

Fall 1979

Declining Sanctity of Written Contracts-Impact of the Uniform Commercial Code on the Parol Evidence Rule, The

George I. Wallach

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

George I. Wallach, *Declining Sanctity of Written Contracts-Impact of the Uniform Commercial Code on the Parol Evidence Rule, The*, 44 MO. L. REV. (1979)

Available at: <https://scholarship.law.missouri.edu/mlr/vol44/iss4/2>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

THE DECLINING "SANCTITY" OF WRITTEN CONTRACTS—IMPACT OF THE UNIFORM COMMERCIAL CODE ON THE PAROL EVIDENCE RULE*

GEORGE I. WALLACH**

The parol evidence rule has been expressed in numerous ways during its long and tortured history. A working definition of the rule is: When the parties to an agreement have reduced their agreement to a writing intended by them, or treated by the court, as a final and complete statement of the entire agreement, the writing may not be contradicted, varied, or even supplemented by prior oral or written understandings of the parties. If the parties intended, or the court believes, that the writing was to be merely a final expression of some of the terms of the agreement, the writing may be supplemented but not varied or contradicted by prior oral and written understandings of the parties.¹

The term "parol evidence rule" is something of a misnomer for it does not deal exclusively with parol, is not a rule of evidence, and at least in the minds of some, is not even a rule. Although the rule does not deal exclusively with parol, or oral agreements, the vast majority of the decided cases involve attempts to introduce oral terms. In addition, the rule also excludes prior written agreements and would do so under any of the different expressions of the parol evidence rule which will be discussed later in this article.

Those who question whether the parol evidence rule is really a rule at all seem to feel that certainty of definition and application are required before something can be labeled a "rule," and the parol evidence rule tends to lack both. The parol evidence rule has been defined in a number

* This article is based on material prepared for a treatise on the law of sales and contracts under the Uniform Commercial Code to be published by Warren, Gorham & Lamont, Inc. in 1980.

** Professor of Law, University of Missouri-Columbia; B.S., City College of New York, 1964; J.D., SUNY-Buffalo, 1967. The author acknowledges the research assistance of David E. Woods, Class of 1980, in the preparation of this article.

1. For other expressions of the parol evidence rule, see 3 A. CORBIN, CONTRACTS § 573 (rev. ed. 1960); J. MURRAY, CONTRACTS § 105 (2d rev. ed. 1974); 9 J. WIGMORE, EVIDENCE § 2425 (3d ed. 1940); 4 S. WILLISTON, CONTRACTS § 631 (3d ed. W. Jaeger 1961); RESTATEMENT (SECOND) OF CONTRACTS § 239 (1973); RESTATEMENT OF CONTRACTS §§ 237, 240 (1932).

of different ways, and different definitions have been used even within a single jurisdiction when parol evidence questions have arisen.²

There does seem to be unanimous agreement that the parol evidence rule is not a rule of evidence but is a rule of substantive law.³ While a rule of evidence is concerned with the proper method of proving a question of fact, the parol evidence rule is not concerned with whether the evidence has been properly introduced and admitted. Instead, it absolutely prohibits the admission of certain evidence as "legally ineffective"⁴ even if the offered evidence, which again usually takes the form of prior oral agreements not repeated in the written contract, are otherwise admissible.

The parol evidence rule "defines the limits of a contract"⁵ by declaring what may be considered in finding the contract between the parties. The rule is thus exclusionary and prevents the admission of certain kinds of extrinsic evidence at trial in order to prove what the agreement of the parties was. When the writing is treated as representing the final expression of the

2. *Zell v. American Seating Co.*, 138 F.2d 641, 649 (2d Cir. 1943), *rev'd*, 322 U.S. 709 (1944) ("[A] rule so leaky cannot fairly be described as a stout container of legal certainty."); 3 A CORBIN, CONTRACTS § 575 (rev. ed. 1960); Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 DUKE L.J. 881, 884 ("[E]ven these leading academic commentators cannot agree about what the rule is, what it purports to exclude, and what evidence may be admitted despite its restrictions."); Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036, 1045-46 (1968).

3. *Centronics Fin. Corp. v. El Conquistador Hotel Corp.*, 573 F.2d 779 (2d Cir. 1978); *Associated Hardware Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114 (3d Cir. 1966); *Long v. Morris*, 128 F.2d 653, 141 A.L.R. 1041 (3d Cir. 1942); *Matthews v. Drew Chem. Corp.*, 475 F.2d 146 (5th Cir. 1973); *Hoffman v. Late*, 222 Ark. 395, 260 S.W.2d 446 (1953); *Shivers v. Liberty Bldg. Loan Ass'n*, 16 Cal. 2d 296, 106 P.2d 4 (1940); *Estate of Gaines*, 15 Cal. 2d 255, 100 P.2d 1055 (1940); *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. 1970); *Johnson v. Johnson*, 297 Ky. 268, 178 S.W.2d 983 (1944); *Rinaudo v. Bloom*, 209 Md. 1, 120 A.2d 184 (1956); *Warinner v. Nugent*, 362 Mo. 233, 240 S.W.2d 941 (1951); *Golden Gate Corp. v. Barrington College*, 98 R.I. 35, 199 A.2d 586 (1964); *Quinn v. Bernat*, 80 R.I. 375, 97 A.2d 273 (1953); 9 J. WIGMORE, EVIDENCE § 2400 (3d ed. 1940).

4. 9 J. WIGMORE, EVIDENCE § 2400 (3d ed. 1960). RESTATEMENT OF CONTRACTS § 237 (1932) ("[T]he integration of an agreement makes inoperative . . . all contemporaneous oral agreements . . . and . . . all prior oral or written agreements . . ."). See also Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 334 (1967) ("[P]rior understandings are irrelevant to the process of determining the content of the final contract.").

5. *Hoffman v. Late*, 222 Ark. 395, 260 S.W.2d 446 (1953); *Shivers v. Liberty Bldg. Loan Ass'n*, 16 Cal. 2d 296, 106 P.2d 4 (1940); *Estate of Gaines*, 15 Cal. 2d 255, 100 P.2d 1055 (1940); *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. 1970). See also *Warinner v. Nugent*, 362 Mo. 233, 238, 240 S.W.2d 941, 944 (1951) (The parol evidence rule "fixes the subject matter for interpretation, through its own self as a rule of interpretation."); 9 J. WIGMORE, EVIDENCE § 2400 (3d ed. 1940).

agreement between the parties, it is deemed to be the contract as a matter of substantive law. The parol evidence rule assumes that earlier agreements not expressed in the written contract have been abandoned by the parties at some point in their negotiations leading up to this final written agreement.

I. THE SCOPE OF THE PAROL EVIDENCE RULE

A. *Policies Behind the Rule*

The parol evidence rule exists for many of the same policy reasons that are used to justify the existence of the statute of frauds. Written contracts have long enjoyed a preferred status in the law over oral contracts as a result of their tendency to be more accurate and detailed. Accurate and detailed contracts eliminate much of the risk of perjured testimony concerning the existence and terms of an agreement⁶ and the risk of fading memories.⁷

While the statute of frauds encourages the use of written contracts by preventing the enforcement of certain oral agreements, the parol evidence rule encourages the use of written contracts by insulating the written contract from extrinsic sources of contract terms—and occasionally even from extrinsic sources of interpretation of contract terms. The parol evidence rule, then, sanctifies the writing at the expense of the parties⁸ by excluding other forms of evidence from the jury's consideration when they determine the agreement of the parties. Since the parol evidence rule is a rule applied by the trial judge, evidence which violates the rule never reaches the jury. When the trial judge decides to exclude this evidence, he does so either to protect the writing, or to exclude evidence which he does not believe to be credible from the reach of the jury.⁹

Authorities are divided on the principal justification for the parol evidence rule, assuming that one purpose for the rule's existence has to be

6. *Kupka v. Morey*, 541 P.2d 740 (Alas. 1975); *Mitchill v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928); 3 A. CORBIN, CONTRACTS § 575 (rev. ed. 1960).

7. Professor McCormick offers the following quote from an English case decided in 1604—"uncertain testimony of slippery memory"—in offering this as one of the justifications for the parol evidence rule. McCormick, *The Parol Evidence Rule as a Procedural Device for the Control of the Jury*, 41 YALE L.J. 365, 367 n.3 (1932).

8. *Zell v. American Seating Co.*, 138 F.2d 641 (2d Cir. 1943), *rev'd*, 322 U.S. 709 (1944); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 2-9 (1972).

9. It has sometimes been suggested that the principal, if not the sole, justification for the parol evidence rule is as a jury control device. *Zell v. American Seating Co.*, 138 F.2d 641 (2d Cir. 1943), *rev'd*, 322 U.S. 709 (1944); *Moffitt v. Maness*, 102 N.C. 457, 9 S.E. 399 (1889); McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365 (1932).

given priority over other possible purposes. The parol evidence rule, however, serves at least the following functions: it promotes the use of, and protects, written agreements; and it gives the trial judge a polite means of keeping suspect oral evidence from the jury.

B. *Traditional Situations to Which the Rule Does Not Apply*

The parol evidence rule traditionally has been applied only to evidence that affects the terms of a written contract which is being enforced. For this reason, the parol evidence rule has been held to be inapplicable where a party is seeking to avoid the contract, as where fraud, illegality, duress, failure of consideration or mistake are raised as defenses to the contract's enforcement.¹⁰

Conditions precedent which have not been satisfied can also be shown by parol evidence on the theory that they do not affect the terms of the contract to be enforced, but rather prevent the contract's enforcement.¹¹ This exception to the parol evidence rule is difficult to justify. Fraud, illegality and similar defenses can be raised without conceptual difficulty since these defenses do not turn on contract terms, but rather on other circumstances which have nothing to do with the terms of the agreement itself. Conditions precedent, however, are a type of contract term and arguably should be subject to some type of restriction on admissibility if not found in the written agreement. For this reason, this exception has not been universally recognized.¹² In addition, many courts will not admit evidence of a condition precedent if there is anything in the contract which suggests that such a condition does not exist. The suggestion can come either from the language of the contract or from the fact that the contract lists certain con-

10. *Centronics Fin. Corp. v. El Conquistador Hotel Corp.*, 573 F.2d 779 (2d Cir. 1978); *Bell v. Exxon Co.*, U.S.A., 575 F.2d 714 (9th Cir. 1978); *Cone Mills Corp. v. A. G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975); *Ed Find Oldsmobile, Inc. v. Knisley*, 319 A.2d 33 (Del. Super. Ct. 1974); *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 291 N.E.2d 92 (Ind. App. 1972); *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. 1970); *Millerton Agway Coop., Inc. v. Briarcliff Farms, Inc.*, 17 N.Y.2d 57, 267 N.Y.S.2d 18, 215 N.E.2d 341 (1966); *Allen-Parker Co. v. Lollis*, 257 S.C. 266, 185 S.E.2d 739 (1971); *Coleman v. Continental Cattle Co.*, 488 S.W.2d 492 (Tex. Civ. App. 1972); *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974). See generally 3 A. CORBIN, *CONTRACTS* § 580 (rev. ed. 1960); J. MURRAY, *CONTRACTS* § 109 (2d rev. ed. 1974); 4 S. WILLISTON, *CONTRACTS* § 634 (3d ed. W. Jaeger 1961); *RESTATEMENT (SECOND) OF CONTRACTS* § 240(d) (1973); *RESTATEMENT OF CONTRACTS* § 238 (1932); Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036, 1039 (1968).

11. 3 A. CORBIN, *CONTRACTS* § 589 (rev. ed. 1960); *RESTATEMENT (SECOND) OF CONTRACTS* § 243 (1973); *RESTATEMENT OF CONTRACTS* § 241 (1932).

12. The condition precedent exception is not, for example, recognized in the state of Georgia. *Deck House, Inc. v. Scarborough, Sheffield & Gaston, Inc.*,

ditions other than the one a party is attempting to establish by parol evidence. As one court expressed it:

While generally an integrated written agreement may be shown not to have taken effect because of an oral condition precedent, this being an exception to the parol evidence rule, the exception does not apply where the oral condition precedent would contradict the express terms of the writing.¹³

C. *Total versus Partial Integration*

The overriding issue in parol evidence disputes is whether the parties intended the written document to be a final and complete statement of their agreement, or a final statement of a part of their agreement, or perhaps nothing more than a memorandum not intended to be a final expression of their agreement at all. The court decides this issue of intent before the rule prevents the admission of extrinsic evidence. A writing is labeled a totally integrated contract when the parties to the agreement have adopted the writing as "the final and complete expression of the agreement." A totally integrated contract is the sole source of the agreement between the parties. In contrast, a writing may be considered only partially integrated if the court finds that the parties intended the writing to be the final and complete expression of only the terms actually contained in the writing. A partially integrated contract can be supplemented by at least some types of prior oral or written terms.

The parol evidence rule itself does not provide a guide by which the judge is to determine the related issues of total integration and partial integration. Ordinarily, it might be expected that this intent of the parties to integrate the agreement would be determined in the same way intent is ascertained in other situations, namely, by examination of all relevant evidence that would shed some light on the actual or probable intent of the parties. When the parol evidence rule is involved, however, the question of intent has not been pursued along these lines. Rather than looking for intent, courts generally have established artificial tests to determine if the parties intended to create an integrated agreement. These tests do not necessarily lead to the discovery of the actual intent the parties may have had at the time of contracting.

Three pre-Code tests for total integration are widely recognized, none of which are statutory in origin.¹⁴ The Uniform Commercial Code's parol

13. *Whirlpool Corp. v. Regis Leasing Corp.*, 29 App. Div. 2d 395, 397, 288 N.Y.S.2d 337, 339 (1968). See also *Antonellis v. Northgate Constr. Corp.*, 362 Mass. 847, 291 N.E.2d 626 (1973); 3 A. CORBIN, CONTRACTS § 589 (rev. ed. 1960); 4 S. WILLISTON, CONTRACTS § 634 (3d ed. W. Jaeger 1961); RESTATEMENT (SECOND) OF CONTRACTS § 243, comment b (1973); RESTATEMENT OF CONTRACTS § 241 (1932); Comment, *The "Merger Clause" and the Parol Evidence Rule*, 27 TEX. L. REV. 361, 371 (1949).

14. The Uniform Commercial Code's parol evidence rule has been described as the first statutory codification of the rule. Broad, *The Consumer and the*

evidence rule, and its tests for total and partial integration, can be better understood by beginning with an examination of these pre-Code interpretations of the rule.

II. PRE-CODE APPROACHES TO THE PAROL EVIDENCE RULE

A. *The "Four Corners" Doctrine*

1. Presumption of Finality

The "four corners" doctrine was one of the earliest expressions of the parol evidence rule and today is largely of historical interest.¹⁵ Under this approach, courts used a two-step test to determine whether a writing was the final and exclusive agreement of the parties. The first step was to determine whether the writing appeared to be a complete agreement simply by looking at the face of the writing. The second step, after an affirmative decision upon the first, was to presume that the writing was the final and complete expression of the parties' agreement.

*Thompson v. Libbey*¹⁶ exemplifies the "four corners" approach to the parol evidence rule. That case dealt with the following agreement: "I have this day sold to R. C. Libbey, of Hastings, Minn., all of my logs marked 'H.C.A.,' cut in the winters of 1882 and 1883, for ten dollars a thousand feet, boom scale at Minneapolis, Minnesota. Payment, cash, as fast as scale bills are produced."¹⁷ The writing was dated and signed by both parties. When the plaintiff sued for the purchase price, the defendant raised a breach of warranty defense based on an oral promise allegedly made at the time of the sale.

Applying the "four corners" doctrine, the court stated that the sole test for integration, or whether the parties had intended to express their whole agreement in the writing, was whether the writing contained "such

Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code, 1970 DUKE L.J. 881, 882. It would be more accurate to say that it is the first widely adopted and uniform codification, since a number of states do have statutory parol evidence rules other than the one found in the Uniform Commercial Code. See, e.g., *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029 (8th Cir. 1978).

15. J. MURRAY, *CONTRACTS* § 106 (2d rev. ed. 1974) ("[N]o modern court should be guided by such a restrictive test."). The "four corners" approach has been rejected by the *Restatement (Second) of Contracts* and the Uniform Commercial Code. See *RESTATEMENT (SECOND) OF CONTRACTS* § 236, comment b (1973); U.C.C. § 2-202, comment 1(a). *Thompson v. Libbey*, 34 Minn. 374, 26 N.W. 1 (1885), the leading case employing the "four corners" approach, has been rejected as "no longer authoritative." *Nysingh v. Warren*, 94 Idaho 384, 385 n.2, 488 P.2d 355, 356 n.2 (1971).

16. 34 Minn. 374, 26 N.W. 1 (1885). Other significant opinions adopting this approach to the parol evidence rule include: *Johnson v. Johnson*, 297 Ky. 268, 178 S.W.2d 983 (1944); *Anchor Cas. Co. v. Bird Island Produce, Inc.*, 249 Minn. 137, 82 N.W.2d 48 (1957).

17. 34 Minn. at 375, 26 N.W. at 2.

language as imports a complete legal obligation." The court held that the writing was the whole agreement because nothing on the writing's face indicated that it was informal or incomplete. After finding that the writing was complete on its face, the court presumed that the parties had put "every material item and term" into it.

The rule established in *Thompson*, that a written agreement apparently complete on its face is conclusively presumed to be the final and complete expression of the agreement of the parties, is highly artificial. It presupposes that the parties intended the writing to include all of the terms of the agreement, a supposition which may be far from the parties' actual intent. The justification for the rule in *Thompson* appears to be founded on a significant moral overtone: parties to a contract should put their entire agreement in writing. The "four corners" doctrine, more than any later expression of the parol evidence rule, was at least in part influenced by this belief. Parties who sought to introduce extrinsic sources of contract terms were not treated sympathetically, especially when the written contract looked complete to the judge. If the parties were going to put their contract in a writing which looked complete, they were going to have to put all of it in writing or bear the consequences of having failed to do so.

The "four corners" doctrine did not exclude extrinsic evidence when the court found the writing to be incomplete on its face. The *Thompson* court noted "bills of parcels and the like" as examples of incomplete writings which were not integrated. However, when the writing appeared to be facially complete, it was almost impossible to demonstrate that the writing was only a partially integrated agreement. Without evidence of accident, mistake or fraud, the courts held that the "four corners" doctrine would not allow a party to prove that the writing was incomplete or only partially integrated.¹⁸

2. Decline Under the "Collateral Contract" Concept

On first impression, the "four corners" doctrine would seem to be a total bar to attempts to establish oral agreements between the parties when the writing appeared to be a complete contract. Yet a written contract would not necessarily be the only agreement ever entered into between the two parties. For example, if a consumer had signed a contract to buy a new car from a car dealer for \$8,000, this written contract would not prevent the enforcement of an oral agreement to buy a used truck for \$3,000 entered into a week earlier. The earlier agreement would be enforceable in spite of the parol evidence rule because it was an entirely separate or collateral agreement.

The parol evidence rule does not require all agreements between two parties to be in writing. It only applies to a single contract where all or part

18. The cases are collected in 4 S. WILLISTON, CONTRACTS § 633 (3d ed. 1961).
 Published by the University of Missouri School of Law Scholarship Repository, 1979

of that contract has been reduced to writing. The unwritten agreement can appear to be completely independent of the written contract. When the subject matter of the unwritten contract is completely different from that of the written contract, the consideration for each separate, and the agreements entered into at different times, it is easy to see this independence.

The truly independent agreements are at one end of the spectrum. At the other end are truly interrelated agreements where there is, in substance, only one contract between the parties. In the example given above, could the consumer offer to prove that the car dealer had agreed to install an air conditioner in the car at no additional cost, even though the contract was silent with respect to this obligation? The buyer's argument would be that this agreement was sufficiently independent of the agreement to purchase the car so that it ought to be admissible.

Agreements that are ostensibly independent of the basic agreement illustrate the basis for the "collateral contract" concept. Returning to the example above, if the additional agreement was quasi-independent, or "collateral" to the main agreement, it is arguable that the written agreement was not intended to deal with this "collateral" agreement.

The "collateral contract" concept was developed to avoid the harsh result reached by the "four corners" doctrine where the written contract was facially complete.¹⁹ The "four corners" rule had no response ready for this "collateral contract" argument. This failing, combined with the total artificiality of the rule, led to its decline in popularity. Recent opinions rarely use this test when confronted with a total integration situation.

The "four corners" doctrine was largely displaced by a second test developed for determining the parties' intent to create a complete and final written contract; a test which at least in part was designed to deal more effectively with the "collateral contract" argument. This test, often referred to as the "naturally and normally" or "reasonable man" test, was promoted by Professor Williston²⁰ and adopted by the original *Restatement of Contracts*.²¹

19. McCormick, *The Parol Evidence Rule as a Procedural Device for The Control of the Jury*, 41 YALE L.J. 365, 371 (1932). See also Markoff v. Kreiner, 180 Md. 150, 154, 23 A.2d 19, 23 (1941); Buyken v. Ertner, 33 Wash. 2d 334, 339-42, 205 P.2d 628, 633-636 (1949).

20. 4 S. WILLISTON, CONTRACTS, §§ 638-639 (3d ed. W. Jaeger 1961).

21. The *Restatement of Contracts* expresses the rule in the following language:

§ 240. In What Cases Integration Does Not Affect Prior or Contemporaneous Agreements.

(1) An oral agreement is not superseded or invalidated by a subsequent or a contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and

(a) is made for separate consideration, or
(b) is such an agreement as might naturally be made as a separate

B. *The "Reasonable Man" Standard*

Professor Williston's "reasonable man" approach resembles the "four corners" approach in two ways. First, the test involves several steps. Second, the test concentrates on the appearance of the written contract.²² One of the leading decisions following the "reasonable man" approach is *Mitchill v. Lath*,²³ where the court did not admit an alleged oral agreement under the parol evidence rule. In that case the plaintiff wanted to purchase a piece of land located adjacent to another parcel of land owned by the same seller and upon which sat an icehouse. After buying the land, the purchaser sued for breach of contract when the seller did not remove the icehouse. She alleged that the defendants had orally agreed to remove the icehouse. Unfortunately, no provision requiring that the icehouse be removed was in the written contract that the parties had signed.

agreement by parties situated as were the parties to the written contract.

- (2) Where no consideration is stated in an integration, facts showing that there was consideration and the nature of it, even if it was a promise, or any other facts that are sufficient to make a promise enforceable, are admissible in evidence and are operative.

22. The principal distinction between the two approaches is that Professor Williston had an answer for the proponent of the collateral contract argument. His approach to the question of the parties' intent to produce an integrated writing has been summarized as follows:

(1) If the writing expressly declares that it contains the entire agreement of the parties (what is sometimes referred to as a merger clause), the declaration conclusively establishes that the integration is total unless the document is obviously incomplete or the merger clause was included as a result of fraud or mistake or any reason exists that is sufficient to set aside a contract. As previously indicated, even a merger clause does not prevent enforcement of a separate agreement supported by a distinct consideration.

(2) In the absence of a merger clause, the determination is made by looking to the writing. Consistent additional terms may be proved if the writing is obviously incomplete on its face or if it is apparently complete but, as in the case of deeds, bonds, bills, and notes, expresses the undertaking of only one of the parties.

(3) Where the writing appears to be a complete instrument expressing the rights and obligations of both parties, it is deemed a total integration unless the alleged additional terms were such as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.

Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 338 (1967).

23. 247 N.Y. 347, 160 N.E. 646 (1928). See also *Seitz v. Brewers' Refrig. Mach. Co.*, 141 U.S. 510, 517 (1891); *Hartford Fire Ins. Co. v. Shapiro*, 270 Ala. 149, 117 So. 2d 348 (1960); *Masterson v. Sine*, 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968); *Caputo v. Continental Constr. Corp.*, 340 Mass. 15, 162 N.E.2d 818 (1959); *Gianni v. B. Russel Co.*, 281 Pa. 320, 126 A. 791 (1924); *Golden Gate Corp. v. Barrington College*, 98 R.I. 35, 199 A.2d 586 (1964); *Danielson v. Bank of Scandinavia*, 201 Wis. 392, 230 N.W. 83 (1930).

The court stated that three requirements must be met before an alleged oral agreement would be admitted to vary a written agreement: (1) the agreement must be collateral; (2) it must not contradict express or implied provisions of the writing; and (3) it must be one "that the parties would not ordinarily be expected to embody in the writing," or not "be so clearly connected with the principal transaction as to be part and parcel of it."²⁴

The court rejected plaintiff's evidence of the alleged oral agreement and found that although the alleged oral agreement was collateral, it was too "closely related to the subject dealt with in the written agreement." Therefore plaintiff did not satisfy the third requirement for admission of the parol evidence. The court seemed initially to follow the "four corners" rule as a basis for its conclusion that the writing provided for a full and complete agreement which detailed the obligations of both parties. The test applied, however, was not whether the writing was complete on its face, but rather was an extension of the "four corners" rule. The court went beyond the writing to ascertain whether, if such an agreement had been made, it would "seem most natural that the inquirer should find it in the contract." The court found that it would be natural to include the obligation to remove the icehouse in the contract and therefore refused to admit the oral agreement even though the court appeared to believe that such an agreement did exist.

It is instructive to consider what Professor Williston's "reasonable man" approach to the parol evidence rule does for the proponent of an extrinsic source of contract terms. It firmly adds the possibility of a finding that the written agreement is not the only agreement between the parties—but that is all it does. This is not meant to suggest that the "reasonable man" approach is not a significant step in the evolution of the parol evidence rule. To the contrary, Professor Williston's approach makes it possible to convert a facially complete written contract, which would have been treated as the sole and exclusive source of the agreement of the parties under the "four corners" approach, into a written contract which is not the sole and exclusive source of the terms of the agreement.

The first step in convincing a trial judge to admit the offered evidence is to demonstrate that the terms not found in the written contract were sufficiently "collateral" so that reasonable men would not naturally have included these terms in the writing. Once the judge determines that the writing is not totally integrated under the "reasonable man" test, he still must determine whether the offered evidence is admissible as a consistent additional term. In order to qualify for admission into evidence, the offered term must be both consistent with, and additional to, the terms already found in the writing.

The majority of the opinions which reached this stage of the inquiry concentrated on the question of consistency,²⁵ rather than whether the term was additional to those found in the written contract.²⁶ Those opinions were uniformly restrictive in the standard they established for finding the offered parol evidence consistent with the terms of the written contract. For example, in the *Mitchill*²⁷ case mentioned previously, the court suggested that the buyer was attempting to introduce an inconsistent term in offering to prove that the seller had agreed to remove the icehouse as part of the consideration for the sale of the real property, even though the contract did not expressly state that the icehouse was to remain. Why, then, was the offered evidence inconsistent with the written terms? The answer is that an offered term may not contradict either an express or an implied term of the contract. The contract listed the seller's obligations, thereby permitting the court to infer that the listed obligations were *all* of the seller's obligations. The offered term, by adding an additional obligation, contradicted the implication that there were no other obligations beyond those contained in the written contract.

The *Mitchill* holding placed serious restrictions on the admissibility of parol evidence by requiring that parol terms be consistent not only with express terms, but also with any implied terms the court may find in the written contract.

Not all courts have extended the implied term analysis to this extreme. In *Masterson v. Sine*,²⁸ the question was whether an option to reacquire land sold to the defendant, which was expressed in absolute terms in the written contract, could be shown to have been limited by an oral agreement to be exercisable by the named optionee only. The court admitted the oral agreement because it only conflicted with the legal presumption that an option is ordinarily assignable if it contains no provisions prohibiting assignment. This, however, was a legal implication drawn from the contract's silence on restrictions on assignability. The court did not believe that it was proper to draw the conclusion that the offered term was inconsistent with the writing when the offered term was only inconsistent with a term implied by law.

The *Masterson* court actually skirted the question of whether the agreement making the option personal to the optionee was inconsistent with the implied terms of the contract. The written contract did reserve an "option" in the sellers of the land. If confronted with this situation, the *Mitchill* court might well have concluded that it was not just a rule of law which implied that the option was assignable, but rather a rule of contract construction which implied that the option was unfettered. Any attempt

25. 4 S. WILLISTON, CONTRACTS § 642 (3d ed. W. Jaeger 1961).

26. See 3 A. CORBIN, CONTRACTS §§ 583, 585 (rev. ed. 1960) for a treatment of the "additional" requirement.

27. 247 N.Y. 347, 160 N.E. 646 (1928).

28. 68 Cal. 2d 222, 456 P.2d 501, 65 Cal. Rptr. 543 (1965).

to introduce oral terms restricting the transferability of the option would have been inconsistent with the implication, to be drawn from the contract's silence, that the option was unrestricted.

Even if the offered term is consistent with the written terms, the court must also find that it is additional to the terms contained in the writing. When is the term an additional one? Courts traditionally have looked to the writing itself to see whether it dealt with the subject of the offered term, or whether it was totally silent about the subject. If the writing dealt with the subject matter, the judge was likely to exclude the offered term.²⁹

Professor Wigmore suggested that the issue of whether an offered term was "additional" to the terms contained in the writing was the only sensible standard for determining whether the written agreement was less than fully integrated. He maintained that the consistency requirement only clouded the true issue because no one would seek to offer additional terms if those terms would have no effect on the obligations of the parties under the written contract. If the offered terms were to have any effect at all, they would have to vary, contradict, or be inconsistent with the written terms in some way. Rather than engage in what he perceived to be a futile inquiry about consistency, Professor Wigmore suggested that:

[T]he chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all* in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if not, then probably the writing was not intended to embody that element of the negotiation. This test is the one used by most careful judges, and is in contrast with the looser and incorrect inquiry . . . whether the alleged extrinsic negotiation contradicts the terms of the writing³⁰

The approaches of both Professors Williston and Wigmore increased the probability that a party seeking to introduce contract terms not found in the written contract would be successful in that effort. Neither approach, however, could guarantee success, even if there was no question that the outside terms had been agreed to, and were initially intended by both parties to survive the execution of the written contract. The party who wished to avoid the impact of the term not found in the written contract could prevent its admission if the offered term was one reasonable parties would naturally have included in the writing, or if the offered term either dealt with a subject considered in the written contract, or was inconsistent with an express or implied term of the written contract.

At this stage in its development, the parole evidence rule remained a barrier to finding the true agreement of the parties because it tested the in-

29. 4 S. WILLISTON, CONTRACTS § 640 (3d ed. W. Jaeger 1961). See also *Caputo v. Continental Const. Corp.*, 340 Mass. 15, 162 N.E.2d 813 (1959).

30. J. WIGMORE, EVIDENCE § 2430 (1940).

tent of the parties by objective criteria. Asking what reasonable men might do did not necessarily explain what the parties had intended to do. It was Professor Corbin who attempted to bypass the fiction of the reasonable man in order to ascertain the true intent of the parties.

C. Professor Corbin's Approach

A third pre-Code approach to the parol evidence rule was developed and advanced by Professor Corbin³¹ and later adopted by the *Restatement (Second) of Contracts*.³² Professor Corbin's formulation of the rule was not radically different from earlier expressions of the rule:

When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.³³

His suggested method of finding the parties' intent to create a totally or partially integrated agreement, however, was a sharp departure from earlier views. He was not interested in a fictional intent ascribed to the parties that might or might not coincide with their actual intent. Professor Williston's objective "reasonable man" standard was concerned with what people normally would do. Professor Corbin was concerned with whether the parties subjectively agreed to the writing as a final and either partial or complete statement of their agreement.³⁴ The difference between the two approaches is immense.

*United States v. Clementon Sewerage Authority*³⁵ illustrates the emphasis Professor Corbin's approach places on a judicial determination of

31. 3 A. CORBIN, CONTRACTS § 573 (rev. ed. 1960).

32. RESTATEMENT (SECOND) OF CONTRACTS §§ 236, comment b, & 239 (1973). The *Restatement* draftsmen may have thought they were adopting the Uniform Commercial Code approach, but the *Restatement's* approach seems closest to that propounded by Professor Corbin. J. MURRAY, CONTRACTS § 107 (2d rev. ed. 1974). Professor Corbin thought that the Uniform Commercial Code was adopting his position. 3 A. CORBIN, CONTRACTS § 583, n.94 (rev. ed. 1960). As the text suggests, the Code's approach falls somewhere between the Williston and Corbin approaches. See note 46 and accompanying text *infra*.

The Code position is not the same as the position taken by the *Restatement (Second) of Contracts* and Professor Corbin, but the dissimilarity is not apparent from reading the text of the Code's parol evidence rule. This appears to have been the cause of the confusion on this question. The Code's approach to the question of total integration is found only in the comments to § 2-202. The court in *Interform Co. v. Mitchell*, 575 F.2d 1270 (9th Cir. 1978), failed to acknowledge the relevant comment and concluded that the Code has adopted Professor Corbin's approach.

33. 3 A. CORBIN, CONTRACTS § 573 (rev. ed. 1960).

34. *Id.* § 582.

35. 365 F.2d 609 (3d Cir. 1966). See also *Sylvania Elec. Prod., Inc. v. United States University of Maryland School of Medicine*, 437 F.2d 1094 (4th Cir. 1970), and *Scholarship Repository*, 1979 *Delta Dynamics, Inc. v. Arto*, 69

the parties' actual intent. The Clementon Sewerage Authority was created to construct a sewage system. The Authority contracted in writing with Albert Wise, an engineer, for the preparation of preliminary studies and final plans for the system. The parol evidence question raised in this case was whether Wise had breached an oral agreement concerning the cost of the project. The trial court adopted Professor Corbin's approach by examining the extrinsic evidence in order to ascertain the parties' intent to integrate. The court phrased the issue as "whether the parties assented to the writing as the complete integration of their agreement."³⁶ The lower court found that the writing was not integrated, but rather was only part of an agreement that also involved an oral agreement as to the project's cost. The appellate court affirmed, holding that although it was "unusual" to omit such an important term from a written contract as comprehensive as the one before it, the record was convincing that the parties had done just that. The impact of the Corbin approach on the result in this case is clear. Had the court followed Professor Williston's "reasonable man" view, it would have excluded the evidence of the alleged oral agreement because reasonable men would not have excluded their agreement as to the final cost from the written contract if they had wanted it to be a part of their final contract.

The differences between the Corbin and Williston views are significant only in terms of the approach taken and not in terms of the ultimate conclusion the trial judge would draw in any given case. Professor Williston's overall approach does much to retain the preferred position of the written contract in the eyes of the law. Although the written contract is not fully insulated from the effect of prior oral or written agreements, it remains protected to a significant degree. Professor Corbin's approach seems to demote the written contract from its exalted position and to largely eliminate the "rule of form" aspects of the parol evidence rule. A trial judge following Professor Corbin's approach would test the admissibility of the parol terms solely by the credibility of the party seeking to introduce the term. But this does not mean that the offered terms are likely to be admissible in any significant number of cases where they would not have been admissible under Professor Williston's approach. To the contrary, Professor Corbin warned several times that "flimsy and improbable"³⁷ evidence should not be admitted, and that a party seeking to introduce additional oral terms will have a "heavy"³⁸ burden in establishing them in the face of a written contract.

Cal. 2d 525, 446 P.2d 785, 72 Cal. Rptr. 785 (1968); *Martindell v. Lake Shore Nat'l Bank*, 15 Ill. 2d 272, 154 N.E.2d 683 (1958); *Atlantic N. Airlines v. Schwimmer*, 12 N.J. 293, 96 A.2d 652 (1953).

36. 365 F.2d at 614, quoting *Atlantic N. Airlines v. Schwimmer*, 12 N.J. 293, 304, 96 A.2d 652, 657-58 (1953).

37. 3 A. CORBIN, CONTRACTS §§ 582-583 (rev. ed. 1960).

If the adoption of Professor Corbin's approach would not change the result in any great number of cases, and if his approach avoids the use of fictions about reasonable men or clauses "touching on" a subject, why have judges continued to adhere to the earlier versions of the parol evidence rule which are more likely to fail to discover the true intent of the parties? The answer lies in the otherwise unmatched advantage of the more traditional approaches to the parol evidence rule. As Professor McCormick, a supporter of the Willistonian approach to the parol evidence rule, said fifty years ago:

[The parol evidence rule] enables the judge to head off the difficulty at its source, not by professing to decide any question as to the credibility of the asserted oral variation, but by professing to exclude the evidence from the jury altogether because forbidden by a mysterious legal ban.³⁹

Although Professor Corbin sought to take this convenient excuse away from the trial judges, the parol evidence rule remains a judicial trump card, held ready by the trial judge as a convenient basis for excluding suspect parol evidence from the jury's consideration.

III. THE UNIFORM COMMERCIAL CODE'S PAROL EVIDENCE RULE

Uniform Commercial Code section 2-202 contains the Code's parol evidence rule. It provides:

Final Written Expression: Parol or Extrinsic Evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The Code drafters obviously intended to change a number of the factors involved in considering parol evidence questions that arose under pre-Code expressions of the rule. First, parol evidence is more narrowly defined, at least more narrowly than some pre-Code opinions had defined it. Under the Code, parol evidence includes only prior oral and written agreements, and contemporaneous oral agreements. The Code makes the types of evidence described in subsection (a) of section 2-202, such as usage

of trade and course of dealing, admissible to supplement or explain a contract even if a court finds that the agreement is totally integrated, and even if the contract contains a merger clause.⁴⁰

Perhaps even more importantly, the drafting of the Code's parol evidence rule has shifted the nature of the judge's inquiry. Under all pre-Code approaches to the parol evidence rule, the judge's first task was to examine the transaction to determine if the written contract was a total integration. The phrasing of the parol evidence rule required this because the statement of the rule began with language such as: "if the parties intended the writing to be a final and complete statement."⁴¹

In drafting the Code's parol evidence rule, the initial inquiry was shifted to the question of partial integration. The Code begins by asking whether the "writing [was] intended by the parties as a final expression of their agreement with respect to such terms as are included therein."⁴²

The question of total integration is theoretically made the judge's last inquiry under the Code's rule. The last clause of section 2-202 asks whether the writing was "intended also as a complete and exclusive statement of the terms of the agreement."⁴³ This change in the order of inquiry appears to have been intended to change the judge's frame of reference from one which assumes that total integration was the likely or normal intent, to one which assumes that the starting point, or initial assumption, is that partial integration is the norm.⁴⁴

These two changes have had a significant impact on courts which have worked with the Code's parol evidence rule. The Code's stated desire to allow usage of trade, course of performance and course of dealing to play a larger role as sources of contract terms than they sometimes had in the past, and the shift in any presumption from one of total integration to one of partial integration, have combined to increase dramatically the likelihood that extrinsic sources of contract terms will be admitted for consider-

40. A traditional "merger clause," stating that the written contract contains all of the terms of the agreement, is not sufficient to exclude course of dealing and usage of trade. Their relevance must be "carefully negated." U.C.C. § 2-202, comment 2. *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 10-11 (4th Cir. 1971); *Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.*, 59 Cal. App. 3d 948, 131 Cal. Rptr. 183 (1976); *Provident Tradesmens Bank & Trust Co. v. Pemberton*, 196 Pa. Super. Ct. 180, 173 A.2d 780 (1961); *Modine Mfg. Co. v. North East Independent School Dist.*, 503 S.W.2d 833 (Tex. Civ. App. 1973).

41. For references to the varying methods of expressing the parol evidence rule, see note 1 *supra*.

42. U.C.C. § 2-202.

43. U.C.C. § 2-202(b).

44. *Michael Schiavone & Sons, Inc. v. Securalloy Co.*, 312 F. Supp. 801 (D. Conn. 1970); *Broude, The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1070 *Duke L.J.* 881, 902; Note, *Sales—Parol Evidence Under the U.C.C.*, 35 TENN. L. REV. 398 (1968).

ation by the trier of fact. These changes support the conclusion that the drafters of the Code intended to "liberalize" the parol evidence rule.⁴⁵

With the Code's presumption of partial integration and its intended purpose of liberalizing the parol evidence rule established, the analysis returns to the initial question in all parol evidence rule questions: what test do courts now use to find total integration? This question remains the first inquiry for two reasons. First, it is still the most commonly accepted approach to all parol evidence rule cases. Second, while section 2-202 may make this the last question in that section, if the court's answer is that a total integration was intended, earlier questions such as whether the offered term is consistent with the written contract do not have to be answered by the court. For this reason judges, to the extent they are asking whether a written contract was intended to be fully integrated, continue to make this the first question they ask. Judges operating under the parol evidence rule do not always ask this question. Many opinions seem to adopt the Code's presumption that a partial integration was the most that was intended, and do not test the written contract for total integration.

While the Code does not prescribe a standard for determining whether the parties intended to totally integrate their agreement, the Code comments do provide clues as to what the drafters did not intend the test to be. Comment 1(a) to section 2-202 expressly rejects any pre-Code assumption of total finality merely because the writing appears final on some matters.⁴⁶ It is difficult to be certain which pre-Code assumption this comment is rejecting; it appears to be a rejection of those vestiges of the "four corners" doctrine which survived until the Code's promulgation. In addition to suggesting what ought not to be an appropriate test, the comments also suggest at least one possible test for total integration. Comment 3 to section 2-202 provides:

Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

The "certainly" test of the last sentence of comment 3 is a variation of Professor Williston's "reasonable man" test. The Uniform Commercial Code thus offers a test for total integration which falls between those offered by Professors Williston and Corbin. It is for this reason that their approaches to the question of total integration are necessary background

45. *Michael Schiavone & Sons, Inc. v. Securalloy Co.*, 312 F. Supp. 801 (D. Conn. 1970); *Zwiersycki v. Owens*, 499 P.2d 996 (Wyo. 1972).

46. U.C.C. § 2-202, comment 1(a) states: "This section definitely rejects . . . [a]ny assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon"

for a complete understanding of how the Code's parol evidence rule operates.

The Code tests total integration by starting with a search for the true intention of the parties. The trial judge is to look at all circumstances surrounding the execution of the contract in an effort to determine whether both parties intended the written contract to be their final and complete agreement.⁴⁷ This is essentially an adoption of Professor Corbin's approach, but the inquiry does not end there. Even if the trial judge believes that the written contract was not intended as a final and complete statement of the agreement, extrinsic evidence may still be excluded under the more mechanical approach suggested by Professor Williston. However, the mechanical test is no longer one of "naturally," but rather is one of "certainly." While Professor Williston's approach would allow the trial judge to admit the extrinsic evidence if he believes that reasonable men would "naturally" have made the extrinsic terms the subject of a separate agreement, the Code would exclude the extrinsic terms only if reasonable men would "certainly" have included the extrinsic terms in the writing if they had intended to preserve those terms as part of their total agreement. The "certainly" standard implies a narrower frame of human conduct and increases the possibility that extrinsic evidence will be admitted.

Once the trial judge concludes that the written contract is not a final and complete integration, the court next must determine whether the agreement is partially integrated, so that only consistent additional terms are admissible, or not integrated at all. If the court concludes that a writing was not integrated at all, all evidence of prior or contemporaneous agreements would be admissible and the jury would have to decide what the actual agreement of the parties was. The kinds of writings that lead to litigation about the parol evidence rule invariably appear sufficiently complete and final to be either partially or fully integrated, and these are the alternatives from which the court must ordinarily choose.

If the practical choice is between full and partial integration, and the written contract is considered partially integrated, parol evidence is still only admissible if it involves consistent additional terms. The Uniform Commercial Code's parol evidence rule thus resembles earlier versions of

47. *Sunbury Textile Mills, Inc. v. Commissioner*, 585 F.2d 1190 (3d Cir. 1978); *S. M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. 1978); *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 400 F. Supp. 273 (E.D. Wis. 1975); *Port City Constr. Co. v. Henderson*, 48 Ala. App. 639, 266 So. 2d 896 (1972); *Shore Line Prop., Inc. v. Deer-O-Paints & Chem., Ltd.*, 24 Ariz. App. 331, 538 P.2d 760 (1975); *General Equip. Mfrs. v. Bible Press, Inc.*, 10 Mich. App. 676, 160 N.W.2d 370 (1968); *McDown v. Wilson*, 426 S.W.2d 112 (Mo. App. 1968); *Massey-Ferguson Credit Corp. v. Brown*, 547 P.2d 846 (Mont. 1976); *Whirlpool Corp. v. Regis Leasing Corp.*, 29 App. Div. 2d 395, 288 N.Y.S.2d 337 (1968); *Golden Gate Corp. v. Barrington College*, 98 R.I. 35, 199 A.2d 586 (1964); *Conner v. May*, 444 S.W.2d 948 (Tex. Civ. App. 1969); *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974).

the rule in yet another way. The question of total integration is only the first hurdle a proponent of parol evidence must clear. The second hurdle to be encountered centers around whether the offered evidence involves consistent additional terms.

The Uniform Commercial Code's parol evidence rule does not define the phrase "consistent additional terms." Instead, the definition was left to case law development. Its definition was seriously considered, apparently for the first time, in the case of *Hunt Foods & Industries, Inc. v. Doliner*.⁴⁸ That decision, although brief and somewhat confusing, has become the centerpiece around which subsequent developments under the Code's parol evidence rule have occurred. In *Hunt Foods* the plaintiff was a corporation that wanted to buy the controlling stock of another corporation owned by the defendant. The price was settled but the terms of the acquisition were not. The prospective buyer began to worry about the transaction when the negotiations were temporarily recessed, and demanded and received an option to buy the defendant's stock. The optionee later attempted to exercise the option but the defendant refused to deliver the stock, alleging that the optionee had orally promised that the option would be exercised only if the defendant solicited an outside offer for his stock. Defendant also claimed that the optionee had insisted that the option be signed in an unconditional form under threat that the negotiations would halt.

The court's opinion did not deal directly with the total integration question. Instead, it seemed to assume that the written contract was only partially integrated and thus merely a final statement of those terms contained in it. The court appeared to be more interested in the issue of whether the offered contemporaneous oral agreement involved a consistent additional term which could be admitted to supplement the writing. After holding that the oral agreement was "clearly additional" since it was not set out in the writing,⁴⁹ the court defined "consistent" in the negative: "To be inconsistent the term must contradict or negate a term of the writing. A term or condition which has a lesser effect is provable."⁵⁰ The court also found that the alleged oral agreement did not contradict or negate the written terms of the option.

48. 26 App. Div. 2d 41, 270 N.Y.S.2d 937 (1966). The *Restatement (Second) of Contracts* offers no help at all in this area. Section 241 provides that an integrated agreement may not be contradicted. The comments then state that whether a contradiction is present depends on whether the language is consistent or inconsistent, but no attempt is made to define these terms and no illustrations are given.

49. Subsequent cases do not discuss the "additional" requirement at all. In this respect, the case law under the Code parallels the pre-Code situation where the judicial emphasis was on consistency. See text accompanying note 25 *supra*.
 50. *Hunt Foods & Industries, Inc. v. Doliner*, 26 App. Div. 2d 41, 43, 270 N.Y.S.2d 937, 940 (1966).

Under the *Hunt Foods* holding, then, the parol evidence must directly contradict or negate a term of the written agreement before "proof of its existence" can be excluded. Anything short of a direct contradiction is insufficient to make the parol evidence inconsistent with the express terms. Furthermore, the inconsistency must be in relation to an express term of the contract, not one implied in law when the agreement is silent, or even one implied in fact from the balance of the contract.

By requiring that nothing short of a direct contradiction with an express term will lead to the exclusion of extrinsic evidence, the *Hunt Foods* decision has gone far toward emasculating the parol evidence rule when the written contract is only partially integrated. Many pre-Code cases had required that the offered parol evidence be consistent not only with the express terms of the contract, but also with implied terms.⁵¹ *Hunt Foods'* equation of inconsistency with a direct contradiction is also far narrower than pre-Code definitions which almost universally held that consistency required that the offered terms neither affect nor vary the terms which were found in the written contract.⁵²

In defining what constitutes a consistent additional term, the *Hunt Foods* decision creates some confusion by suggesting that even though the parol evidence is found to be a consistent additional term, it must still pass the "certainly" test found in the comments to section 2-202. The certainly test is generally believed to be a test for total integration, or more accurately, whether the offered terms are sufficiently collateral to the written agreement that they would not "certainly" belong in the writing. There seems to be no harm in applying the certainly test twice, if that is what the court was in fact suggesting should be done. If this is required, then the parol evidence must be consistent and additional, and must also satisfy the "certainly" test.

51. The cases are collected by both Williston and Corbin. Both agree that terms implied by law should not be considered terms of the contract for purposes of the parol evidence rule. Thus both objected to cases which held, for example, that parol evidence of an agreed time of delivery was inconsistent with a written contract which was silent about time of delivery because of the "reasonable time for delivery" term supplied by law when a contract was silent with respect to that term. 3 A. CORBIN, CONTRACTS § 593 (rev. ed. 1960); 4 S. WILLISTON, CONTRACTS § 640 (3d ed. W. Jaeger 1961). Professor Williston, however, also believed that parol evidence should not be allowed to contradict an implied in fact term of the contract, at least not the implication that the written terms seemed to express the complete agreement of the parties on a particular transaction. 4 S. WILLISTON, CONTRACTS § 639 (3d ed. W. Jaeger 1961).

52. *Seitz v. Brewers' Refrig. Mach. Co.*, 141 U.S. 510 (1891); *Johnson v. Johnson*, 297 Ky. 268, 178 S.W.2d 983 (1944); *Violette v. Rice*, 173 Mass. 82, 53 N.E. 144 (1899); *Thompson v. Libbey*, 34 Minn. 374, 26 N.W. 1 (1885); *Gianni v. R. Russel & Co.*, 281 Pa. 320, 126 A. 791 (1924); *Gladden v. Keistler*, 141 S.C. 524, 140 S.E. 161 (1927); *Van Doren Roofing & Cornice Co. v. Guardian Cas. & Guar.*, 99 Wash. 68, 168 P. 1124 (1917); *Bushnell v. Elkins*, 34 Wyo. 495, 245 P. 304 (1926).

The *Hunt Foods* opinion, after supplying a somewhat unique definition for "inconsistent," did the same thing for the word "certainly." The court offered the following explanation of the last sentence of comment 3 to section 2-202 which contains the "certainly" requirement: "It is not sufficient that the existence of the condition is implausible. It must be impossible."⁵³

The "impossibility" standard attempts to change the judge's inquiry from one of form to one of credibility. The "certainly" test, as originally expressed in the comment to the Code's parol evidence rule, seemed designed to preserve to some degree the rule of form that the parol evidence rule has always promoted. The trial judge is to exclude extrinsic evidence if he believes that reasonable men would certainly have included it in their written contract. This is not an inquiry into credibility—it is a question of form and the behavior patterns of reasonable men. What these parties intended becomes irrelevant if reasonable men would certainly have acted otherwise. In phrasing the question in terms of impossibility, the *Hunt Foods* holding arguably shifts the inquiry to one of pure credibility. Is it impossible to believe the term was either agreed to or meant to be retained? Only if the answer is yes is the offered parol evidence to be excluded. If *Hunt Foods* were followed on this point, the parol evidence rule would lose those vestiges of a rule of form it has retained and would become a pure credibility testing device.

IV. POST-HUNT FOODS DEVELOPMENTS

One of the frustrating aspects of the parol evidence rule is that the courts have applied it unevenly. While there has been no apparent problem in recognizing that a parol evidence question is present, the cases cannot be easily pigeonholed in a consistent pattern. There is, however, a reasonably uniform approach to parol evidence questions which can be gleaned from the cases decided under the Code's parol evidence rule during the post-*Hunt Foods* era. That approach focuses on whether the parties intended to totally integrate their agreement, and on the presence of consistent or inconsistent terms in the agreement.

When faced with a parol evidence question, most courts look first for evidence of an intent by both parties to product a final written agreement. Courts look to the writing itself, the negotiations which led up to the execution of the written contract, and any other relevant facts that might shed light on the intentions of the parties. If this evidence convinces the trial court that the writing was intended to be a final and exclusive statement of the agreement, no parol evidence will be admitted for the purpose of providing contract terms. To this extent, then the true intentions of the parties control whether parol evidence will be admitted and Professor Corbin's view of the parol evidence rule seems to dominate.

The true intent of the parties, however, does not always control. Vestiges of Professor Williston's "reasonable man" test remain under the Uniform Commercial Code's parol evidence rule. Professor Williston, it should be remembered, recommended that parol evidence be admitted only if the offered evidence involved terms which were sufficiently distinct, or collateral, from the basic subject matter of the written contract that reasonable men might "naturally and normally" make these terms the subject of a separate parol agreement. It is only if the trial court concludes that it is natural to have a separate parol agreement that the evidence will be admitted. The evidence is excluded, even if the court believes the terms existed and were intended to survive the execution of the written contract, in order to protect the sanctity of the written contract.

The Uniform Commercial Code followed Professor Williston's approach in a limited way, substituting a "reasonable man would certainly have included these terms in the written contract" approach for the "naturally and normally would have made it part of a separate agreement" approach. Most courts have caught the connection between Professor Williston's recommended approach and the Code's variation on his theme. The clearest expression of the Code's approach is found in *Braund, Inc. v. White*:⁵⁴

[T]he trial court must make the specific finding either that the agreement was intended to be a complete and exclusive statement of the terms of the contract, or that, as a matter of law, the additional terms asserted were such that, if they had been agreed upon, they certainly would have been included in the documents of sale. In the absence of either of these findings, the superior court must admit evidence of consistent terms.⁵⁵

Two additional cases illustrate the courts' applications of the total integration test. *Conner v. May*⁵⁶ dealt with a sale of cattle under a written agreement which provided for delivery three months after the contract's execution. The buyer refused to accept delivery from the seller, alleging that the seller had breached the agreement by feeding the cattle in a manner substantially different from that agreed upon. Although the alleged agreement for the manner of feeding was not included in the written agreement, the court admitted the parol evidence of this contract term.

The appellate court held that it was for the trial court to decide if the writing was intended to be the complete and final expression of the terms of the parties' agreement. The trial court had done so, and its findings that the parties had not intended the written contract to be the exclusive source of their agreement was supported by the evidence. Both the buyer and several disinterested witnesses had testified concerning the circumstances leading up to the execution of the written contract. That testimony, and

54. 486 P.2d 50 (Alas. 1971).

https://scholarship.law.missouri.edu/mlr/vol44/iss4/2

55. *Id.* at 56.

56. 444 S.W.2d 948 (Tex. Civ. App. 1969).

the trial court's belief that the manner of feeding until delivery was important to the buyer, helped convince the court that the oral agreement had not been abandoned. An expert witness even testified that it was common to leave part of the agreement verbal in contracts of this type. Finally, the intent of the parties was not frustrated by the "certainly" test since it was, in the appellate court's opinion, satisfied in this case.⁵⁷

*Whirlpool Corp. v. Regis Leasing Corp.*⁵⁸ is illustrative of decisions which, while attempting to ascertain the intent of the parties, reach an opposite conclusion on the "certainly" issue. In that case the defendant had submitted a purchase order on its own form for some equipment. The written contract provided that installment payments for the equipment would "start from the date of receipt of the material and/or equipment." The defendant offered to prove that there was an oral agreement that the seller would supervise the installation of the equipment, inspect it, and train the buyer's personnel to operate the equipment before payments would begin. The court did not think the offered terms were consistent with the written contract, but went on to state:

If perchance the oral proof could be found to be consistent with the terms of the instrument within the meaning of paragraph (b) of Section 2-202 of [the] Uniform Commercial Code it would be objectionable in the light of the official Comment of the drafters of the Code. They wrote that "If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact."

It taxes credulity to believe that defendant having prepared the writing with considerable precision would not have included therein the all important provisions that plaintiff was to supervise installation of the equipment, provide for training of personnel and thereafter notify defendant that it had an operable plant.⁵⁹

While the court did not believe the defendant, this part of the decision did not turn on credibility. Instead, it focused on a rule of form: reasonable men would certainly have included these terms in the written

57. The court stated:

From the testimony in this case it is manifest that the usual practice in the area is to have an agreement as to the manner of feeding yearling steers intended for future delivery, and that such agreements commonly are oral and collateral to any writing between the parties. The record supports the implied finding of the trial court that the additional terms covering feeding of the steers would not certainly have been included in the writing by the parties. We hold that the court correctly admitted evidence offered in proof of such additional terms.

Id. at 953. See also *Luria Bros. & Co. v. Piolet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103 (7th Cir. 1979); *Hull-Dobbs, Inc. v. Mallicoat*, 57 Tenn. App. 100, 415 S.W.2d 344 (1966).

Published by University of Missouri School of Law Scholarship Repository, 1979

58. 29 App. Div. 2d 395, 288 N.Y.S.2d 337 (1968).

59. *Id.* at 398, 288 N.Y.S.2d at 340.

agreement. If the defendant did not act like a reasonable man, the parol evidence was inadmissible even if the terms had been agreed to and were intended to be operative by both parties when the agreement was signed.

As these opinions indicate, courts have not followed the *Hunt Foods* suggestion that "certainly" should be converted from an objective test of the form in which reasonable men would frame their agreement into a pure credibility test. The *Hunt Foods* definition of "certainly," that the offered term must be admitted unless the trial court concludes that it is impossible to believe that the term exists, has not been adopted by any other court. In fact, the *Whirlpool* opinion discussed above was decided by the same appellate court that decided *Hunt Foods*. It cites *Hunt Foods*, and even quotes from *Hunt Foods*, but it does not repeat or adopt the *Hunt Foods* definition of "certainly." Instead, it follows the rule of form function suggested for the word "certainly" by the comments to section 2-202.⁶⁰

The second element of the Code's approach to parol evidence questions during the post-*Hunt Foods* era is an analysis of whether the oral agreement contains terms which are consistent or inconsistent with the written agreement. The parol evidence rule has always required that the offered terms be consistent with the written contract. *Hunt Foods* suggests that parol evidence is inconsistent with the written terms only when the offered terms directly contradict an express term of the written contract. If *Hunt Foods* had done no more than suggest that the contradiction had to be with an express term, rather than one implied in law or fact, the opinion still would be of relative importance. However, by requiring a direct negation of an express term before parol evidence can be considered inconsistent with the written contract, the opinion became truly significant. This part of the *Hunt Foods* opinion has been largely followed in subsequent cases, although the opinion has not always been cited as authority. These cases generally require that the parol evidence directly contradict an express term of the contract before it is excluded. In *Whirlpool*,⁶¹ for example, the court would not admit evidence of an oral understanding that installment payments were not to begin until the seller had performed installation, inspection, and personnel training tasks. The parol evidence contradicted the written terms of the contract, under the *Hunt Foods* definition of consistent, which the court said had been stated with "precision": "To be inconsistent the term must contradict or negate a term of the writing. A term or condition which has a lesser effect is provable."⁶² The offered evidence was excluded because it directly contradicted a term

60. No case has been found adopting the *Hunt Foods* approach to the meaning to be given to "certainly." One generous assessment of the situation is "it is a fair observation that this decision . . . has not had many adherents [on this point]." R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 4.08[3] Supp. p. 4-138 to 139 (rev. ed. 1978).

61. 29 App. Div. 2d 395, 288 N.Y.S.2d 537 (1968).

62. *Id.* at 398, 288 N.Y.S.2d at 340.

of the written contract which provided that payments were to begin on the date the equipment was received.

In *Bunge Corp. v. Recker*,⁶³ the court refused to admit evidence of an oral agreement that the defendant was to supply crops for a contract of sale from his own fields because the offered evidence contradicted a clause in the contract in which the defendant warranted that "the commodity delivered . . . was grown within the boundry [sic] of the continental United States."

Finally, in *Recreatives, Inc. v. Travel-On Motorcycles Co.*,⁶⁴ a party was precluded from offering evidence that goods had been delivered under a consignment arrangement when the contract resembled a contract for sale. In finding the offered evidence inconsistent with the terms of the contract, the court relied on Uniform Commercial Code section 2-326, which requires that consignment arrangements be described in the writing in order to satisfy the Statute of Frauds. The court reasoned that a failure to put this term in the written contract created a contradiction with the sale aspects of the contract for purposes of the parol evidence rule. In effect, section 2-326(4) makes the consignment term inconsistent with the written terms as a matter of law.

When the contract is silent about a particular term, the *Hunt Foods* approach suggests that parol evidence is almost always consistent with the written contract. Thus, in *Thrifty Rent-A-Car Systems v. Chuck Ruwart Chevrolet, Inc.*,⁶⁵ parol evidence about promised rebates on the sale price was found to be consistent with the written contracts, even if the contracts contained a sale price. The unexpressed reasoning was that evidence of the rebate agreement did not directly contradict any express term of the writing. At most, the offered evidence affected the price term, but it did so only indirectly.

Another decision along these lines is *Ace Supply, Inc. v. Rocky-Mountain Machinery Co.*,⁶⁶ where the parties had signed a contract for the sale of a tractor. The seller offered to prove that the sale would be completed only if he was unable to sell the tractor elsewhere. In effect, he was attempting to show that a sale which appeared unconditional was actually conditional. The court admitted the evidence, but did not cite *Hunt Foods*. The opinion, however, is consistent with *Hunt Foods*. The parol evidence did not directly contradict the written contract because the

63. 519 F.2d 449 (8th Cir. 1975).

64. 29 N.C. App. 727, 225 S.E.2d 637 (1976). See also *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39 (N.D. Ill. 1970); *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F. Supp. 987 (S.D.N.Y. 1968); *Deck House, Inc. v. Scarborough, Sheffield & Gaston, Inc.*, 139 Ga. App. 173, 228 S.E.2d 142 (1976); *Spina v. Ferentino*, 30 App. Div. 2d 1035, 294 N.Y.S.2d 721 (1968).

65. 500 P.2d 172 (Colo. App. 1972); *Flemm v. Scherer*, 40 Mich. App. 1, 198 N.W.2d 702 (1972).

66. 96 Idaho 183, 525 P.2d 965 (1974).

written contract did not say the sale was unconditional. Ordinarily this would be implied from the contract's failure to describe the condition, but *Hunt Foods* requires more than this. There must be a direct contradiction, not merely an implied one.

Numerous cases have found the parol evidence offered by a party to be consistent with the written terms of the contract, often in situations where traditional thinking about consistency would have led to a different conclusion. In *MacGregor v. McReki Inc.*,⁶⁷ the buyer of goods offered to introduce parol evidence, in the form of an oral agreement, that there was a firm delivery date of no later than the second week of December. This term had not been met; the goods had not been delivered until the latter part of January. The appellate court thought this evidence should have been admitted and found that it was not inconsistent with a written term which provided "[w]e also understand that you are going to try to have an approximate December 1 shipping date." The court relied on the *Hunt Foods* definition of inconsistent which had been followed in the *Whirlpool* case. The *Whirlpool* decision was cited as authority for the narrow definition of inconsistent used by this court.

Another decision which follows the reasoning of the *Hunt Foods* case is *Michael Schiavone & Sons, Inc. v. Securallloy Co.*⁶⁸ In that opinion the court concluded that an oral understanding that the seller would deliver up to 500 gross tons, depending on his ability to obtain the materials, was not inconsistent with a contract term describing the quantity as "500 Gross Tons."

Still another decision which followed the *Hunt Foods* approach but which did not cite that opinion is *Ciunci v. Wella Corp.*⁶⁹ In that case a fashion model had signed an agreement waiving any claim for injuries she might receive from a hair treatment. When the model's ear was injured by the hair treatment, she sued for damages. The defendant relied on the waiver agreement as a defense. When the model offered to testify that the release was only intended to cover damage to her hair, the court concluded that this evidence was admissible as a consistent additional term.

As these opinions demonstrate, the *Hunt Foods* requirement of a direct negation of an express term has become the operative definition of "inconsistent." This is especially true in those cases involving partially integrated contracts and the Uniform Commercial Code's parol evidence rule.⁷⁰

67. 494 P.2d 1297 (Colo. App. 1971).

68. 312 F. Supp. 801 (D. Conn. 1970).

69. 26 App. Div. 2d 109, 271 N.Y.S.2d 317 (1966). See also *Bunge Corp. v. Miller*, 381 F. Supp. 176 (W.D. Tenn. 1974).

70. When the Uniform Commercial Code's parol evidence rule does not govern, the decisions adhere to the more traditional definition of consistent and the offered parol evidence is excluded if it would contradict or vary the terms of the contract. See, e.g., *Zim v. Western Publishing Co.*, 573 F.2d 1318 (5th Cir. 1978); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029 (8th Cir.), cert. denied, 99

V. MERGER CLAUSES UNDER THE UNIFORM COMMERCIAL CODE

Any study of the parol evidence rule would be incomplete without some consideration of merger clauses. Merger clauses are clauses inserted in written contracts in an attempt to prevent the introduction of contract terms from extrinsic sources. In a sense, a merger clause is a private parol evidence rule, designed to prevent a party from later seeking to add in any way to the written contract. A merger clause could take the following form: "THIS AGREEMENT SIGNED BY BOTH PARTIES AND SO INITIALED BY BOTH PARTIES IN THE MARGIN OPPOSITE THIS PARAGRAPH CONSTITUTES A FINAL WRITTEN EXPRESSION OF ALL THE TERMS OF THIS AGREEMENT AND IS A COMPLETE AND EXCLUSIVE STATEMENT OF THOSE TERMS."⁷¹

At one time there was unanimous agreement among the authorities that merger clauses were totally effective.⁷² A study of recent cases involving these clauses shows that this remains an accurate statement in most situations,⁷³ but merger clauses nevertheless are not treated with the

S. Ct. 189 (1978); *Sylvania Elec. Prod., Inc. v. United States*, 458 F.2d 994 (Ct. Cl. 1972).

There are a few Code cases which adhere to the traditional formula for consistency, but the parol evidence question is usually not central to the decision. *See, e.g.*, *Friendly Ford, Inc. v. Avis Rent A Car Sys., Inc.*, 293 So. 2d 746 (Fla. Dist. Ct. App. 1974); *Romines v. Wagstaff Motor Co.*, 120 Ga. App. 608, 171 S.E. 2d 752 (1969); *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652 (Miss. 1975).

A line of cases rejecting the *Hunt Foods* formula for consistency is beginning to emerge. *See, e.g.*, *Luria Bros. & Co. v. Piolet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103 (7th Cir. 1979); *Southern Concrete Servs., Inc. v. Mableton Contractors, Inc.*, 407 F. Supp. 581 (N.D. Ga. 1974), *aff'd*, 569 F.2d 1154 (5th Cir. 1978); *Snyder v. Herbert Greenbaum & Assoc., Inc.*, 38 Md. App. 144, 152, 380 A.2d 618, 623 (1977) ("[W]e reject the narrow view of inconsistency espoused in *Hunt Foods* . . . Rather we believe 'inconsistency' as used in § 2-202(b) means the absence of reasonable harmony in terms of the language and respective obligations of the parties.").

71. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 2-12 (1972). The litigated cases do not involve separately signed merger clauses. The expectation would be that a separately signed clause would carry greater weight. *But see* text accompanying notes 75-76 *infra*.

72. 3 A. CORBIN, CONTRACTS § 578 (rev. ed. 1960); R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 4.08[3] (rev. ed. 1978); 4 S. WILLISTON, CONTRACTS §§ 633, 643 (3d ed. W. Jaeger 1961); Comment, *The "Merger Clause" and the Parol Evidence Rule*, 27 TEX. L. REV. 361, 362 (1949).

73. *See, e.g.*, *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974); *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975); *Avery v. Aladdin Prods. Div. Nat'l Serv. Indus., Inc.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973); *Dave Markley Ford, Inc. v. Lair*, 565 P.2d 671 (Okla. 1977); *80th Div. Veteran's Ass'n v. Johnson*, 200 Pa. Super. Ct. 447, 159 A. 467 (1931); *Santos v. Mid-Continent Refrig. Co.*, 469 S.W.2d 24 (Tex. Civ. App.), *aff'd*, 471 S.W.2d 568 (1971); *Super-Cold Southwest Co. v. Elkins*, 140

reverence they once enjoyed.⁷⁴ While the vast majority of cases enforce merger clauses, several have not. In a sense, the erosion which the parol evidence rule has undergone under the Uniform Commercial Code is being paralleled, as yet to a significantly lesser degree, by an erosion of the impact of merger clauses.

In *Luther Williams, Jr., Inc. v. Johnson*,⁷⁵ a merger clause was considered to be only some evidence of the parties' intent to produce a fully integrated agreement, and it did not prevent the admission of oral evidence of a condition precedent which was not contained in the written contract. A similar result was reached in *Zwierzycki v. Owens*,⁷⁶ where an oral promise to repair made by a seller was enforced even though the promise was not repeated in the written contract which contained a merger clause. The court found that the written contract was not a complete and final statement of the agreement of the parties, even though a merger clause was present in the written contract.

Merger clauses can be mere boilerplate added to a contract by one party in an effort to protect that party from both false claims and genuine ones based on oral promises that were actually made. A merger clause can also be a fully negotiated term accepted by both parties at the time the contract was signed, only to be later challenged by a dissatisfied party. Unfortunately, many courts seem just as willing to enforce the merger clause in the first situation as in the second, often without articulating any justification for doing so. These recent cases which have refused to accept merger clauses as an absolute bar to the introduction of parol evidence offer some hope that the situation in cases of the former type may be changing.

VI. CONCLUSION

The evolution of the parol evidence rule, both within and without the Uniform Commercial Code, is certain to continue. The Uniform Commercial Code's codification of the rule has succeeded, as its draftsmen apparently intended it to, in accelerating that evolutionary process.

Tex. 48, 166 S.W.2d 97 (1942); *Tracy v. Vinton Motors, Inc.*, 130 Vt. 512, 296 A.2d 269 (1972).

74. J. MURRAY, *CONTRACTS* § 106 (2d rev. ed. 1974) ("[A] merger clause may not be conclusive by any means [I]f it is a printed provision on a form document, its effect may be substantially diminished."). The *Restatement (Second) of Contracts* suggests that boilerplate merger clauses will not be given effect. *RESTATEMENT (SECOND) OF CONTRACTS* § 242, comment e (1973).

75. 229 A.2d 163 (D.C. 1967).

76. 499 P.2d 996 (Wyo. 1972). See also *Matthews v. Drew Chem. Corp.*, 475 F.2d 146 (5th Cir. 1973); *Port City Constr. Co. v. Henderson*, 48 Ala. App. 639, 266 So. 2d 896 (1972); *Kupka v. Morey*, 541 P.2d 740 (Alas. 1975); *O'Neil v. International Harvester Co.*, 575 P.2d 862 (Colo. App. 1978); *Atlantic Chem. Co. v. Hardin Bag Co.*, 49 Ga. App. 748, 176 S.E. 772 (1934); *Whitney v. Halibut, Inc.*, 235 Md. 517, 202 A.2d 629 (1964); *Rinaudo v. Bloom*, 209 Md. 1, 120 A.2d 184 (1956).

The restrictive approaches of the earlier versions of the parol evidence rule have generally given way, in cases decided under the Code, to a more liberal attitude toward the admission of oral evidence when a written agreement is present. This liberal attitude finds its expression in two essentially new rules of interpretation under the Code's parol evidence rule. The first is the presumption of partial, rather than total integretation. This opens the door to the admission of consistent additional terms. The second is the narrow definition of "inconsistent" originally established by *Hunt Foods* and, at least thus far, largely followed in subsequent cases: oral terms are only inconsistent, and thus barred by the parol evidence rule, if they directly negate the express terms of the contract.

Little is to be gained by attempting to make a judgment about the wisdom of a more liberal approach to the admission of parol evidence. The argument has raged on for so long, with the authorities so evenly divided, that one more opinion would make no difference. It is sufficient to demonstrate that the Uniform Commercial Code, while not abandoning the rule, has significantly restricted its impact.