OREGON LAW REVIEW

2005

VOLUME 84
NUMBER 2

Articles

RALPH JAMES MOONEY*

A Friendly Letter to the Oregon Supreme Court: Let's Try Again on the Parol Evidence Rule

> The purpose of this article is . . . to show that the [parol evidence] rule has not been an aid but a positive menace to the due administration of justice . . . .
>
> —U of O Law School Dean William Hale (1925)[1]

* Kaapcke Professor of Law, University of Oregon Law School. Student and friend Matthew Jaksa provided valuable research help.

[1] William G. Hale, *The Parol Evidence Rule*, 4 OR. L. REV. 91 (1925). Dean Hale concluded his colorful indictment of the rule by stating, "The avowed purpose of the parol evidence rule was to bring . . . certainty into business transactions. The promise was appealing; the fulfillment appalling. We were promised bread. We received a stone. The parol evidence rule is a delusion and a snare." *Id.* at 120; *see also infra* text accompanying notes 38 and 43.

My Dear Justices:

I hope you will not think too impertinent the title, salutation, and somewhat personal tone of this brief essay. I truly do consider it more a friendly letter to esteemed colleagues than a typically impersonal, exhaustive law review article. I'm publishing it in our law review, as well as mailing it privately to Your Honors, only because (1) publishing such essays is part of my job, and (2) someday, somewhere, a reader other than yourselves might find it useful. Perhaps even interesting.

I write to you about the "dreaded parol evidence rule"[2] in contract law. James Bradley Thayer was surely correct a century ago when he wrote that few things in law are "darker than this, or fuller of subtle difficulties."[3] Certainly no casebook section bedevils my students and me more thoroughly each year; and, judging by reported decisions at least, no contract-law issue vexes more persistently a great many Oregon attorneys and judges.

I write to suggest to Your Honors, with the greatest respect, that at the next reasonable opportunity you consider "softening" the parol evidence rule in our state.[4] A softer, less restrictive rule would contribute, I believe, both to (1) greater certainty regarding the rule, for bench and bar alike, and (2) more justice in contract litigation, through closer judicial attention to contracting

[2] Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 799 (2002).

[3] JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 390 (Augustus M. Kelley ed., 1969) (1898). Dean Wigmore concurred a generation later, calling the parol evidence rule the "most discouraging subject in the whole field of evidence." 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2400, at 235-36 (2d ed. 1923). More recent scholars and judges have expressed similar frustrations as well. *E.g.*, Justin Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036, 1036 (1968) (the rule is a "maze of conflicting tests, subrules, and exceptions adversely affecting both the counseling of clients and the litigation process"); Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1045 (5th Cir. 1971) (the rule resembles a "treacherous bog in the field of contract law").

[4] The University of Chicago's Eric Posner has categorized various parol evidence rule formulations and applications as either "hard" (tending to exclude parol) or "soft" (tending to admit it). Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534 (1998). The foremost academic advocate of a "hard" rule, naturally, was Samuel Williston, while the leading champion of a "soft" rule was Arthur Corbin. *See generally* SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 631-650 (1920); 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 573-596 (2d ed. 1960).

parties' true *ex ante* understandings.[5] Let's see if I can convince you.

One preliminary matter. I write here only about the parol evidence rule, *not* about the related but distinct question whether so-called "extrinsic evidence" should be admitted to help interpret a written term. Both courts and commentators rather frequently collapse these two questions into one, but I join my hero Professor Corbin and others in believing that they are and should remain separate and distinct.[6] The parol evidence rule determines whether a party may *add* a term to a written contract (such as a lessor's oral assurance that the lessee will have an exclusive right to sell soft drinks in the building);[7] the "extrinsic evidence" question is whether evidence outside a writing's four corners is admissible to help *interpret* a term in the writing itself (such as evidence of what the parties meant by the term "residential purposes").[8] The Second Restatement, most courts, and most commentators agree that, whether one labels interpretive evidence as "parol" or "extrinsic," the parol evidence rule prop-

[5] Sorry, but it's just not a Contracts essay these days without at least one reference to "*ex ante*."

[6] "The 'parol evidence rule' is not, and does not purport to be, a rule of interpretation or a rule as to the admission of evidence for the purpose of interpretation." CORBIN, *supra* note 4, at 412-13. Professor John Murray agrees, noting that the "failure to distinguish between the parol evidence rule on the one hand and interpretation on the other" is a "significant cause of confusion." John E. Murray, Jr., *The Parol Evidence Rule: A Clarification*, 4 DUQ. L. REV. 337, 343 (1966); *see also* E. ALLAN FARNSWORTH, CONTRACTS § 7.3, at 426 (4th ed. 2004) ("[T]he rule does not exclude evidence offered to help interpret the language of the writing."). Admittedly, the line between adding and interpreting blurs a bit at times, especially when the parol asserted is some sort of "private code." *See infra* notes 71-76 and accompanying text.

[7] *See* Gianni v. R. Russel & Co., 126 A. 791 (Pa. 1924).

[8] *See* Yogman v. Parrott, 325 Or. 358, 937 P.2d 1019 (1997). Oregon law on this second, interpretation issue is somewhat unclear as well. In *Abercrombie v. Hayden Corp.*, 320 Or. 279, 292, 883 P.2d 845, 853 (1994), the court declared "parol and other extrinsic evidence" admissible to help determine whether written contract language is ambiguous. Three years later, however, the *Yogman* opinion directed that that "ambiguity" issue be resolved from the disputed text itself, i.e., from the "four corners of a written contract." 325 Or. at 361, 937 P.2d at 1021 (quoting Eagle Indus., Inc. v. Thompson, 321 Or. 398, 404, 900 P.2d 475, 479 (1995)). Post-*Yogman* Court of Appeals panels have split on the question. *Compare* Oregon Trail Elec. Consumers Co-op., Inc. v. Co-Gen Co., 168 Or. App. 466, 7 P.3d 594 (2000) (admitting extrinsic evidence, citing *Abercrombie*), *with* Cornelius Manor Trailer Court, Inc. v. Esch, 191 Or. App. 204, 209, 81 P.3d 727 (2003) (stating "if, but only if, an ambiguity exists, we 'examine extrinsic evidence'" (quoting *Yogman*, 325 Or. at 363)).

erly understood does not bar its admission.[9] Something like the "plain meaning rule" might do so, but not the parol evidence rule.

I

THE PROBLEM

In part, the parol evidence rule is so "dark and difficult" for us all because, amazingly, there exists even today no definitive statement of the rule. One can try to cobble together such a statement from sections 209 through 217 of Restatement Second, or try to untangle U.C.C. section 2-202, but in general one hunts far and wide without success for anything very helpful either to a first-year law student or to a court.[10] Nor can one find anywhere a clear, authoritative standard for resolving any of the various issues typically arising in a parol-evidence dispute: (1) whether a written contract is "integrated"; (2) if so, whether it's integrated "completely" or only "partially"; (3) whether the disputed parol evidence is "consistent" with the writing; (4) whether the so-called "fraud exception" applies; and so forth.

At a slightly deeper level, all this darkness and difficulty surely result from the fact that the parol evidence rule creates so frequently the fundamental tension existing throughout contract law, and perhaps beyond: the tension between (1) clear rules of general, predictable application and (2) equitable, common-sense results in particular cases. The important goal of allowing parties to rely on their written words as final and complete conflicts inevitably in parol-evidence disputes with the equally if not more fundamental goal of assuring parties that a court will enforce the

[9] RESTATEMENT (SECOND) OF CONTRACTS § 214 (1981); *Abercrombie*, 325 Or. at 291, 883 P.2d at 853 (stating that the rule "does not prohibit a party from introducing evidence extrinsic to a writing to explain an ambiguity . . . ."); State v. Triad Mech., Inc., 144 Or. App. 106, 113, 925 P.2d 918, 922 (1996) (same); CORBIN, *supra* note 4, at §§ 412-31; Sweet, *supra* note 3, at 1041. Even ORS 41.740, Oregon's restrictive 1862 statutory version of the rule, states that it "does not exclude . . . evidence . . . to explain an ambiguity, intrinsic or extrinsic."

[10] For me, the most useful summary formulation of the rule remains Chief Justice Traynor's in *Masterson v. Sine*, 436 P.2d 561 (Cal. 1968):

> When the parties to a written contract have agreed to it as an "integration"—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms . . . . When only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing.

Id. at 563 (citations omitted).

terms to which they actually agreed. Currently, in Oregon and elsewhere, these conflicts result all too often in perplexing legal uncertainty, evident injustice, or both.

A. Uncertainty

This part of the argument will be familiar to you, and perhaps even noncontroversial. It's hardly a secret that for a very long time parol evidence rule decisions, both nationally and in our own state, have seemed to many observers strikingly inconsistent and at times downright confusing.

Professor Eric Posner has summarized the national disarray as follows: "In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair."[11] Others have documented such uncertainty and despair in various individual states, including Alaska, California, Illinois, Montana, Texas, and Wisconsin.[12]

The situation in Oregon is not dissimilar. Your able predecessors a generation ago tried hard, in *Hatley v. Stafford*,[13] to make a new, more certain beginning on the rule. They succeeded ad-

---

[11] Posner, *supra* note 4, at 540; *see also* Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383, 1403 (1983) ("Commentators frequently have assailed the inconsistency typifying the parol evidence rule's application and the confusion and disagreement about its underlying policy foundations . . . . [The rule] encourages litigation, 'adversely affects both the counseling of clients and the litigation process,' and hurts the administration of justice.") (citations omitted).

[12] *See generally* Leonard Marinaccio, III, Note, *Out on Parol?: A Critical Examination of the Alaska Supreme Court's Application of the Parol Evidence Rule*, 11 ALASKA L. REV. 405, 405 (1994) ("imprecision and confusion" have "plagued" Alaskan applications of the rule); Susan J. Martin-Davidson, *Yes, Judge Kozinski, There is a Parol Evidence Rule in California—The Lessons of a Pyrrhic Victory*, 25 Sw. U. L. REV. 1, 4 (1995) (California courts face "persistent and intractable problems in the application of the parol evidence rule"); Marie Adornetto Monahan, *The Disagreement Over Agreements: The Conflict in Illinois Regarding the Parol Evidence Rule and Contract Interpretation*, 27 S. ILL. U. L.J. 687, 688 (2003) (Illinois parol-evidence decisions have been "in conflict since 1976"); Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 MONT. L. REV. 93, 95, 98 (1994) (the Montana Supreme Court has been "notoriously inconsistent" in its treatment of the rule, creating a "great deal of misunderstanding"); David R. Dow, *The Confused State of the Parol Evidence Rule in Texas*, 35 S. TEX. L. REV. 457, 458 (1994) (Texas decisions suffer from "a great deal of confusion"); Michael A. Lawrence, Comment, *The Parol Evidence Rule in Wisconsin: Status in the Law of Contract, Revisited*, 1991 WIS. L. REV. 1071, 1079 ("pervasive uncertainty" concerning the rule exists in Wisconsin and elsewhere).

[13] 284 Or. 523, 588 P.2d 603 (1978).

mirably to a point,[14] but in truth the majority opinion in *Hatley* was itself too inconsistent, and too wedded to Professor Williston's classical worldview,[15] to serve as a durable new beginning. Barely a decade later, for example, a Court of Appeals panel remarked that *Hatley* achieved its greater-certainty goal only if read quite "carelessly."[16]

Recent Oregon trial and appellate rulings have exhibited basic disagreements among justices and judges themselves over parol evidence rule applications. In *Deerfield Commodities, Ltd. v. Nerco, Inc.*,[17] for example, a divided Court of Appeals panel reversed a trial court decision admitting parol evidence of a buyer's precontractual assurances, thereby also reversing the plaintiff seller's $27,000,000 jury verdict. And in *Abercrombie v. Hayden Corp.*,[18] the Supreme Court reversed a trial court ruling (affirmed by the Court of Appeals) admitting evidence that a real estate seller had orally extended the closing date. Once again, that ruling also reversed the plaintiff's multimillion-dollar jury

[14] *Hatley*'s virtues include (1) a creative, common-sense interpretation of ORS 41.740, Oregon's *statutory* parol evidence rule—*see infra* note 20; (2) a helpful, realistic description of factors relevant to deciding whether parties intended a complete rather than a partial integration; (3) a commendably broad conception of "consistency," one that allows more parol evidence to supplement a writing than do some others; and (4) an obviously just result, compensating a tenant farmer for the wheat crop he planted and grew. However, the court also directed trial judges to "presume" that parties intended any writing to be a complete integration–a direction that certainly contradicts the "softer" innovations elsewhere in the opinion.

[15] For explanations of what legal historians and others mean by a "classical worldview" in law, see, for example, WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT (1998); *see also* GRANT GILMORE, THE AGES OF AMERICAN LAW 41-67 (1977) ("The Age of Faith"); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 9-31 (1992) ("The Structure of Classical Legal Thought"). In one sentence, the classical worldview that dominated late 19th and early 20th century American law was one that (1) emphasized systematic, generalized legal "rules" and (2) sought greater legal "certainty" by characterizing issues whenever possible as legal, for the court, rather than factual, for the jury. In contract law, Professor Williston was the leading exemplar of this worldview, including his favored "hard" version of the parol evidence rule. *See generally* WILLISTON, *supra* note 4.

[16] Hatley v. Stafford . . . sets as its goal clarification of the [parol evidence rule] confusion. Unfortunately, the case only achieves that goal if it is read carelessly. When it is read carefully, it is not particularly clear and is by no means as helpful as the frequency of its citation would suggest.

O'Meara v. Pritchett, 97 Or. App. 329, 334, 776 P.2d 866, 867 (1989).

[17] 72 Or. App. 305, 696 P.2d 1096 (1985); *see also infra* text accompanying notes 26-30.

[18] 320 Or. 279, 883 P.2d 845 (1994).

verdict.[19]

Moreover, sharply worded disagreements regarding the parol evidence rule appear occasionally even within the same court. Justice Lent dissented from *Hatley*, for example, urging that the majority's ruling rendered ORS 41.740 "meaningless."[20] Judge Rossman dissented from *Deerfield Commodities*, believing that the trial court should have admitted the abundant evidence of the buyer's "fraudulent representations," at least under the "fraud exception" to the rule.[21] Judge Warren dissented in *Leitz v. Thorson*,[22] disagreeing emphatically with (1) the majority's addressing the "integration" issue before the "consistency" issue and (2) its conclusion that the parol term was consistent with the written lease.[23] Finally, Judge Armstrong dissented in *State v. Triad Mechanical, Inc.*,[24] urging that the majority was "wrong" to

[19] If you wonder how the *Abercrombie* court managed to apply the parol evidence rule to a *postcontractual* conversation, the explanation is that it decided to postdate escrowed quitclaim deeds from the date they were executed to the date they were recorded. Fortunately, the significance of *that* sketchy maneuver seems likely confined to the *Abercrombie* facts.

[20] 284 Or. 523, 536, 588 P.2d 603, 610 (Lent, J., dissenting). ORS 41.740, enacted in 1862, states in part, "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be . . . no evidence of the terms . . . other than the contents of the writing . . . ."

As the *Hatley* majority noted, literal enforcement of this ultra-hard-line version of the parol evidence rule would exclude virtually all parol relating to any written agreement. To avoid such unfortunate literalism, the court interpreted the legislative intent as being simply to codify the (evolving) common law rule. *Hatley*, 284 Or. at 527 & n.1, 588 P.2d at 605 & n.1. As authority for that view, or at least as an example, the court cited *Masterson v. Sine*, 436 P.2d 561 (Cal. 1968), the landmark California decision a decade earlier interpreting that state's identical statute identically. *See also supra* note 10.

[21] 72 Or. App. 305, 331, 696 P.2d 1096, 1113 (1992) (Rossman, J., dissenting).

[22] 113 Or. App. 557, 562, 833 P.2d 343, 346 (1992) (Warren, J., dissenting). In *Leitz*, the plaintiffs leased space from the defendant to open a florist shop, then learned later that the Deschutes County Code prohibited their placing a freestanding sign on the adjacent highway. The written lease prohibited the tenant from erecting a sign without the landlord's prior written consent, but the plaintiffs alleged a prior oral promise by the defendant that they could in fact erect a freestanding sign. The trial court ruled that the lease was only partially integrated, that the parol term was "not inconsistent" with it, and that the defendant therefore had breached the lease by failing to provide a lawful sign location.

The Court of Appeals affirmed 2-1. Judge Warren, in dissent, accused the majority of sanctioning an analytical methodology that "cannot be correct" and of "trudg[ing] on to conclude that patently inconsistent terms are consistent." *Id.* at 564, 833 P.2d at 347.

[23] *Id.* at 563-65, 833 P.2d at 346-47.

[24] 144 Or. App. 106, 119, 925 P.2d 918, 925 (1996) (Armstrong, J., dissenting). For a brief description of *Triad*'s facts, see *infra* text accompanying notes 34-35.

bar evidence of the parties' discussions held prior to signing two change orders.[25]

In short, it seems not unfair to conclude that the current condition of parol evidence rule jurisprudence in our state, as in most states, is considerably variable and uncertain even to its most astute observers, the judiciary.

B. Injustice

Even worse than the judicial conflicts and resulting uncertainty are the several recent examples of evident injustice in parol evidence rule cases. A clear such example, surely, was the *Deerfield Commodities* decision mentioned above,[26] where a written multimillion-dollar coal silt contract stated that the seller would be subject to price penalties for silt delivered with moisture content exceeding 7%. The seller offered to prove (1) repeated oral assurances by the buyer that the penalty threshold in fact would be *12%* and (2) the buyer's precontractual explanation that the written contract could not be altered to reflect the true 12% figure because of certain Korean government procurement specifications.[27] The writing also contained a merger clause.[28]

When the buyer later enforced the written 7% penalty threshold, the seller sued and won a $27,000,000 jury verdict. However, a Court of Appeals majority reversed, ruling that the trial court had erred in admitting evidence of the repeated oral assurances and explanation. It stated, virtually without discussion, that (1) the parties had "meant" what the merger clause stated, so the writing was "fully integrated"; (2) the 12% oral assurances could not be admitted even as interpretive evidence because they "contradicted" the written 7% threshold; and (3) applying Pennsylvania law, the assurances also were inadmissible under the

[25] For one more vigorous dissent in a parol evidence rule case, see *Sternes v. Tucker*, 239 Or. 105, 114-15, 395 P.2d 881, 886 (1964) (Rossman, J., dissenting) (by the majority's affirming an exclusion of parol evidence "the plaintiff is deprived of trial by jury").

[26] *See supra* note 17 and accompanying text.

[27] 72 Or. App. 305, 311-12, 696 P.2d 1096, 1101-02 (1985).

[28] "This document contains the entire agreement between the parties and . . . [t]here are no other understandings, representations or agreements between the parties." *Id.* at 309, 696 P.2d at 1100. Because the *Deerfield Commodities* contract was for a sale of goods, coal silt, U.C.C. Article 2 applied to it. However, there is precious little difference between the common law parol evidence rule and its Code counterpart—*see* OR. REV. STAT. § 72.2020—and, in any event, the *Deerfield Commodities* court noted none.

fraud exception, again because they contradicted the writing.[29] Judge Rossman dissented, pointing out that the record was "full of testimony" that the two sides actually had agreed to the 12% threshold; and urging that therefore evidence of that agreement surely was admissible, at least as proof of fraud.[30]

Similarly, in *Howell v. Oregonian Publishing Co.*,[31] the newspaper had distributed papers for many years through a "dealership system" under which individual dealers would purchase papers for resale to subscribers and others. Over time, the dealerships became quite valuable, some being purchased for as much as $150,000. Nothing in the newspaper's standard written dealership contract gave either party a right to renew, but newspaper personnel had "consistently represented" to the dealers that it would continue to renew contracts of all dealers who "performed adequately."[32] In 1982, however, newspaper management decided to switch to an in-house "agency" distribution system, so it declined to renew any dealer contracts thereafter.

In the dealers' action for contract breach and fraud, the trial court excluded all evidence of the newspaper's representations and granted the paper summary judgment. The Court of Appeals affirmed that ruling, asserting that the representations "directly contradict[ed]" the written term that neither party had a "right to insist on renewal."[33]

Well, perhaps, but surely some readers will remain unconvinced. Query whether a right to renew dependent on a dealer's having "performed adequately" necessarily contradicts the lack of an *unqualified* right to renew. I myself think it does not: neither the plain meaning of the language nor plain old common sense seems to me to support such a restrictive conclusion.

---

[29] 72 Or. App. at 325, 328, 626 P.2d at 1109-11. The trial judge himself had overturned much of the large jury verdict by granting the buyer a new trial on the damages issue, limiting the contract's duration to one year rather than five as the jury had found.

[30] *Id.* at 331-32, 626 P.2d at 1113-14 (Rossman, J., dissenting).

[31] Howell v. Oregonian Publ'g Co. (Howell I), 82 Or. App. 241, 728 P.2d 106 (1986).

[32] *Id.* at 243, 728 P.2d at 107.

[33] *Id.* at 243, 728 P.2d at 107. The court reversed the newspaper's summary judgment on the fraud claim, noting that proof of fraud "is not prohibited by the parol evidence rule." *Id.* at 246-47, 728 P.2d at 109. It also reversed the paper's judgment on contract breach itself, noting there remained a question whether the parties had orally *modified* their written agreements. On reconsideration, however, it concluded that the dealers had waived that theory. Howell v. Oregonian Publ'g Co. (Howell II), 85 Or. App. 84, 735 P.2d 659 (1987).

Moreover, and most important, it is clear even from the court's opinion that the plaintiff dealers received far less than the justice to which our Oregon legal system long has been committed.

Finally, in *State v. Triad Mechanical, Inc.*,[34] the Oregon Department of Fish and Wildlife (ODFW) hired Triad to construct improvements to a fish hatchery. The contract included (1) a 335-day completion period and (2) a term requiring a change order for any rock excavation exceeding 100 cubic yards. When Triad encountered more than 100 cubic yards of rock, the parties agreed to two written change orders setting forth a "fixed unit price" for the increased excavation itself. However, according to Triad personnel, the parties explicitly postponed at that time considering any additional "delay and impact costs" resulting from the extra work because they could not then estimate those costs accurately; they agreed instead that Triad would submit a separate claim for them at the project's end.[35]

Triad did submit such a separate claim later, but the State denied it, and Triad sued. Applying the parol evidence rule, the trial court excluded all Triad's evidence of the agreement regarding a later claim.[36] A Court of Appeals panel majority affirmed, reasoning that (1) each change order constituted a "complete integration" because it would not have been "natural" for the parties to have omitted an agreement regarding a later claim from such an order; and (2) in any event, such an oral agreement was "inconsistent" with change-order language that the orders themselves would not extend the original 335-day completion schedule.[37]

My goodness! The contractors I represented in private practice would be surprised, if not shocked, to hear that by signing a change order compensating for additional direct expense they intended to negate a simultaneous oral agreement regarding a later supplemental claim. Or to hear that it's somehow "not natural" on a jobsite for an owner and a contractor to reach partial agreement on some matter midway through a project, leaving an unquantifiable remainder for later determination. Or, even more,

---

[34] 144 Or. App. 106, 925 P.2d 918 (1996).

[35] *Id.* at 110 & n.2, 925 P.2d at 920 & n.2.

[36] The trial court ruled, alternatively, that each change order constituted an "accord and satisfaction," another ruling that seems most puzzling given that no dispute existed at those times to be settled by any "accord." The Court of Appeals had no need to address that ruling, and did not.

[37] *Id.* at 117-18, 925 P.2d at 924-25.

to hear that an agreement regarding a future possible pay increase and time extension is fatally "inconsistent" with a recital that two signed change orders *themselves* will not extend the completion date!

Admittedly, I know not whether the ODFW representative in fact agreed that Triad could submit a later, supplemental claim. However, as Judge Armstrong urged in dissent, the majority's parol-evidence ruling precluded Triad from even attempting to prove its claim. Assume for a moment that the State *did* authorize a later, supplemental claim; then imagine the anger and cynicism such an exclusionary parol-evidence ruling creates among contractors and their communities toward law, lawyers, and our entire legal system.

II

The Solution

All right. If you're still reading, no doubt you're asking something like, "Well, even assuming a 'softer' parol evidence rule would reduce both uncertainty and injustice in Oregon contract litigation, how exactly might we move toward such a rule?" I intend to offer here three possibilities, taken principally from academic literature, and suggest eventually that you adopt the third, the one closest to existing precedent in Oregon and elsewhere.

Nearly all advocates of reforming the parol evidence rule, teachers and judges alike, begin by reminding readers that the principal goal of contract interpretation is and should be to enforce the parties' actual agreement. William Hale, for example, the University of Oregon law dean nearly a century ago, expressed this well: in any "contractual controversy," a court's "real quest is for the terms of the bargain."[38] More recently, Professor Corbin expressed the same fundamental idea: "The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties."[39] If we all can agree on that first principle, the reform question becomes simply, how can we

[38] Hale, *supra* note 1, at 121.

[39] Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161, 162 (1965). *See generally* Corbin, *supra* note 4; John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. Pa. L. Rev. 1342, 1348 (1975) ("Some commentators strongly urge a test that would emphasize the actual intention of the parties.").

best ascertain such intention in cases involving both a written contract and an alleged prior oral agreement? Here are three "softer" possibilities.

A. Abolish the Rule Altogether

One quite revolutionary idea would be simply to abolish the parol evidence rule altogether, as Professor Corbin urged from time to time:

> It would have been better had no such rule ever been stated as a rule preventing the introduction of testimony. Instead, attention should be called to the accepted rule that parties can by a substituted contract discharge and annul any and all of their previously made contracts. The question may then be put: Have the parties in the instant case made such a substituted contract? On this issue of fact, no relevant testimony should be excluded . . . .[40]

Professor Murray has explained the principal implications of such a reform:

> [It] would eschew any evidentiary gloss and have the court focus upon two questions: Was the extrinsic agreement made? Did the parties intend to nullify that agreement by their subsequent writing? . . . The application of this test requires no "parol evidence rule." It emphasizes the actual intention of the parties rather than the fictitious problem of whether parties might naturally and normally include the alleged extrinsic matter in the writing.[41]

Those urging this abolitionist position naturally express greater confidence in juries than do believers in a "harder" parol evidence rule. They point out that in many other contexts our legal system relies routinely on juries to make important, sometimes difficult fact determinations. So why, they ask, should we trust juries less in the context of a partly oral and partly written contract? Boalt Hall Professor Justin Sweet, for example, asked, "Our system allocates to the jury the function of determining credibility of witnesses . . . . What makes parol evidence cases more difficult for the jury than construction accidents, consumer

---

[40] Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 631-32 (1944); *see also* CORBIN, *supra* note 4. Recently, the Eleventh Circuit Court of Appeals interpreted Article 8(3) of the United Nations Convention on Contracts for the International Sale of Goods as a "rejection of the parol evidence rule" for contracts that it governs. MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, 144 F.3d 1384, 1390 (11th Cir. 1998).

[41] Murray, *supra* note 39, at 1348.

injuries or gift tax cases?"[42]

Realistically, however, I suppose it's unlikely today that any American state supreme court will abolish the parol evidence rule altogether within its jurisdiction. This seems especially true in a state like Oregon, where a decidedly "hard" version of the rule remains embedded in an old statute. Moreover, on the merits, even many critics of the rule concede it serves a useful purpose in *some* transactions. So, following are a couple further reform possibilities.

B. Create A Rebuttable Presumption

What about simply creating a rebuttable presumption that a writing represents the parties' complete, integrated agreement, but in all cases allowing the proponent of parol evidence to introduce it "for what it's worth" (as California trial judges used to say to me)? Dean Hale was among the early advocates of such a reform:

> The basic evils of the rule in its present form are, first, that it is a pretense, and second, that the collateral inquiries which arise whenever it confronts the court are artificial, capricious and arbitrary.
>
> The cure. Let the parol evidence rule be phrased and operate as a rule of presumption. When the terms of an agreement have been reduced to writing by the parties, let it be presumed that the writing contains with exactness and completeness all those terms, but allow this presumption to be overcome by clear and convincing proof to the contrary.[43]

Several modern commentators have cited this "presumption" idea favorably,[44] and I myself believe it's an idea whose time someday will come. It is simple; it would respond meaningfully to the persistent academic and judicial criticism of the parol evidence rule; it would signal again the legal system's confidence in juries to decide contract cases as well as they decide others; and to most drafters and defenders of written contracts, it would be

---

[42] Sweet, *supra* note 3, at 1055; *see also* Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365 (1932); Murray, *supra* note 6, at 344 ("It is the intrusion of the trial judge on the traditional province of the jury which is the parol evidence rule in action.").

[43] Hale, *supra* note 1, at 122. Dean Hale found his principal model for this "solution of the parol evidence problem" in equity principles governing reformation of instruments for mistake. *Id.*

[44] *E.g.*, McCormick, *supra* note 42, at 366; Corbin, *supra* note 40, at 629.

less troubling than the more revolutionary possibility of abolishing the parol evidence rule altogether.

Again, however, this second possible reform—substituting a mere presumption for the all-too-frequent absolute bar—may seem to Your Honors a little too far from today's mainstream. Therefore, I'll propose to you instead a third, more modest reform, one that hews closer to existing law both nationally and in our own state. It consists simply of a logical ordering of the typical issues in a parol evidence rule dispute, together with suggested guidelines or standards for resolving those issues.

C. A More Modest Proposal

To begin, we need to consider the kind of transaction in which the parol evidence rule's exclusionary effect does make sense at times. Surely it is a large, commercially sophisticated transaction—say, a corporate merger—in which experienced parties and able counsel have negotiated, drafted, and redrafted a lengthy written contract, and both sides understood and agreed that only terms contained in that writing would be enforceable.[45]

We've all seen these: two or more teams of attorneys meeting in a walnut-paneled conference room overlooking the Willamette River, saying to each other something like, "O.K., this is it, right?" "Right." "We agree this is our entire deal?" "Absolutely." "Then let's both initial the merger clause in paragraph 33, just to be on the safe side." "Sure, no problem. By the way, how's the new granddaughter?"

My own personal view of the parol evidence rule, after 35 years of first litigating about it then later reading and teaching about it, is that courts should restrict the rule's operation to precisely this kind of transaction. As Professor Sweet wrote in 1968, "The only proper function of the parol evidence rule is to protect truly integrated writings."[46] And it is only where both parties

[45] Professor Sweet expressed this same rather obvious thought nearly four decades ago. "The hallmark of a truly integrated contract is that it is put together carefully and methodically. In this sense it resembles the creation of a statute or a treaty." Sweet, *supra* note 3, at 1063.

[46] *Id.* at 1036. Sweet's somewhat fuller statement of the same point is as follows:

> If the rule must be lived with, it should be limited to a generally accepted and desirable objective—the protection of truly integrated writings. If the parol evidence rule is limited solely to protecting integrated agreements, many difficult parol evidence issues and subissues will disappear. There will be no need to wrestle with consistent collateral agreements, oral condi-

plainly understood the legal implication of omitting an agreed term from their writing that the commendable goal of "commercial certainty" truly outweighs the competing, even more fundamental goal of enforcing all terms to which the parties actually agreed.

This third, most modest path toward achieving a "softer" parol evidence rule, one confined largely to the foregoing paradigm transactions, is not difficult to chart. There are, after all, only three fundamental issues in most parol-evidence disputes, and only two are particularly important.

1. Is the Writing Integrated at All?

The first issue in nearly any such dispute is—or at least should be—whether the rule applies at all. Every well-considered formulation of the parol evidence rule, whether judicial or academic, begins something like this: "When parties to a written contract intended their writing to constitute a final expression of all or part of their agreement, ..."[47] As the *Hatley* court wrote, "The fact that a writing exists does not bring the rule into play if the parties do not intend the writing to embody their final agreement."[48] The point is, a party seeking to invoke the parol evidence rule should have to produce something more than a mere writing; it should be required to establish a quite special kind of writing, one that both parties intended would supercede, i.e., *erase*, some or all of what preceded it.

Curiously, even though courts repeat this foundational principle consistently, they almost never apply it, or even consider applying it. In only the rarest of cases does a trial or appellate court require actual proof of party intent to "integrate" their agreement—that is, to do something more than simply write down

tions, oral delivery, fraud, sham, true consideration and the like as devices to avoid the rule.

Id. at 1059-60; s*ee also* 9 WIGMORE, *supra* note 3, at § 2425.

[47] *E.g.*, formulation quoted from *Master v. Sine, supra* note 10; *see also, e.g.,* State v. Triad Mech., Inc., 144 Or. App. 106, 114, 925 P.2d 918, 922 (1996) ("In analyzing a parol evidence rule issue, we must determine whether the agreement the parties have reduced to writing is integrated and, if so, to what extent."); U.C.C. § 2-202 (1977) (stating that the rule applies to a "writing intended by the parties as a final expression"); RESTATEMENT (SECOND) OF CONTRACTS § 214 (1981) (stating that parol evidence is always admissible to establish "that the writing is or is not an integrated agreement").

[48] Hatley v. Stafford, 284 Or. 523, 527, 588 P.2d 603, 605 (1978). *See generally* CORBIN, *supra* note 4, § 573, at 357; WILLISTON, *supra* note 4, § 633, at 1225.

some or all the agreed terms.[49] Nearly always, they simply assume that the disputed writing constitutes an integration, at least in part.

I hope, once before I die, to read about an Oregon court asking an attorney seeking to exclude testimony by means of the parol evidence rule, "Counsel, have you any evidence that these parties actually intended their writing to *integrate* their agreement—that is, to supercede and erase prior conversations and writings? Did the parties, for example, have a *conversation* to that effect?"

Requiring such evidence of genuine intent to integrate, as a condition of applying the parol evidence rule at all, would dispose quickly of many disputes about the rule. It also would help immeasurably confine the rule within its legitimate sphere, the world described above of sophisticated, negotiated written contracts that parties truly did intend to "integrate." Most important, requiring such proof as a condition of applying the rule would help insure that cases like *Deerfield Commodities*, *Howell*, and *Triad Mechanical* would be decided not on a technicality but on the merits of whether the defendants in those cases actually made the promises the plaintiffs alleged they did.[50]

2. If Integrated at All, Is the Writing a Complete or Only a Partial Integration?

Because so few courts examine seriously the first, "integrated at all" issue, this is actually the first crucial question in most parol evidence rule disputes. If a court declares a writing to be a *complete* integration—a final and *exclusive* statement of the parties' agreement—very little parol evidence is admissible;[51] if only a

[49] The standard Oregon citation to such a rare case is *National Cash Register Co. v. I.M.C., Inc.*, 260 Or. 504, 491 P.2d 211 (1971). Following an oral month-to-month equipment lease and the lessee's signing an incomplete form, the lessor completed the form by inserting a one-year lease term. The lessor then contended that the parol evidence rule barred proof of the month-to-month agreement, but both the trial and appellate courts concluded that the parties "did not agree to an integration of that oral agreement into a written lease agreement." *Id.* at 509, 491 P.2d at 214.

[50] *See supra* text accompanying notes 26-37.

[51] Restatement (Second) of Contracts section 214 sets forth the general rule, in Oregon and elsewhere, that even a complete integration does not preclude (1) evidence to interpret a written term or (2) evidence of illegality, fraud, duress, mistake, or "other invalidating cause." Section 217 then adds a similar exception to the rule for evidence of a condition precedent to the writing's effectiveness. *See, e.g.*, Roberts v. Maze, 116 Or. App. 441, 443, 985 P.2d 211, 212 (1999) (evidence that the writing was a "sham" admissible); Pendleton Grain Growers v. Pedro, 271 Or. 24,

partial integration, evidence of "consistent additional terms" also may reach the trier of fact.[52]

To begin with, it is vitally important to any reform of Oregon's parol evidence rule that you abandon explicitly the presumption from *Hatley v. Stafford*[53] that parties intended *any* writing "complete on its face" to be a complete integration. With respect, that presumption is seriously unrealistic, misleading in most cases, and a potential source of considerable injustice. It also is contrary to the position adopted by drafters and promulgators of the Uniform Commercial Code.[54]

Indeed, the presumption, if any, should be quite the reverse. A party contending that a writing constitutes a complete integration, i.e., that both parties agreed consciously to abandon all prior understandings and agreements, should bear at least the burden of persuasion on that issue. That party, after all, is attempting to exclude from any consideration whatsoever evidence even of a consistent additional term. Personally, I would prefer that such a party be required to demonstrate a complete integration by "clear and convincing evidence," but, in any event, it certainly seems clear that the current presumption in that party's *favor* should cease to exist.

The Restatement criterion for a partial rather than complete integration is whether the parol term is one that "in the circumstances might naturally be omitted from the writing."[55] For example, the *Hatley* court concluded that the parties there might naturally have omitted from their informal written lease a time limit on the lessor's buyout right.[56]

Some have criticized the Restatement criterion as too restrictive, too susceptible to abuse by parties claiming complete inte-

29, 530 P.2d 85, 88 (1975) (evidence of condition precedent admissible). *But see* Sternes v. Tucker, 239 Or. 105, 395 P.2d 881 (1964) (evidence of condition precedent *not* admissible).

[52] *See, e.g.*, *Triad Mech.*, 144 Or. App. at 113, 925 P.2d at 922; Siegner v. Interstate Prod. Credit Ass'n, 109 Or. App. 417, 425, 820 P.2d 20, 25 (1991).

[53] 284 Or. at 535, 588 P.2d at 609.

[54] U.C.C. section 2-202, comment 1 expressly "rejects any assumption" that a writing constitutes a complete integration.

[55] RESTATEMENT (SECOND) OF CONTRACTS § 216(2)(b) (1981). The comparable U.C.C. Article 2 criterion is similar, though somewhat "softer": a writing will be deemed a complete integration only if the disputed parol term "certainly" would have been included in the writing if actually agreed to. U.C.C. § 2-202 cmt. 3 (1977). This more parol-friendly "certainly" criterion seems actually quite close to my own suggestion of a presumption *against* complete integration.

[56] 284 Or. at 535-36, 588 P.2d at 609-10.

grations. Professor Corbin, for example, objected to it as long ago as 1944, characterizing it as an unwise, artificial barrier against truth telling. In his view, the dispositive question should not be whether persons might "naturally" have omitted a particular term from their writing; instead, it should be whether the parties then before the court in fact *did* so. That more particular inquiry raises simply a "question of weight of evidence and of probability of truth; it is a question of fact." And the correct way to proceed, according to Corbin, is to conduct that inquiry like any other, to admit all relevant evidence and simply treat the "flimsy and improbable" as flimsy and improbable.[57]

In my own view, however, you need not abandon altogether the Restatement's well-established "naturally" criterion in order to make progress on this critical second issue. Rather, the important thing is to encourage Oregon courts to apply it, or any other test or criterion, as realistically to individual disputes as did your predecessors in *Hatley*.[58] Professor Justin Sweet suggested, for example, that a court faced with a degree-of-integration issue consider a series of "key facts" that likely will be helpful: (1) subject matter of the transaction, (2) length of the negotiations, (3) the parties' business experience, (4) extent of any participation by counsel, (5) degree of standardization of the writing, and (6) presence or absence of a merger clause.[59]

Moreover, once again the benefit of any plausible doubt on this issue should belong to the party seeking to introduce parol, seeking a trial on the merits of a claim, rather than to the party attempting to avoid such a trial. After all, the introducing party almost certainly will be the less commercially and legally sophisticated, as well as far less likely to have consulted an attorney before signing.

A persistent, troublesome question within this second issue is what weight to give a written "merger" or "integration" clause: for example, "This writing constitutes the final and exclusive statement of the parties' agreement with respect to its subject matter." Such clauses appear all too frequently in written contracts today[60]—sometimes negotiated, understood, and agreed to

[57] Corbin, *supra* note 40, at 642; *see also* Murray, *supra* note 39, at 1366-69 (criticizing the "might naturally" test, primarily for logical inconsistencies created when juxtaposing it against other Restatement sections).

[58] *See supra* notes 13-14, 48, and accompanying text.

[59] Sweet, *supra* note 3, at 1064-66.

[60] *See, e.g.*, discussion of *Deerfield Commodities*, *supra* notes 26-30 and accompa-

by both parties, but very often not.

Some courts are understandably tempted to accept a merger clause at face value, thereby making it determinative on the crucial degree-of-integration issue. In Oregon, happily, ample authority exists for the proposition—endorsed by Restatement Second—that such a clause is *not* determinative on this issue.[61] What remains for Your Honors to do here is only to reiterate and emphasize that important principle.

A trial court should inquire searchingly into the factual background of each merger clause it encounters rather than simply accepting it as face-value truth. Again, an appropriate question would be, "Counsel, what evidence do you have that both parties actually understood and agreed to this crucial term?" If the attorney seeking to exclude evidence even of a consistent additional term can establish such understanding and agreement, then of course the court should enforce the merger clause, as it would any other term to which the parties actually agreed. If, however, as is more generally true, one or both parties did not read the clause, did not understand it, or had no realistic choice with respect to it, the court should declare it to be unenforceable boilerplate,[62] admit the consistent additional parol terms, and proceed to try the claim on its true merits.

So, in sum, Your Honors need do nothing very revolutionary on this important degree-of-integration issue to "soften" Oregon's parol evidence rule appropriately. You need only (1) abandon the unrealistic presumption from *Hatley v. Stafford* that a written contract is completely integrated; and (2) endorse once again the Restatement's "naturally" test, but recognize explicitly for the future that in fact relatively few contracting parties truly understand and agree to complete integrations. Because so few parties actually do form a specific intent that a writing will negate every prior conversation, promise, or agreement, a party asserting such specific intent should have to establish it.

---

nying text; Siegner v. Interstate Prod. Credit Ass'n, 109 Or. App. 417, 820 P.2d 20 (1991).

[61] Restatement (Second) of Contracts section 209, comment b states that a merger clause "may not be conclusive" on the degree-of-integration issue. For Oregon law to the same effect, see, for example, *Howell v. Oregonian Publ'g Co.*, 82 Or. App. 241, 245, 728 P.2d 106, 108 (1968); *State v. Triad Mech., Inc.*, 144 Or. App. 106, 115, 925 P.2d 918, 923 (1996); *Siegner*, 109 Or. App. at 426, 820 P.2d at 26.

[62] A merger clause, like any other, can be unconscionable. *See generally* U.C.C. § 2-302 (1977); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); FARNSWORTH, *supra* note 6, at 424 n.37.

3. Is the Parol Evidence Consistent with the Writing?

This is the second of two critically important issues in much parol evidence rule litigation. If a court declares a writing to be only partially rather than completely integrated, evidence of any "consistent" additional term is admissible to supplement it.[63]

By and large, American courts have adopted one of two contrasting standards on the question whether parol evidence is consistent with a writing. The preferable one, surely, is the parol-friendly standard announced by your predecessors in *Hatley*: a parol term is consistent unless it contradicts directly "an *express* provision in the writing."[64] In *Hatley* itself, the oral 60-day time limit on the lessor's buyout right was consistent with the written lease because the lease was silent regarding duration of that right.[65]

Other courts, however, have adopted a considerably narrower view of consistency, one that excludes far more parol even in partial-integration cases. A leading example we read occasionally in Contracts class is *Snyder v. Herbert Greenbaum & Associates, Inc.*, where an owner attempted to prove an oral agreement between itself and a contractor that either party could cancel a carpet-installation contract at any time prior to performance.[66] The Maryland court excluded evidence of that agreement, partly because it was "inconsistent" with the written contract: there was, in the court's view, an "absence of reasonable harmony" between the writing and the parol term.[67]

A second, more typical example of this narrower view appears in Justice Burke's dissent in *Masterson v. Sine*.[68] Burke contended that evidence of an oral nonassignability term "contradicted" a written repurchase right that was silent as to assignability.[69] In other words, he seemed to say, if parol is in-

[63] Abercrombie v. Hayden Corp., 320 Or. 279, 286-87, 883 P.2d 845, 850 (1994); Hatley v. Stafford, 284 Or. 523, 535, 588 P.2d 603, 609 (1978); U.C.C. § 2-202 (1977); RESTATEMENT (SECOND) OF CONTRACTS § 216 (1981).

[64] 284 Or. at 533, 588 P.2d at 608-09.

[65] The *Hatley* court cited the leading midcentury authority for this parol-friendly standard, *Hunt Foods v. Doliner*, 270 N.Y.S.2d 937 (N.Y. App. Div. 1966) (oral condition precedent not inconsistent with written unconditional stock purchase option); *see also* Masterson v. Sine, 436 P.2d 561 (Cal. 1968) (oral nonassignability term consistent with written realty repurchase right that was silent as to assignability).

[66] 380 A.2d 618 (Md. App. 1977).

[67] *Id.* at 623.

[68] 436 P.2d at 567 (Burke, J., dissenting).

[69] *Id.*

consistent even with a writing's legal *implication*, such as free assignability, it must be excluded.[70]

Even though Oregon courts generally have followed *Hatley*'s broader, preferable view of consistency in this context,[71] it still would be useful for Your Honors to reaffirm that view sometime soon and, perhaps, to articulate an even more expansive statement of it.

Consider again just for a moment the facts of *Deerfield Commodities*, where the court ruled, alternatively, that parol evidence of an agreement to begin seller penalties at 12% moisture content was inconsistent with the written 7% threshold.[72] This is in fact a more interesting and difficult question than first appears.

At the surface, "12%" does seem inconsistent with "7%." However, on the relatively undisputed *Deerfield Commodities* facts, perhaps the correct answer lay somewhere below the surface. According to the seller, the jury, and Judge Rossman in dissent, the parties *agreed* prior to signing the contract that the written 7% figure would not be enforced and that the penalty threshold instead would be 12%.[73] To me at least, it does not seem altogether inconsistent, or even particularly implausible in *Deerfield Commodities*, that contracting parties would write one thing but agree outside the writing they would be bound by something else instead.

This point is analogous to Professor Corbin's polite exception taken to Justice Holmes's famous dictum that a party should not be allowed to prove a private agreement that "Bunker Hill Monument should signify Old South Church."[74] The "great judge was in error," Corbin wrote, because the risks of permitting such

---

[70] *Id.*; *see also* WILLISTON, *supra* note 4, at 1238-39 ("Collateral Agreements Contradicting an Implication of Law").

[71] *See generally* Loverin v. Paulus, 160 Or. App. 605, 611, 982 P.2d 20, 24 (1999); Leitz v. Thorson, 113 Or. App. 557, 561-62, 833 P.2d 343, 346 (1992).

[72] Recall that the court ruled also, applying Pennsylvania law, that that same "inconsistency" precluded admitting the parol agreement under the "fraud exception" found in Restatement (Second) of Contracts section 214. Of the several questionable conclusions reached by the *Deerfield Commodities* court, that one seems (and seemed to Judge Rossman) the most troubling. If followed, it virtually would eliminate the fraud exception altogether because, almost by definition, parol evidence will contradict the writing when fraud is alleged.

[73] Deerfield Commodities, Ltd. v. Nerco, Inc., 72 Or. App. 305, 696 P.2d 1096 (1985).

[74] Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899).

proof are "not so great as he feared."[75] One "must remember," he explained, "that a person asserting [such a claim] bears the heavy risk of not being able to persuade the court and jury that it is true."[76]

The point, as always in a parol-evidence dispute, is that admitting such evidence by no means insures that its proponent will prevail on the asserted claim or defense. It means simply that the trier of fact will have an opportunity to hear that claim or defense in its entirety and assess its truthfulness. As Professor Corbin observed so often, "The more bizarre and unusual an asserted interpretation is, the more convincing must be the testimony that supports it." Naturally at some point a court should "cease listening to testimony that white is black and . . . a dollar is fifty cents," but that point should be a "matter for sound judicial discretion and common sense," not one governed by an artificial "consistency" rule.[77]

4. Other, Miscellaneous Issues.

There are, of course, other parol evidence rule issues that arise occasionally, such as the legitimate scope of the fraud exception;[78] the meaning, if any, of the enigmatic "collateral agreement" exception;[79] and whether U.C.C. section 2-202 alters the common law rule in any significant way for a sale-of-goods contract.[80] Again, however, I do not intend to burden either myself or you with an exhaustive article examining all such issues.

Instead, I hope simply to convince you to "soften" Oregon's parol evidence rule by (1) reaffirming someday soon the funda-

---

[75] Corbin, *supra* note 40, at 624.

[76] *Id.* The Restatement now endorses Corbin's view. *See* RESTATEMENT (SECOND) OF CONTRACTS § 212 illus. 4 (1981); *see also* Sweet, *supra* note 3, at 1041 (describing differing judicial treatments of such "private codes").

[77] Corbin, *supra* note 40, at 623.

[78] *See, e.g.*, Berry v. Richfield Oil Corp., 189 Or. 568, 220 P.2d 106 (1950) (evidence of fraud inadmissible if it "directly conflicts" with the writing); Howell v. Oregonian Publ'g Co., 85 Or. App. 84, 86, 735 P.2d 659, 660 (1987) (evidence of fraud admissible even if it "directly contradicts" the writing).

[79] For an introduction to this particular enigma, see FARNSWORTH, *supra* note 6, at 424-25. Its difficulties include (1) whether a "collateral agreement" must be supported by separate consideration to be enforceable and (2) the admissibility of such an agreement that contradicts the principal writing.

[80] Probably not much, despite the drafters' rather clear preference for a more parol-friendly rule. U.C.C. § 2-202 cmt. 1 (1977) (rejecting any complete-integration assumption); *id.* cmt. 3 (the "certainty" test for complete integration)—*see supra* note 55 and accompanying text .

mental principle that a court's first duty in a contract dispute is to determine and enforce the parties' actual agreement; and by (2) analyzing parol evidence disputes in a way that generally will facilitate rather than hinder that task. Is the writing truly integrated? If so, did both parties truly intend a complete rather than partial integration? And if merely partial, does the disputed parol evidence truly contradict the writing in such a way that it positively must be kept from the trier of fact? To conclude by repeating, I myself have believed for many years that such a renewed emphasis on the parties' actual agreement, together with the logical, common-sense approach to issues I've described here, would contribute both to greater certainty in Oregon contract litigation and to results in that litigation more consistent with the ethical sense of our entire statewide community.

Thank you for reading. Very best wishes.

Sincerely yours,

Jim Mooney