, an initial offer of sale is rejected. That may be settled-upon in their discussions before the parties agree on price and quantity to be memorialized in a form contract not containing the specifications the buyer desires.

As noted above, other authority contemplates incorporating by reference a future document, where there are “ascertainable standards” governing its development.<sup>334</sup> One might view *International Milling* as being one in which one agreement, concerning specifications, contemplates incorporating into it future agreements concerning price and quantity. In this case, the ascertainable standard for promulgation of the subsequent document would be that there is an agreement between the parties as to the

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<sup>333</sup> See *supra* 145–148 and accompanying text.

<sup>334</sup> See *supra* note 37.

quantity, etc., of the goods to be sold. Such an agreement between both parties would be consistent with that approach.

## V. CONCLUSION

This review of the principles governing interpretation of contracts memorialized in multiple documents has examined principles governing incorporation of extrinsic writings by reference and selected principles of interpretation as applied in that context. Separate lines of authority extending back over a century limit incorporation by reference of terms of which one party does not have adequate notice.

However, the thrust of these cases is undercut by certain traditional bromides of contract interpretation as applied to transactions memorialized in multiple contracts. The principle that multiple documents should be construed as one in a variety of cases is used by courts to incorporate provisions aggressively, for example, expanding on the events constituting a default. This approach seems unlikely to implement the parties' intent. Moreover, it makes more burdensome the contract drafting process. It is natural and efficient to document a complicated transaction by partitioning various aspects of the transaction in separate documents. Memorializing a relationship in discrete components allows the documentation to be built by combining individual components that can be more easily formulated and understood. The application of the construe-as-one principle by some courts prevents effective use of this drafting technique and is problematic.

In addition, application of the principle that disfavors interpretations that results in some language being surplusage is inconsistent with allowing flexibility in documenting transactions where a party has a form it typically uses. Tailoring transaction terms in individual contexts where a form is used is often done using a side letter. Aggressive application of this interpretative principle in this context can produce interpretations inconsistent with the parties' evident intent.

The interpretative principle, of construing multiple agreements as one, is used by some courts to avoid application of the parol evidence rule. In the kind of non-literal application of a rule that foments great frustration in students of the law, non-contemporaneous documents are treated as being executed at the same time so that the parol evidence rule does not bar the former. That use of the principle is warranted where the content of the documents raises a substantial question as to the latter document being a second step in a transaction in which the former terms were contemplated to survive.