Chapter 8. The Parol Evidence Rule

8.1. The Common Law Parol Evidence Rule

8.1.1. Purpose. The ***parol evidence rule*** is based upon two foundational premises:

- Parties who have reduced their agreement to a writing intended to be a final expression of their understanding should not be allowed to introduce evidence of ***prior oral*** or ***written*** terms or ***contemporaneous*** oral terms that ***contradict*** or ***supplement*** that writing.
- The parol evidence rule gives ***more evidentiary weight*** to writings than to non-written statements.

8.1.2. Meaning of "Parol" Evidence. Contrary to common misperceptions, "parol" when used in the context of the parol evidence rule does not mean "oral." The more accurate definition is "***extrinsic***," meaning extrinsic to the written agreement between the parties. To be more precise, the parol evidence rule may be used to exclude ***written*** or ***oral*** agreements made ***prior*** to the written agreement, as well as ***oral*** (but ***not*** written) agreements that are ***contemporaneous*** with the written agreement. Generally, contemporaneous written agreements are not excluded by the parol evidence rule, even if they contain contradictory terms. See § 8.2.6.1.

Furthermore, the rule is not really a rule of "evidence" – it is a rule of substantive contract law. For example, if objection to its introduction is not timely made, it can still be challenged. And when the trial is in federal court on diversity grounds, the state law of parol evidence will govern.

8.1.3. Exceptions. The common law parol evidence rule does not exclude all types of extrinsic evidence in all situations. Parol evidence ***is admissible*** for certain purposes, including (1) the formation of the contract, (2) the existence of a separate enforceable agreement, (3) the interpretation of the agreement, (4) the validity of the contract, and (5) a subsequent modification of the agreement.

8.1.4. Final Written Expression. The common law parol evidence rule applies to written agreements ***intended to be the final expression*** of the parties' agreement.

The common law distinguishes between final agreements that are "***completely integrated***" and "***partially integrated***." Some jurisdictions create a rebuttable presumption that a contract reduced to writing is presumed to completely integrated. See, e.g., Mont. Code Ann. § 28-2-905.

A "partially integrated agreement" is a final expression of some of the terms but is not complete or exclusive as to all of the terms. While a party cannot introduce evidence of a consistent additional term to a completely integrated agreement, evidence of a consistent additional terms is admissible when an agreement is partially integrated. *Restatement (Second) of Contracts* § 216(1) (1981).

8.1.5. Necessary Elements. Because the parol evidence rule entails several elements, all of which must be satisfied before the rule is applied, you should always ask the following questions:

- Is there a written agreement intended to be the final expression of the parties' agreement?
- If so, is the agreement "completely integrated" or "partially integrated"?
- Does the extrinsic evidence offered fall within one of the categories of evidence excluded by the parol evidence rule?
- If so, is the extrinsic evidence being offered for an admissible purpose and thus is not excluded by the parol evidence rule?

8.2. UCC Parol Evidence Rule. The UCC parol evidence rule is found at UCC § 2-202. Read it carefully, keeping in mind the elements of the common law rule:

> § 2-202. 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.

8.2.1. Under § 2-202, evidence of prior oral or written agreements, or contemporaneous oral agreements, is not admissible ***to contradict*** either (1) agreed terms contained in confirmatory memoranda or (2) a writing intended as the final expression of their agreement. This is consistent with the common law.

8.2.2. UCC § 2-202(a) allows three types of evidence -- usage of trade, course of dealing, and course of performance -- to ***explain or supplement*** a term contained in the writing ***even if*** the parties intended the writing to be complete and exclusive. This is broader than the common law rule, which would not allow evidence of usage of trade, course of dealing, or course of performance to supplement a completely integrated agreement.

8.2.3. The common law allows parol evidence to be admitted for issues relating to the formation, interpretation, or validity of the contract. UCC § 2-202 is silent in these situations, and thus the common law supplements under UCC § 1-103(b). For example, evidence of prior oral or written agreements, or contemporaneous oral agreements, may be introduced to interpret an ambiguous term, or to prove mistake, fraud, misrepresentation, or failure of a condition precedent that would invalidate the contract.

8.2.4. Note that ***modifying a contract after the contract has been formed is a different matter***. The UCC rules concerning the use of parol evidence regarding the modification of a contract subsequent to its formation are found at UCC § 2-209, and are discussed in the next chapter.

☑ **Purple Problem 8-1.** What types of ***contradictory*** evidence are suppressed by the UCC § 2-202 parol evidence rule, if (1) there are terms in a confirmatory memoranda to which the parties agree or (2) a writing intended as the final expression of their agreement?

___ prior oral agreements

___ prior written agreements

___ contemporaneous oral agreements

___ contemporaneous written agreements

___ oral agreements arising after contract formation

___ written agreements arising after contract formation

☑ **Purple Problem 8-2**. A written contract for the sale of a car specifies that payments shall be made on the 1st day of each month for 12 months. By telephone conversations afterwards, the car dealer agrees to accept payments on the 15th of each month. Is evidence of the telephone conversation suppressed by UCC § 2-202? Why or why not?

8.2.5. In addition to the common law exceptions (see 8.1.3), the UCC itself provides two important exceptions to the parol evidence rule at UCC § 2-202(a) and (b). Under § 2-202(a), the writings of the parties may ***always be explained or supplemented*** by course of dealing, usage of trade, or course of performance. This exception does not, at least on its face, allow ***contradictory*** terms; it only allows explanation of existing terms or supplementation of existing terms. As illustrated in the following case, it is not always easy to distinguish between terms that "explain or supplement" versus terms that contradict.

8.2.5.1. Case: *Columbia Nitrogen Corp. v. Royster Co.*

Columbia Nitrogen Corp. v. Royster Co.

U.S. Court of Appeals for the Fourth Circuit
1971

451 F.2d 3 (4th Cir. 1971). Argued April 6, 1971. Decided Oct. 26, 1971. Before HAYNSWORTH, Chief Judge, and WINTER and BUTZNER, Circuit Judges.

BUTZNER, Circuit Judge:

[Columbia Nitrogen Corp. entered into a contract to purchase minimum quantities of phosphate from Royster Co. over a period of several years at specified prices. The market price of phosphate dropped precipitously, and Columbia refused to purchase the phosphate in the quantities that it had agreed to in the written agreement. When Royster brought a claim for

breach of contract against Columbia, Columbia defended on the grounds that the contract, when construed in light of the usage of the trade and course of dealing between the parties, imposed no responsibility on Columbia to accept at the quoted prices the minimum quantities stated in the contract. The district court rejected Columbia's argument, determined that Columbia had breached its agreement, and entered judgment in favor of the seller, Royster.] ….

Columbia assigns error to the pretrial ruling of the district court excluding all evidence on usage of the trade and course of dealing between the parties. It offered the testimony of witnesses with long experience in the trade that because of uncertain crop and weather conditions, farming practices, and government agricultural programs, express price and quantity terms in contracts for materials in the mixed fertilizer industry are mere projections to be adjusted according to market forces.

Columbia also offered proof of its business dealings with Royster over the six-year period preceding the phosphate contract [during which Columbia, which produces nitrogen and other fertilizers, had repeatedly and substantially deviated from the prices and quantities at which it had agreed to sell nitrogen to Royster when market prices for nitrogen changed significantly]. This experience, a Columbia officer offered to testify, formed the basis of an understanding on which he depended in conducting negotiations with Royster.

The district court held that the evidence should be excluded. It ruled that "custom and usage or course of dealing are not admissible to contradict the express, plain, unambiguous language of a valid written contract, which by virtue of its detail negates the proposition that the contract is open to variances in its terms[.]"

A number of Virginia cases have held that extrinsic evidence may not be received to explain or supplement a written contract unless the court finds the writing is ambiguous. E. g., *Mathieson Alkali Works v. Virginia Banner Coal Corp.*, 147 Va. 125, 136 S.E. 673 (1927). This rule, however, has been changed by the Uniform Commercial Code which Virginia has adopted. The Code expressly states that it "shall be liberally construed and applied to promote its underlying purposes and policies," which include "the continued expansion of commercial practices through custom, usage and agreement of the parties[.]" [UCC § 1-103(a)(2)]. The importance of usage of trade and course of dealing between the parties is shown by [UCC § 1-303], which authorizes their use to explain or supplement a contract. The

official comment states this section rejects the old rule that evidence of course of dealing or usage of trade can be introduced only when the contract is ambiguous. And the Virginia commentators, noting that "this section reflects a more liberal approach to the introduction of parol evidence … than has been followed in Virginia," express the opinion that *Mathieson, supra*, and similar Virginia cases no longer should be followed. (citations omitted) We hold, therefore, that a finding of ambiguity is not necessary for the admission of extrinsic evidence about the usage of the trade and the parties' course of dealing.

We turn next to Royster's claim that Columbia's evidence was properly excluded because it was inconsistent with the express terms of their agreement. There can be no doubt that the Uniform Commercial Code restates the well-established rule that evidence of usage of trade and course of dealing should be excluded whenever it cannot be reasonably construed as consistent with the terms of the contract. *Division of Triple T Service, Inc. v. Mobil Oil Corp.*, 60 Misc. 2d 720, 304 N.Y.S.2d 191, 203 (1969), *aff'd mem.*, 34 A.D.2d 618, 311 N.Y.S.2d 961 (1970). Royster argues that the evidence should be excluded as inconsistent because the contract contains detailed provisions regarding the base price, escalation, minimum tonnage, and delivery schedules. The argument is based on the premise that because a contract appears on its face to be complete, evidence of course of dealing and usage of trade should be excluded. We believe, however, that neither the language nor the policy of the Code supports such a broad exclusionary rule. [UCC § 2-202] expressly allows evidence of course of dealing or usage of trade to explain or supplement terms intended by the parties as a final expression of their agreement. When this section is read in light of Va. Code Ann. [UCC § 1-303(e)], it is clear that the test of admissibility is not whether the contract appears on its face to be complete in every detail, but whether the proffered evidence of course of dealing and trade usage reasonably can be construed as consistent with the express terms of the agreement.

The proffered testimony sought to establish that because of changing weather conditions, farming practices, and government agricultural programs, dealers adjusted prices, quantities, and delivery schedules to reflect declining market conditions. For the following reasons it is reasonable to construe this evidence as consistent with the express terms of the contract.

The contract does not expressly state that course of dealing and usage of trade cannot be used to explain or supplement the written contract.

The contract is silent about adjusting prices and quantities to reflect a declining market. It neither permits nor prohibits adjustment, and this neutrality provides a fitting occasion for recourse to usage of trade and prior dealing to supplement the contract and explain its terms.

Minimum tonnages and additional quantities are expressed in terms of "Products Supplied Under Contract." Significantly, they are not expressed as just "Products" or as "Products Purchased Under Contract." The description used by the parties is consistent with the proffered testimony.

Finally, the default clause of the contract refers only to the failure of the buyer to pay for delivered phosphate. During the contract negotiations, Columbia rejected a Royster proposal for liquidated damages of $10 for each ton Columbia declined to accept. On the other hand, Royster rejected a Columbia proposal for a clause that tied the price to the market by obligating Royster to conform its price to offers Columbia received from other phosphate producers. The parties, having rejected both proposals, failed to state any consequences of Columbia's refusal to take delivery -- the kind of default Royster alleges in this case. Royster insists that we span this hiatus by applying the general law of contracts permitting recovery of damages upon the buyer's refusal to take delivery according to the written provisions of the contract. This solution is not what the Uniform Commercial Code prescribes. Before allowing damages, a court must first determine whether the buyer has in fact defaulted. It must do this by supplementing and explaining the agreement with evidence of trade usage and course of dealing that is consistent with the contract's express terms. [UCC §§ 1-303(e), 2-202]. Faithful adherence to this mandate reflects the reality of the marketplace and avoids the overly legalistic interpretations which the Code seeks to abolish.

Royster also contends that Columbia's proffered testimony was properly rejected because it dealt with mutual willingness of buyer and seller to adjust contract terms to the market. Columbia, Royster protests, seeks unilateral adjustment. This argument misses the point. What Columbia seeks to show is a practice of mutual adjustments so prevalent in the industry and in prior dealings between the parties that it formed a part of the agreement governing this transaction. It is not insisting on a unilateral right to modify the contract.

Nor can we accept Royster's contention that the testimony should be excluded under the contract clause:

> "No verbal understanding will be recognized by either party hereto; this contract expresses all the terms and conditions of the agreement, shall be signed in duplicate, and shall not become operative until approved in writing by the Seller."

Course of dealing and trade usage are not synonymous with verbal understandings, terms and conditions. [UCC § 2-202] draws a distinction between supplementing a written contract by consistent additional terms and supplementing it by course of dealing or usage of trade. Evidence of additional terms must be excluded when "the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." Significantly, no similar limitation is placed on the introduction of evidence of course of dealing or usage of trade. Indeed the official comment notes that course of dealing and usage of trade, unless carefully negated, are admissible to supplement the terms of any writing, and that contracts are to be read on the assumption that these elements were taken for granted when the document was phrased. Since the Code assigns course of dealing and trade usage unique and important roles, they should not be conclusively rejected by reading them into stereotyped language that makes no specific reference to them. ... Indeed, the Code's official commentators urge that overly simplistic and overly legalistic interpretation of a contract should be shunned.

We conclude, therefore, that Columbia's evidence about course of dealing and usage of trade should have been admitted. Its exclusion requires that the judgment against Columbia must be set aside and the case retried[.]

8.2.5.2. Various Questions and Notes about *Columbia Nitrogen Corp. v. Royster Co*

1. Many commentators criticize the results of this case, particularly in view of the hierarchy of UCC § 1-303(e), which provides that express contract terms prevail if express terms cannot reasonably be construed as consistent with course of performance, course of dealing, usage of trade. One court, refusing to apply course or dealing or usage of trade to negate a particular contract term, stated:

> Certainly customs of the trade should be relevant to the interpretation of certain terms of a contract, and should be considered in determining what variation in specifications is considered acceptable, but this court does not believe that section 2-202 was meant to invite a frontal assault on the essential terms of a clear and explicit contract.

Southern Concrete Services, Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581, 584 (N.D. Ga. 1975).

2. Another court enunciated the following test to determine whether the offered evidence is consistent with the express language of the agreement:

> Additional terms are inconsistent with a written document if the additional terms are not reasonably harmonious with the "language and respective obligations of the parties." Terms that impose new legal obligations on or alter the existing legal obligations of the parties, like those proffered by MSI, are not reasonably harmonious with the terms of a written agreement.

Sagent Tech., Inc. v. Micros Sys., 276 F. Supp. 2d 464, 468 (D. Md. 2003).

3. Your authors [i.e., Burnham and Juras] suggest this test: If parol evidence rule analysis concludes that the extrinsic term is part of the contract, read the contract as if that term were written into it. Then ask if the two terms can live together in harmony. If so, let the term in to supplement the contract. For example, in *Columbia Nitrogen*, if the contract expressly said "The price is $10,000," and the admitted extrinsic evidence was trade usage to the effect that "The price can be adjusted depending on market conditions," ask if the language would have been harmonious if it had stated:

> The price is $10,000. The price can be adjusted depending on market conditions.

The answer is *yes*, it is harmonious. On the other hand, if the contract expressly stated "The price is $10,000," and the admitted extrinsic evidence was that "The price is $12,000," would the language have been harmonious if the contract had stated:

> The price is $10,000. The price is $12,000.

The answer is *no*, it is not be harmonious.

☑ **Purple Problem 8-3.** Betty owns a building supplies store. She enters into a written agreement for the purchase of a truckload of various sizes of lumber

from Sawmill. The agreement provides that Betty must pay the purchase price within 30 days of delivery. The written agreement says nothing about the packaging of the various sizes of lumber. The truck arrives and the lumber is not packaged in any orderly form; various sizes of lumber are all intermixed. It requires a sizeable amount of effort (and employee hours) on Betty's part to sort and stack the lumber into respective piles according to size.

(1) In an action against Sawmill, may Betty present evidence that it is customary in the lumber industry to deliver an order of a truckload of lumber consisting of various sizes by stacking each size of lumber on a separate pallet banded by wire? Or is such evidence barred under § 2-202?

(2) Will Betty be able to present evidence that it is customary in the lumber industry for sawmills to allow a 5% discount if orders are paid for within 30 days of delivery, which Betty did?

8.2.6 UCC § 2-202(b) provides an exception allowing evidence of prior oral or written agreements, or contemporaneous oral agreements, to provide ***consistent additional terms***. However, there is an important ***exception to the exception***. If the parties intended their agreement to be a ***"complete and exclusive statement of the terms of the agreement***," evidence of prior oral or written agreements or contemporaneous oral agreements is ***not admissible*** to introduce any additional terms, whether consistent or not. In other words, if you have a writing (or writings) which set forth some, but not all, of the terms of the agreement, you can introduce evidence establishing consistent (but not contradictory) additional terms. This is consistent with the "partial integration" rule of common law. On the other hand, if you have a comprehensive document which the parties intended to be the "complete and exclusive" expression of the terms of their agreement, you are not allowed to introduce evidence establishing additional terms, whether consistent or not. This rule is consistent with the "complete integration" rule of common law. For a summary of the "partial integration" and "complete integration" rules at common law, see Restatement (Second) of Contracts § 210 (1981).

8.2.6.1. What factors should you consider in determining if a writing is "intended also as a complete and exclusive statement of the terms of the agreement?" The formality of the agreement, whether lawyers drafted the agreement, its comprehensiveness, the sophistication of the parties involved, and the length of negotiations are factors mentioned by various courts. Another important (but not conclusive) fact is whether the document itself purports to be the "complete and

exclusive" agreement of the parties. This is usually accomplished by the insertion of a "merger" or "integration" clause into the agreement. A merger clause might look like this:

This agreement signed by both parties constitutes a final written expression of all the terms of this agreement and is a complete and exclusive statement of those terms.

Unfortunately, courts sometimes regard a merger clause as relevant for a completely different purpose: to determine whether a written agreement is to be treated separately from other agreements executed at the same time by the same parties. As a result, a traditionally drafted merger clause can have some unintended and undesirable consequences. For example, in *Schron v. Grunstein*, 917 N.Y.S.2d 820 (N.Y. Sup. Ct. 2011), the court ruled that a credit agreement and a stock purchase option agreement were to be regarded as separate agreements in part because of the existence of a merger clause in the option agreement. On the other hand, in *In re Clements Manufacturing Liquidation Co., LLC,* 521 B.R. 231, (E.D. Mich. 2014), the court ruled that, despite the merger clause, the asset purchase agreement was an integral part of a larger transaction, thus helping to insulate the asset purchase from avoidance as a fraudulent transfer. Practice tip: Draft the merger clause so that it makes clear that evidence of other parts of the transaction is admissible. For example:

> This agreement and [list other agreements] collectively contain the complete and exclusive understanding of the parties with respect to their subject matter. There are no promises or representations of the parties not included in one or more of these documents.

8.2.6.2. In *Intershoe, Inc. v. Bankers Trust Co.*, 571 N.E.2d 641 (N.Y. 1991), Intershoe placed a telephone order with defendant concerning a foreign currency futures transaction involving the exchange of Italian lira for United States dollars. Bankers Trust Company sent a confirmation slip to Intershoe including, among others, the following terms: "we [Bankers] have bought from you [Intershoe] ITL 537,750,000" and "we have sold to you USD 250,000.00." The confirmation slip specified a rate of 2,151 lira per dollar and called for delivery of the lira approximately 7 months later, between October 1 and October 31. Intershoe's treasurer signed the slip and returned it to the bank. In mid-October, the bank sent a reminder to Intershoe about the pending transaction, and asked for delivery of the lira. At that point in time, Intershoe said "this is a mistake; we meant to buy lira, not deliver lira," and it sought to present evidence of that mistake. Although the writing was only a few sentences in length, the court found

that the written confirmation was "a complete and exclusive" agreement of the parties, and refused to admit evidence of any additional terms, stating:

> Here, the *essential terms* of the transaction are plainly set forth in the confirmation slip: that plaintiff had sold lira to defendant, the amount of the lira it sold, the exchange rate, the amount of dollars to be paid by defendant for the lira, and the maturity date of the transaction. ... Nothing in the confirmation slip suggests that it was to be a memorandum of some preliminary or tentative understanding with respect to these terms. On the contrary, it is difficult to imagine words which could more clearly demonstrate the final expression of the parties' agreement than "we have bought from you ITL 537,750,000" and "we have sold to you USD 250,000.00." (Emphasis supplied.)

Id. at 644.

☑ **Purple Problem 8-4.** The following language is scribbled on a napkin over drinks by two friends and initialed by both parties: "I, John, sell you, Frank, my 1998 Honda Prelude for $1,000, price payable upon delivery."

(1) Is this a written "final expression" of the price?

(2) Is this writing a "complete and exclusive statement of the terms of the agreement?"

(3) Can the seller introduce into evidence a previous letter offering to sell at $1,500 instead of $1,000?

(4) Can the buyer introduce evidence that seller said he would throw in a new spare tire as part of the deal?

☑ **Purple Problem 8-5.** Change the facts of the previous problem. The seller is a law student, and presents a 15 page agreement detailing the terms of the car purchase, modifying and using a form he got from his father, who is a car dealer. Buyer is also a law student. The agreement sets forth a price of $1,000, but there is no discussion as to when payment will be made.

(1) Is this writing a "complete and exclusive statement of the terms of the agreement?"

(2) Can the buyer introduce evidence that seller said he would throw in a new spare tire as part of the deal?

(3) Can the buyer introduce evidence that in previous dealings between them, they had established a practice of payment within a week of delivery?

8.2.6.3.1 Case: *Sierra Diesel Injection Service v. Burroughs Corp*

Sierra Diesel Injection Service v. Burroughs Corp., Inc.

U.S. District Court for the District of Nevada
January 28, 1987

SIERRA DIESEL INJECTION SERVICE, a Nevada corporation, Plaintiff, v. BURROUGHS CORPORATION, INC., a Delaware corporation, Defendant. No. CV-R-84-535-ECR..

EDWARD C. REED, JR., Judge:

[The defendant Burroughs Corporation negotiated with plaintiff Sierra Diesel Injection Service to provide a computer system to meet Sierra's accounting needs. In the course of negotiations, Burroughs made both oral and written representations to Sierra regarding its systems, including a written representation contained in a letter that the system "can put your inventory, receivables, and invoicing under complete control." Sierra, which did not have extensive knowledge or experience regarding computer systems, alleged that it relied upon these representations in entering into a purchase agreement with Burroughs. The agreement, a standardized agreement prepared by Burroughs, contained an integration clause stating that the agreement constituted the entire agreement between the parties and superseded all prior communications. The warranties contained in the final agreement were limited, and the agreement disclaimed all other express and implied warranties.] ….

Defendant further argues that the plaintiff's allegations regarding any oral warranties or promises made before the contracts were signed must be disregarded by virtue of the parol evidence rule, codified at [UCC § 2-202]. This section of the U.C.C. provides that

> [t]erms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in 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 performance, course of dealing, or usage of trade (Section 1-303); 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.]

This section of the Code contemplates a multifactor analysis. First, the court must determine whether the writing presented to the court is "intended by the parties as a final expression of their agreement to such terms as are included therein." *Id.*, *see Norwest Bank Billings v. Murnion*, 210 Mont. 417, 684 P.2d 1067, 1071 (1984); *see also Amoco Production Co. v. Western Slope Gas Co.,* 754 F.2d 303, 308 (10th Cir.1985), *S.M. Wilson & Co. v. Smith International, Inc.,* 587 F.2d 1363, 1370 (9th Cir.1978); *Interform Co. v. Mitchell*, 575 F.2d 1270, 1274-78 (9th Cir.1978). If the court determines that the parties did not intend the writing to be a final expression of their agreement with respect to the terms contained therein, then parol evidence of prior and contemporaneous agreements may be considered by the court. *Id.*

The defendant argues that the merger clause contained in the contracts in this case establishes as a matter of law that the writings are the final expression of the parties' agreements, and that the restrictions of the rule therefore come into play. The authorities hold that merger clauses such as this one are strong evidence of integration, but that they are not necessarily conclusive. In *O'Neil v. International Harvester Co.*, 40 Colo. App. 369, 575 P.2d 862 (1978), for example, the buyer of a truck brought an action against the seller and assignee for rescission of the installment purchase contract, for damages for breach of express and implied warranties, and for fraud. The defendants argued that all of the plaintiff's causes of action were barred by the terms of the contract itself which conspicuously disclaimed all warranties not stated in the agreement, and which contained a merger clause which purported to make that writing the final agreement of the parties. Because of the conspicuous disclaimer clause and the express merger clause, the defendants argued that the

plaintiff was prevented from introducing any evidence of warranties which were not included in the writing. The trial court had agreed with the defendant, and found that all evidence of oral warranties was made inadmissible by virtue of the integration clause in the contract.

The court of appeals reversed the lower court. Initially, it found that the trial court had properly found no issue of fact as to the warranty disclaimer clause, in that the plaintiff had actually read the clause. This waiver only affected the implied warranties, however. *Id.,* at 865. The trial court had erred in this case by failing to take evidence on the parties' intent regarding the finality of the writing. In this case, the court found, the plaintiff had alleged the existence of oral warranties prior to the execution of the written agreement, as well as conduct following the sale which tended to show that such warranties were indeed made. Because of these facts, the court found that there was a genuine issue of material fact as to the parties' intent regarding integration of the writing, in spite of the existence of a merger clause. *Id.* In view of the existence of such a genuine fact issue, summary judgment was not proper, and the lower court's ruling was reversed. *See also, Amoco Production, supra.*

In the present case, there also appears to be a genuine issue of fact regarding the parties' intent. Although the merger clause does lend weight to the finding of integration here, the plaintiff also claims that oral warranties were made prior to the execution of the contract. Further, the plaintiff also contends that the defendant made numerous efforts to repair the computer system to comply with those alleged warranties. These allegations indicate the existence of a genuine issue of material fact, in that the parties' intent regarding the integration is not clear. Whereas it is possible that these contracts are fully integrated, the evidence presently before the court also permits the opposite conclusion. As in *O'Neil,* therefore, summary judgment on parol evidence grounds is not proper.

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In addition, Nevada case law holds that the parol evidence rule may not operate to exclude evidence of fraud in the inducement of contract, even where the court finds an integrated agreement. *See Havas v. Haupt,* 94 Nev. 591, 583 P.2d 1094, 1095 (1978). *See also Oak Industries, Inc. v. Foxboro Co.,* 596 F. Supp. 601, 607 (S.D.Cal.1984). Thus, parol may always be used to show fraud on the inducement of the contract, even if there has been a valid integration, in that fraud in the inducement invalidates the entire

contract. *Id.* The plaintiff must therefore be allowed to present evidence of fraud regardless of the possible integration of the writing.

[Defendants sought summary judgment on the fraud claim, asserting that its alleged misrepresentations to the plaintiff were opinions and "puffery" rather than statements of fact, and thus could not support a claim of fraud. The court determined that a genuine issue of material fact existed regarding the factual nature of these statements, and denied Burroughs' motion for summary judgment.]

8.2.6.3.2 Various Questions and Notes about *Sierra Diesel Injection Service v. Burroughs Corp*

1. Upon reconsideration, the federal district court determined that the purchaser's owner was unsophisticated, had little knowledge of computers, and did not understand that the integration clause would preclude prior representations upon which the purchaser had relied. The court concluded that there was no "mutual intent of the parties in this case that the agreement be integrated." *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp*., 656 F. Supp. 426, 428-429 (D. Nev. 1987). Review the factors set forth in Section 8.2.6.1; do you agree with the court's conclusion? The district court's ruling was affirmed. *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp*., 890 F.2d 108 (9th Cir. 1989).

2. The integration clause contained in the agreement provided:

> "This Agreement constitutes the entire agreement, understanding and representations, express or implied between the Customer and Burroughs with respect to the equipment and/or related services to be furnished and this Agreement supersedes all prior communications between the parties including all oral and written proposals."

What additional language or actions might you have added to establish the parties' mutual intent that the agreement was, in fact, the final expression of the parties' agreement regarding warranty terms?

☑ **Purple Problem 8-6.** Review Problem. ABC and XYZ sign the following written agreement:

> ABC Widget Corporation agrees to sell 1,000 Type B widgets to XYZ Corporation.
>
> Terms: $10,000 payable 30 days after delivery.
>
> Delivery date: To be determined by the parties.
>
> This writing represents the complete and exclusive agreement of the parties.
>
> allkiri podpis
>
> ABC Widget Corp. XYZ Corp.

(1) Can the parties agree on a delivery date?

(2) Did ABC give XYZ a warranty of merchantability?

(3) Can XYZ introduce evidence that prior to signing the contract, ABC promised that it would deliver the widgets to XYZ at no additional cost?

(4) Can XYZ introduce evidence that in their four prior transactions, ABC delivered the widgets to XYZ at no additional cost?