

2013

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Recommended Citation

David G. Epstein, Adam L. Tate, & William Yaris, *Fifty: Shades of Grey--Uncertainty About Extrinsic Evidence and Parol Evidence After All These UCC Years*, 45 *Ariz. St. L.J.* 925 (2013).

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Citation: 45 Ariz. St. L.J. 925 2013



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FIFTY: Shades of Grey—Uncertainty About Extrinsic Evidence and Parol Evidence After All These UCC Years

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ABSTRACT

Lawyers and judges have been working with the Uniform Commercial Code for about fifty years. Most states adopted the Uniform Commercial Code between 1960 and 1965.

Notwithstanding these years of experience and the importance of certainty to parties entering into commercial transactions, there is still considerable confusion over the use of extrinsic evidence, parol evidence and the parol evidence rule in answering the questions (1) what are the terms of a contract for the sale of goods and (2) what do those contract terms mean. No “black and white rules”—just various “shades of grey.”

This essay explores the reasons for the confusion. While we do not formulate “black and white rules,” we do propose a more transparent approach that emphasizes both the language used in the Uniform Commercial Code and the policy basis for that language.

*. George E. Allen Chair, University of Richmond Law School and formerly an associate at the Phoenix firm that became Streich Lang (and has since become Quarles & Brady). I came to Phoenix because of Harvey Streich, who built a great law firm by recruiting hard-working students from around the country and giving us uncommon responsibility and support. Although a Michigan law graduate, Harvey, like so many Phoenix lawyers, thought of ASU as his law school. And, like so many of the people who were young lawyers at Streich Lang, I still think of Harvey, fondly and thankfully. This essay is dedicated to Harvey.

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INTRODUCTION

Many commercial disputes arise from disagreements regarding the terms of a written contract for the sale of goods.¹ Perhaps the most notorious case involving such a disagreement is *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*² There, Judge Friendly³ first stated that “the word ‘chicken’ standing alone is ambiguous,” and then looked to parol evidence—“an exchange of cablegrams”—and extrinsic evidence—“a definite trade usage that ‘chicken’ meant ‘young chicken’”—to determine whether the seller breached a written contract for the sale of “US Fresh Frozen Chicken” by delivering stewing chickens.⁴

While *Frigaliment* involved a dispute over interpreting a term in a written sale of goods contract, *Frigaliment* was a pre-UCC case.⁵ Accordingly, Judge Friendly’s opinion does not use the language of Article 2 of the Uniform Commercial Code (“UCC”).

Too often, the reported opinions in post-UCC cases that involve a dispute over interpreting a term in or adding terms to a written contract for the sale of goods do not use the language of the UCC. Instead, attorneys and

1. Cf. James J. Spigelman, *Contractual Interpretation: A Comparative Perspective*, 85 AUSTL. L.J. 412, 412 (2011). According to Spigelman, the Chief Justice of New South Wales, “[i]n my experience the majority of commercial disputes involve questions of contractual interpretation.” *Id.*

2. 190 F. Supp. 116 (S.D.N.Y. 1960). See, e.g., Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for a New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 226 n.119 (1998) (“Most law students recall the famous case of *Frigaliment* . . .”). The *Frigaliment* case is in most contracts casebooks. See, e.g., DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, *CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS* 471 (3d ed. 2011); E. ALLAN FARNSWORTH, WILLIAM F. YOUNG, CAROL SANGER, NEIL B. COHEN & RICHARD R. W. BROOKS, *CONTRACTS CASES AND MATERIALS* 401 (7th ed. 2008). One of the reasons that *Frigaliment* is more memorable than other cases in contracts casebooks is that so many law professors wear chicken suits while teaching the case. See (as in watch) jmanicus20, *Professor Rabin and the Chicken Case*, YOUTUBE (Nov. 18, 2006), <http://www.youtube.com/watch?v=xMVyWfIOTOk>; see also Ethan Leib, *Chicken. Fowl, Indeed*, PRAWFSBLAWG (Feb. 27, 2008, 11:23 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/chicken-fowl-in.html>.

3. The *Frigaliment* case was heard by the United States District Court for the Southern District of New York shortly after Judge Friendly’s appointment to the United States Court of Appeals for the Second Circuit. Prior to his appointment, Judge Friendly had been a founding partner of Cleary, Gottlieb, Friendly & Cox. While he had participated in numerous appeals, his trial court experience was very limited. And so, he volunteered to sit as a district court judge in the *Frigaliment* case. See DAVID M. DORSEN, *HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA* 60, 81, 315 (2012).

4. *Frigaliment*, 190 F. Supp. at 118–20.

5. See William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 11 (1967).

judges use (and misuse) the terms “extrinsic evidence,” “parol evidence,” and the “parol evidence rule,” rather than the language of Article 2.

Consider the following argument from *Shell Oil Co. v. AmPm Enterprises, Inc.*,⁶ a United States district court case involving a 1994 written contract for AmPm’s sale of Shell petroleum products.⁷ AmPm’s position was that a 1993 oral agreement that Shell would finance AmPm’s construction of a car wash was a part of the deal.⁸ More specifically,

Defendants argue that a prerequisite to application of the parole [sic] evidence rule is a finding by the court that the parties intended the written instrument to be the complete expression of their agreement. Defendants contend that extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on the threshold question of whether the written instrument is in fact an “integrated” agreement.⁹

Or, consider the statement by a New York Appellate Division Court in *Kolmar Americas, Inc. v. Bioversal, Inc.*:¹⁰

Article 2 of the UCC does not authorize the introduction of parole [sic] evidence to vary the plain meaning of the GTC tax clause. Extrinsic evidence does not merely “explain” or “supplement” a contractual term within the meaning of UCC 2-202 when the purported explanation or supplement actually contradicts the unambiguous contractual terms.¹¹

To state the obvious, both *Shell* and *Kolmar* misspell “parol evidence.”¹² More importantly, both *Shell* and *Kolmar* are sale of goods cases governed by the Uniform Commercial Code.¹³ This is important because the UCC provisions on extrinsic evidence and parol evidence are different from the common law of some states.¹⁴ More specifically, the UCC distinguishes

6. No. 95-CV-75117DT, 1996 WL 189433 (E.D. Mich. Mar. 18, 1996).

7. *Id.* at *1.

8. *Id.* at *2.

9. *Id.* at *3 (citation omitted).

10. 932 N.Y.S.2d 460 (N.Y. App. Div. 2011).

11. *Id.* at 461.

12. To be fair, an October 16, 2013 search of the Westlaw “all cases” database using the term “parole evidence” & da(2012) produced 143 hits. A similar search for “parol evidence” & da(2012) resulted in 1048 hits. The Official Text of the Uniform Commercial Code Article 2 uses the term “parol evidence” in the title to § 2-202 and the text of §§ 2-316 and 2-326. The Massachusetts version of § 2-326 uses the term “parole . . . evidence.” MASS. GEN. LAWS ch. 106, § 2-326(3) (2012).

13. *Frigaliment*, of course, was also a sale of goods case. See *supra* notes 2–4 and accompanying text. The 1957 contracts in *Frigaliment* predated New York’s subsequent adoption of the Uniform Commercial Code in 1962. Schnader, *supra* note 5, at 11.

14. See discussion *infra* Part I.

between extrinsic evidence and parol evidence to a greater extent than the common law of some states.¹⁵

The lawyer in *Shell* and the judges in *Kolmar* confuse “extrinsic evidence” with “parol evidence” by using the terms erroneously or interchangeably. Under the structure of UCC § 2-202, the *Shell* evidence of “prior or contemporaneous agreements or negotiations” is “parol evidence,” not “extrinsic evidence.” And, unlike UCC § 2-202, the New York court in *Kolmar* is using the terms “parole [sic] evidence” and “extrinsic evidence” interchangeably.¹⁶

In this essay, we will compare (1) the common law parol evidence rule with UCC § 2-202, (2) UCC § 2-202(a)’s treatment of extrinsic evidence with UCC § 2-202(b)’s treatment of parol evidence, and (3)¹⁷ UCC § 1-303’s provisions relating to extrinsic evidence with UCC § 2-202(a) provisions relating to extrinsic evidence.

15. *Id.*

16. While the language of the New York appellate court in *Kolmar* is inconsistent with the language of U.C.C. § 2-202, it is the language that is consistently used by New York appellate courts and other courts in cases governed by common law. *See, e.g.*, *Schron v. Troutman Sanders LLP*, 986 N.E.2d 430, 433 (N.Y. 2013) (“Parol evidence—evidence outside the four corners of the document . . .”).

17. We are mindful of the popularity, power, and simplicity of the “rule of three” in both rhetoric and storytelling. *See* Nick Skellon, *Rhetorical Devices: Anaphora*, SPEAK LIKE A PRO, http://www.speaklikeapro.co.uk/Rhetorical_devices.htm (last visited Sept. 19, 2013); Nick Skellon, *Rhetorical Techniques: Tricolon*, SPEAK LIKE A PRO, http://www.speaklikeapro.co.uk/What_is_tricolon.htm (last visited Sept. 19, 2013) (“A Tricolon (sometimes called the ‘Rule of Threes’) is really more of a general principle than a rhetorical technique, but it is very effective. For some reason, the human brain seems to absorb and remember information more effectively when it is presented in threes. . . . [Think of these famous] examples: . . .

- ‘Veni, vidi, vinci’. . . Julius Caesar
- ‘Tell me and I forget. Teach me and I may remember. Involve me and I will learn’ – Benjamin Franklin
- ‘The few, the proud, the Marines’ – advertising slogan, United States Marine Corps.”)

As for storytelling, remember (1) “Three Little Pigs”? Walt Disney Studios newlookchick, *Silly Symphony—The Three Little Pigs*, YOUTUBE (June 10, 2008), <http://www.youtube.com/watch?v=Olo923T2HQ4>; (2) “Goldilocks and the Three Bears”? TheABCZone, *Goldilocks and the Three Bears*, YOUTUBE (May 2, 2010), http://www.youtube.com/watch?v=63w9aPO-W_E; and, of course, (3) “The Fifty Shades of Grey Trilogy,” (now the subject of a course at American University). Rachel K. Bussel, ‘50 Shades of Grey’ Is the subject of a Course at American University, DAILY BEAST (Dec. 28, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/12/28/50-shades-of-grey-is-the-subject-of-a-course-at-american-university.html>.

I. COMPARISON OF THE UCC PAROL EVIDENCE RULE WITH ITS
COMMON LAW COUNTERPARTS

Law review discussions of the parol evidence rule often begin¹⁸ with the following quotation from a 19th century evidence treatise: “Few things are darker than [the parol evidence rule], or fuller of subtle difficulties.”¹⁹

In part, the common law parol evidence rule is so dark and difficult because “instead of a parol evidence ‘rule,’ there is a continuum of many different [common law] approaches, all using the same name and often the same words.”²⁰ Yet the differences among the approaches are often substantive.²¹

Professor Eric Posner has categorized states’ common law parol evidence rule formulations and applications as either “hard-PER” or “soft-PER.”²² In a state that falls into Posner’s hard-PER category, the threshold questions of (1) whether a written contract is final or complete and (2) whether a term in the written contract is ambiguous must be made from the writing itself without consideration of evidence of earlier negotiations and agreements or custom and usage.²³ In a soft-PER state, courts consider all relevant evidence in determining whether a written agreement is complete or whether a term is ambiguous.²⁴

The common law of most states is not completely consistent with either Posner’s hard-PER or soft-PER.²⁵ As the Missouri Court of Appeals explained:

18. See, e.g., Scott J. Burnham, *The Parol Evidence Rule: Don’t Be Afraid of the Dark*, 55 MONT. L. REV. 93, 93 (1994); see also Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1310 n.457 (1998) (calling it “obligatory”).

19. JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 390 (1898).

20. See Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 807 (2002); see also Ralph James Mooney, *A Friendly Letter to the Oregon Supreme Court: Let’s Try Again on the Parol Evidence Rule*, 84 OR. L. REV. 369, 372 (2005) (“[T]here exists even today no definitive statement of the [common law parol evidence] rule.”).

21. This essay will not discuss the various common law approaches to the parol evidence rule. Other law review articles have explored this topic and to do so here would be redundant, especially since this article focuses on the U.C.C..

22. 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).

23. *Id.* at 535.

24. *Id.*

25. *Id.* at 538–40 (“The reader should, for now, understand that the reality is more complex than the stylized versions of the parol evidence rule developed for purpose of analysis. Although some jurisdictions use something like the hard-PER, while other jurisdictions use something like the soft-PER, many jurisdictions take different and often conflicting approaches In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine,

The parol evidence rule is simple to state. When the parties have reduced their final and complete agreement to writing, the writing cannot be varied or contradicted. . . . But, the rule is difficult to apply. It does not answer two basic questions: (1) how do we determine whether the writing is the “final” and “complete” agreement, and (2) how do we determine what meaning to give the language used in that agreement.

To answer these two questions, we, in Missouri, no different than the courts in most other jurisdictions, have used a variety of principles, chosen randomly with no consistency, from the common law, the treatises of Professor Williston and Corbin, and the First and Second Restatement of the Law of Contracts. The principles developed within each source may well be consistent with one another. The principles of one source, however, are not necessarily consistent with the principles of another source. Thus, the random selection of principles from more than one source to resolve parol evidence issues has made the parol evidence rule in Missouri, no different than in most other jurisdictions, a deceptive maze rather than a workable rule.²⁶

No one has described the UCC provisions on parol and extrinsic evidence as “dark”, “difficult” or “deceptive.” The relevant UCC provisions have been properly described as “different”²⁷ from common law. The Ninth Circuit in *Nanakuli Paving & Rock Co. v. Shell Oil Co.*²⁸ was especially emphatic about the difference: “Perhaps one²⁹ of the most fundamental departures of the Code . . . is found in the parol evidence rule and the definition of an agreement between two parties.”³⁰

confusion, and cries of despair.”); see also John D. Calamari & Joseph M. Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 343–44 (1967).

26. *Jake C. Byers, Inc. v. J.B.C. Invs.*, 834 S.W.2d 806, 811 (Mo. Ct. App. 1992).

27. Luke L. Stuart, *Electricity and U.C.C. Article 2: A Regulatory and Contractual Pyramid of Mismatched Liabilities*, 40 No. 2 UCC L.J. Art. 4 (2007); see also *School-Link Techs., Inc. v. Applied Res., Inc.*, 471 F. Supp. 2d 1101, 1111 (D. Kan. 2007) (“The two legal standards are by no means synonymous.”); *Cent. Ariz. Water Conservation Dist. v. United States*, 32 F. Supp. 2d 1117, 1127 n.8 (D. Ariz. 1998) (“[U.C.C. 2-202] is a significant change from the common law parol evidence rule.”); *contra Port City Constr. Co., Inc. v. Henderson*, 266 So. 2d 896, 899 (Ala. Civ. App. 1972) (“The provisions of Section 2-202 . . . do not depart from the law of contracts as it existed prior to the adoption of the [Uniform] Commercial Code.”).

28. 664 F.2d 772 (9th Cir. 1981).

29. We will save the question of whether “parol evidence rule” and “definition of an agreement” are two, not one “fundamental departure(s).”

30. *Nanakuli*, 664 F.2d at 794.

The difference (or “fundamental departure”) is not obvious in the wording of the UCC’s parol evidence rule. Although the term “parol evidence rule” does not appear in UCC Article 2, courts generally describe UCC § 2-202 as the UCC’s parol evidence rule.³¹ It provides:

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 performance, course of dealing or usage of trade (§ 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.³²

Although courts and commentators commonly refer to UCC § 2-202 as the UCC’s parol evidence rule, UCC § 2-202 is more than a parol evidence rule. The parol evidence rule only governs the question of whether a court can look to prior agreements or negotiations between the parties to determine the terms of the contract.³³ UCC § 2-202(a) is not a parol evidence rule.³⁴

The prefatory words of UCC § 2-202 read together with the words of subsection (b) above are not a fundamental departure from the words of the various versions of the common law parol evidence. In his book, *Elements of Contract Interpretation*, Professor Steven Burton sets out the following as “the most widely endorsed version of the common law parol evidence . . .

31. *E.g.*, *Froines v. Valdez Fisheries Dev. Ass’n, Inc.*, 75 P.3d 83, 86 n.4 (Alaska 2003) (“This provision codifies the parol evidence rule in section 2-202 . . .”); *Sunhyong Am., Inc. v. Beta Sound of Music Corp.*, 605 N.Y.S.2d 62, 63 (App. Div. 1993) (invoking “[t]he parol evidence rule embodied in U.C.C. 2-202”).

32. U.C.C. § 2-202 (2001).

33. *Klosek v. Am. Express Co.*, No. 08-426 (JNE/JJG), 2008 WL 4057534, at *13 n.9 (D. Minn. Aug. 26, 2008) (“The parol evidence rule, however, only governs admissibility of prior agreements and negotiations, not other forms of extrinsic evidence.”); *see also* STATE OF N.Y. LAW REVISION COMM’N, REPORT RELATING TO THE UNIFORM COMMERCIAL CODE 598–99 (1955) (“The [parol evidence rule] excludes only utterances of the parties and has nothing to do with proof of usage to explain the meaning of a term. However, this limitation has not always been recognized in judicial opinions.”).

34. *Cf.* Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35, 71–72 (1985) (comparing the common law parol evidence rule to U.C.C. § 2-202(b)).

synthesizing the authorities read for this study”: “When an enforceable, written agreement is the final and complete expression of the parties’ agreement, prior oral and written agreements and contemporaneous oral agreements (together ‘parol agreements’) . . . do not establish contract terms when the parol agreement . . . adds to the terms of the writing”³⁵

While UCC § 2-202 does not use the term “parol agreements,” the UCC § 2-202 phrase “prior agreement or a contemporaneous oral agreement” is essentially the same thing. Both common law and UCC § 2-202 prevent a court from looking to earlier agreements to (i) contradict the terms of a final written contract or (ii) add terms to a final written contract *if that written contract was intended to be the final and complete expression*.

The italicized language is especially important. As Professor George I. Wallach observed:

The overriding issue in parol evidence disputes is whether the parties intended the written document to be a final and complete statement of their agreement, or a final statement of part of their agreement, or perhaps nothing more than a memorandum not intended to be a final expression of their agreement at all.³⁶

And, neither the common law parol evidence rule nor UCC § 2-202 expressly addresses how a court is to determine whether the final writing was intended to be the complete, final expression.³⁷

Courts have used different tests to determine whether the writing is complete. Some common law parol evidence rule decisions have applied the “four corners test,” i.e., the trial court looks only to the words within the four corners of the final writing to determine whether it is complete.³⁸ Under other common law parol evidence decisions, other evidence,

35. STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 64 (2009). *But cf.* Recent Developments, *Parol Evidence: First New York Construction of U.C.C. § 2-202*, 66 COLUM. L. REV. 1370, 1371 (1966) (“Since it has developed through a long course of historical accretion, this common law construct lacks the clarity of a legislative rule. Some treatise writers have sought to restate the parol evidence rule; however, none of these restatements has been accepted as definitive.”).

36. George I. Wallach, *The Declining “Sanctity” of Written Contracts—Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 MO. L. REV. 651, 655 (1979).

37. *See generally id.*

38. *See* *Thompson v. Libbey*, 26 N.W. 1, 2 (Minn. 1885) (“The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself.”); *see also* 2 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 633, at 1226 (1st ed. 1920) (“It is generally held that the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms.”).

including evidence of prior negotiations, can be considered for the limited purpose of determining whether the agreement is complete.³⁹

There is no reported case citing UCC § 2-202 that either expressly accepts or expressly rejects the “four corners test.”⁴⁰ This absence of instructive case law is not surprising. As Professor E. Allan Farnsworth observed:

Surprisingly little light is shed on the problem [dispute over process for determining complete integration] by the hundreds of decisions resolving the issue of whether an agreement is completely integrated. Opinions often fail to set out the text of the writing in full, and each case turns on its own peculiar facts. . . .

In the face of this uncertainty, the contract drafter is wise to recite that the agreement is completely integrated if it is meant to be so regarded.⁴¹

There are statements in treatises and law review articles that Comment 3 to UCC § 2-202 rejects a four corners test.⁴² For example, Professor Russell Weintraub asserted that “official comment 3 assumes that the court will hear the alleged extraneous terms before deciding whether the parties intended the writing as the ‘complete and exclusive statement of the terms of the agreement,’” and then cites to Comment 3 to support that assertion.⁴³

Official Comment 3 simply provides:

Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are *such that, if agreed upon, they would certainly have been included in the*

39. See, e.g., *Masterson v. Sine*, 436 P.2d 561, 563–64 (Cal. 1968) (in bank) (“The requirement that the writing must appear incomplete on its face has been repudiated in many cases where parol evidence was admitted ‘to prove the existence of a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms’—even though the instrument appeared to state a complete agreement.”).

40. There are statements in treatises and law review articles that suggest that, in sale of goods cases, courts can use the four corner test to determine whether the writing was intended as complete. See, e.g., 1 JAMES J. WHITE, ROBERT A. SUMMERS, & ROBERT A. HILLMAN, *UNIFORM COMMERCIAL CODE PRACTITIONER TREATISE SERIES* 225 (6th ed. 2012); Russell J. Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the U.C.C.*, 53 TEX. L. REV. 60, 74 (1975). The cases there cited do not support the proposition that a court has expressly adopted the four corners test.

41. 2 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 222–23 (2d ed. 1998).

42. 1 WHITE, SUMMERS & HILLMAN, *supra* note 40, at 225–26; Keith A. Rowley, *Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (And Everything in Between)*, 69 MISS. L.J. 73, 337 (1999); see also Weintraub, *supra* note 40, at 74.

43. Weintraub, *supra* note 40, at 74.

document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.⁴⁴

The italicized words are quoted by Professor Weintraub to support his assertion that Comment 3 provides a reason that courts should not use the “four corners” approach in determining whether a written sale of goods contracts is complete under § 2-202(b).⁴⁵

In sum, under both common law parol evidence rules and UCC § 2-202, the use of parol agreements to add terms to a written contract turns on determining whether the written contract is complete. And there is no clear difference between the language of UCC § 2-202 and common law parol evidence rules as to whether courts can and should use a “four corner” approach in making that determination.

Yet another law professor suggests another difference between UCC § 2-202 and common law parol evidence rules. In his 1955 report to the New York Law Revision Commission, Professor Edwin Patterson writes: “The chief purpose of this section is apparently to ‘loosen up’ the parol evidence rule by abolishing the presumption that a writing (apparently complete) is a total integration.”⁴⁶

It is clear from both the language of UCC § 2-202—“evidence of consistent additional terms”—and the language of Official Comment 1 thereto—“[t]his section definitely rejects: (a) any assumption that because a writing has been worked which is final on some matters, it is to be taken as including all the matters agreed upon”—that there is no presumption under UCC § 2-202 that a writing is complete.⁴⁷ It is less clear how pervasive such a presumption is under common law.

Professor Farnsworth concludes that there is no such presumption under common law: “It is generally agreed that the mere fact that an agreement is integrated does not give rise to a presumption that it is completely integrated.”⁴⁸ Regrettably, Professor Farnsworth does not provide citations

44. U.C.C. § 2-202 cmt. 3 (2000) (emphasis added).

45. Weintraub, *supra* note 40, at 74; cf. Ellen Byers, *Corporations, Contracts, and the Misguiding Contradictions of Conservatism*, 34 SETON HALL L. REV. 921, 931–32 n.50 (2004) (“[T]he policy behind the U.C.C. . . . encourages courts to look beyond the four corners.”).

46. EDWIN PATTERSON, N.Y. LAW REVISION COMM’N, STUDY OF THE UNIFORM COMMERCIAL CODE 598 (1955); see also *Parol Evidence: First New York Construction of U.C.C. § 2-202*, 66 COLUM. L. REV. 1370, 1372 (1966) (“[T]he U.C.C. reversed a long-standing presumption in favor of complete integration.”).

47. *E.g.*, *Anderson & Nafziger v. G. T. Newcomb, Inc.*, 595 P.2d 709, 714 (Idaho 1979) (“2-202 was intended to liberalize the parol evidence rule and to abolish the presumption that a writing is a total integration.”); *Michael Schiavone & Sons, Inc. v. Securalloy Co.*, 312 F. Supp. 801, 804 (D. Conn. 1970) (“2-202 was intended to liberalize the parol evidence rule and abolish the presumption that a writing is a total integration.”).

48. 2 FARNSWORTH, *supra* note 41, at 220.

to the cases (or even the law review articles) that so agree. Professor Farnsworth's footnote at the end of the statement simply refers to a 1909 case "[f]or an example of a few loose assertions to the contrary."⁴⁹

There are numerous, more recent cases with dicta suggesting that there is a presumption under common law that a written contract is complete.⁵⁰ Some of these statements seem to combine the "four corners" approach with a presumption of completeness. For example, in *Hatley v. Stafford*,⁵¹ the Oregon Supreme Court stated: "The court should presume that the writing was intended to be a complete integration, at least *when the writing is complete on its face . . .*"⁵²

Even if UCC § 2-202(b) differs from common law parol evidence rules with respect to whether courts should use the "four corners" approach to determine completeness and as to whether there is a presumption that a written contract is complete, these differences cannot be the reason for the Ninth Circuit's "fundamental departure" language in the *Nanakuli* case. There must be some other reason for the *Nanakuli* dictum and some other reason that so many courts and commentators describe § 2-202 as "more liberal" than common law parol evidence rules.⁵³

The clearer differences between Article 2 and common law are with respect to extrinsic evidence, rather than parol evidence and the parol evidence rule.⁵⁴ And under Article 2, unlike under common law, there are clear differences between extrinsic evidence and parol evidence.

49. *Id.* at 220 n.20.

50. *E.g.*, *Podraza v. New Century Physicians of Neb., LLC*, 789 N.W.2d 260, 266 (Neb. 2010) (recognizing a "legal presumption that the writing is a complete integration"); *Melvin v. Principi*, No. 5:03-CV-968-FL(3), 2004 WL 3769429, at *9 (E.D.N.C. Dec. 2, 2004) (requiring plaintiff to "rebut the presumption of complete integration").

51. 588 P.2d 603 (Or. 1978) (en banc).

52. *Id.* at 609 (emphasis added).

53. *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 972 (4th Cir. 1977) (asserting that a more liberal parol evidence rule was incorporated into U.C.C. § 2-202); Peter G. Dillon & Alvin C. Harrell, *Revocation of Acceptance Under U.C.C. Section 2-608 as a Remedy in a Consumer Sales Transaction Involving Conflicting Oral Quality Representations and Standardized Quality Warranty Disclaimer Language*, 25 OKLA. CITY U. L. REV. 269, 283 (2000) ("U.C.C. drafters deliberately designed the Parol Evidence Rule in section 2-202 to be more liberal and flexible than other pre-code versions of the rule.").

54. *O'Neill v. United States*, 50 F.3d 677, 684 (9th Cir. 1995) ("The Code permits the use of extrinsic evidence in a manner that substantially narrows the traditional application of the parol evidence rule.").

II. COMPARISON OF UCC § 2-202(A)'S TREATMENT OF EXTRINSIC EVIDENCE WITH UCC § 2-202(B)'S TREATMENT OF PAROL EVIDENCE

Looking to the words of a dictionary⁵⁵ and the words of many reported cases,⁵⁶ parol evidence is extrinsic evidence, i.e., evidence extrinsic to the “four corners” of a writing. Literally, “parol evidence” is “extrinsic evidence.” But not legally—at least not under the UCC. Looking to the words of the UCC, “parol evidence” is different from “extrinsic evidence.”

A. Parol Evidence Distinguished from Extrinsic Evidence

“Parol evidence” is more narrowly defined by the UCC than by many courts applying common law. Under UCC § 2-202, “parol evidence” is limited to “only prior oral and written agreements, and contemporaneous oral agreements.”⁵⁷

The phrase “parol or extrinsic evidence” appears in the title to UCC § 2-202 and the text of UCC §§ 2-316(1) and 2-326(4). If the UCC viewed “parol evidence” as the same as “extrinsic evidence,” then the UCC would not use the phrase “parol evidence or extrinsic evidence.”⁵⁸ Courts applying

55. The leading 21st century law dictionary, Black's Law Dictionary, defines “parol evidence” as “[e]vidence of oral statements,” and defines “extrinsic evidence” as “[e]vidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement.” BLACK'S LAW DICTIONARY 637–38 (9th ed. 2009). The quoted language in the previous sentence supports the conclusions that (1) “parol evidence” is a form of “extrinsic evidence” and (2) “parol evidence” is not the only form of extrinsic evidence, since extrinsic evidence also includes the circumstances surrounding the agreement. There is, however, additional, relevant language in Black's definitions of “extrinsic evidence” and “parol evidence.” The definition of “extrinsic evidence” continues: “Also termed *extraneous evidence*, *parol evidence*, *evidence aliunde*.” And the definition of “parol evidence” goes on to say “[s]ee *extrinsic evidence*.” *Id.*

56. *Amkor Tech., Inc. v. Motorola, Inc.*, No. C.A. No. 02C-08-160 CHT, 2007 WL 3360039, at *7 (Del. Super. Ct. Nov. 14, 2007) (“The most common form of extrinsic evidence is parol evidence.”); *see also* *Yacoubou v. Wells Fargo Bank, N.A.*, 901 F. Supp. 2d 623, 635 (D. Md. 2012) (“[e]xtrinsic evidence, such as evidence of the parties' prior agreements”); *United Nat'l Maint., Inc. v. San Diego Convention Ctr. Corp.*, No. 07CV2172 AJB, 2012 WL 3861695, at *12 (S.D. Cal. Sept. 5, 2012) (“extrinsic evidence of any prior agreement or contemporaneous oral agreement”).

57. Wallach, *supra* note 36, at 665.

58. *Cf. In re MCI Telecomms. Complaint*, 596 N.W.2d 164, 175–76 (Mich. 1999) (“It is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory.”); BJ Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L.J. 185, 190 (2010) (“Section 105 of the Senate Manual states that ‘[a] court presumes that different words have different meanings’ and ‘that every word is there for a reason.’”) (alteration in original) (quoting OFFICE OF THE

Article 2 should not use the terms “extrinsic evidence” and “parol evidence” interchangeably.

While “parol evidence or extrinsic evidence” is a part of the title of UCC § 2-202, neither the term “extrinsic evidence” nor the term “parol evidence” appears in the text of UCC § 2-202. Instead, the prefatory part of UCC § 2-202 uses the words “prior agreement or of a contemporaneous oral agreement,” and UCC § 2-202(a) uses the words “course of dealing⁵⁹ or usage of trade⁶⁰ or by course of performance.”⁶¹

The first quoted phrase—“prior agreement or of a contemporaneous oral agreement”—is “parol evidence.” The second quoted phrase from UCC § 2-202—“course of dealing or usage of trade or course of performance”—is “extrinsic evidence.”

In other words, UCC § 2-202(a) applies only to “extrinsic evidence,” and UCC § 2-202(b) applies only to “parol evidence.” This is important because UCC § 2-202(a)’s rules for extrinsic evidence are different from UCC § 2-202(b)’s rules for parol evidence.

B. Comparison of Using Parol Evidence to “Supplement” the Terms of a Written Contract for the Sale of Goods with Using Extrinsic Evidence to “Supplement” the Terms of Written Contracts for the Sale of Goods

The verb “supplemented”⁶² immediately precedes both paragraphs (a) and (b) of UCC § 2-202. Either extrinsic evidence or parol evidence can be used to add a term (i.e., “supplement”) to a written contract for the sale of goods.

The use of parol evidence to supplement is, however, expressly limited by the concluding clause of UCC § 2-202(b), “unless the court finds the writing to have been intended also a complete and exclusive statement of the terms of the agreement.” There is no similar limiting language for extrinsic evidence in UCC § 2-202(a). This comparison of the language of

LEGISLATIVE COUNSEL, U.S. SENATE, LEGISLATIVE DRAFTING MANUAL § 105 (1997)), available at [http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual\(1997\).pdf](http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf).

59. “Course of dealing” is defined in U.C.C. § 1-303(b) (2001) (formerly U.C.C. § 1-205(1)).

60. “Usage of trade” is defined in U.C.C. § 1-303(c) (2001) (formerly U.C.C. § 1-205(2)).

61. “Course of performance” is defined in U.C.C. § 1-303(a) (2001) (formerly U.C.C. § 2-208).

62. *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 545 (Iowa 1995) (“‘Supplement’ means ‘to add . . . to.’ Consequently, the trade-usage evidence upon which C-Thru relies is admissible even though it adds a new term to the contract.” (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2297 (1993))).

paragraphs (a) and (b) of UCC § 2-202 supports the conclusion that a court can look to evidence of course of dealing or trade usage to add terms to a writing, even if that writing is a complete integration.⁶³

Policy reasons also support courts' looking to extrinsic evidence to add terms to a "complete and exclusive" written contract for the sale of goods. Assume, for example, that Great Harvest Bread Co. ("GH") contracts for the sale and daily delivery of bread to Eppie's Restaurant ("ER").⁶⁴ GH and ER sign a long, detailed written contract.

This written contract between GH and ER does not, however, contain any provision about the time of delivery. ER wants the bread delivered before 8 a.m., which is the usual deadline for food deliveries to Charlottesville restaurants; GH wants to deliver the bread between 10 a.m. and 11 a.m.

What are an arbitrator's or judge's choices in resolving this dispute? She could (1) look to trade custom to add a delivery term, (2) make up her own term, or (3) leave a gap in the contract (which is essentially siding with GH). Of the three choices, (1) looking to trade custom is the easiest to defend on general policy grounds. And looking to trade custom to add a term is the choice most consistent with UCC policy.⁶⁵

Professor Karl Llewellyn⁶⁶ was the principal architect of the Code⁶⁷ and "emphasis on the importance of applying trade norms to regulate

63. *Id.* ("[E]ven a completely integrated contract may be supplemented by practices in the industry that do not contradict express terms of the contract."); 1 WHITE ET AL., *supra* note 40, at 255 ("One can always use trade usage and its cohorts, but other extrinsic evidence (such as oral testimony) may be used only if the writing is found not to be fully integrated.").

64. EPIE'S RESTAURANT, <http://eatateppies.com/> (last visited Sept. 23, 2013) (a wonderful restaurant owned and operated by the senior author's two sons).

65. Professor Lisa Bernstein agrees that looking to trade custom is most consistent with U.C.C. policy, but questions whether looking to trade custom is the correct policy. She provides empirical data that challenges the Code's "assumptions that unwritten usages of trade that are widely known across the relevant geographic boundaries of trade exist, that these usages can [be] found by courts, and that contextualized adjudication is a majoritarian default rule from the perspective of business transactors." Lisa Bernstein, *Merchant Law in a Modern Economy 2* (Coase-Sandor Inst. for Law and Econ., Working Paper No. 639, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242490; see also Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1205 (2012) (suggesting that Article 2 erred in its focus on usage because merchants did not create uniform customs but rather used local law when they needed to supplement their common contracts).

66. See Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-1949*, 51 SMU L. REV. 275, 277 (1998) (describing Professor Llewellyn as "a radical professor—a fan of folk music, a poet, a supporter of the New Deal, a devotee of anthropologists and . . . radical institutional economists, a despiser of pallid intellectuals who instead preferred 'action-direction thinking,' and a decorated veteran of the German Army of World War I who was about to divorce his second wife and marry one of his former students").

commercial transactions was possibly the most important of his goals for commercial law.”⁶⁸ Professor Llewellyn “advocated a much wider reliance on trade usage than that contemplated under traditional contract law and parol evidence rules.”⁶⁹

In his introductory commentary to the 1941 draft of the Revised Uniform Sales Act, Llewellyn wrote: “[b]etween merchants, the usage of trade, or a particular trade, and any course of dealing between the parties are presumed to be the background which the parties have presupposed in their bargain and have intended *to read into the particular contract*.”⁷⁰

C. *Terms in Written Contracts for the Sale of Goods “Explained” by Extrinsic Evidence*

Extrinsic evidence is not only relevant to questions of what additional terms should be “read into” a written contract, but also to questions of how to read the words already in the written contract. It is not just the verb

67. See Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962) (“Make no mistake: this Code was Llewellyn’s Code.”); see also Roger W. Kirst, *Usage of Trade and Course of Dealing: Subversion of the U.C.C. Theory*, 1977 U. ILL. L.F. 811, 812 n.4 (1977) (“[W]hen the interpretation of a Code section is uncertain the task of determining the best interpretation of the statutory language will be easier if the judge or lawyer first understands what Llewellyn sought to do and how he thought contract law should be organized.”). *But cf.* Soia Mentschikoff, *The Uniform Commercial Code: An Experience in Democracy in Drafting*, 36 A.B.A. J. 419, 419–20 (1950) (downplaying Llewellyn’s influence in the original drafting of the U.C.C.).

68. Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949–1954*, 49 BUFF. L. REV. 359, 414 (2001); see also U.C.C. § 1–103 (2001) (identifying “continued expansion of commercial practices through custom, usage, and agreement of the parties” as one of the “underlying purposes and policies” of the U.C.C.).

69. Mark Garavaglia, *In Search of the Proper Law in Transnational Commercial Disputes*, 12 N.Y.L. SCH. J. INT’L & COMP. L. 29, 90 (1991).

70. See REVISED UNIF. SALES ACT § 59–59(d), Introductory Comment (Report and Second Draft), reprinted in 1 UNIFORM COMMERCIAL CODE DRAFTS 334–35 (E. Kelly ed. 1984) (emphasis added); see also Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 467–69 (1987). Professor Wiseman argues that scholars should give greater consideration to Llewellyn’s early drafts: “Karl Llewellyn’s drafts for the law of sales, which he wrote in 1940 and revised in 1941 and 1943, have been largely ignored. When scholars study the Code, they typically look only at the already modified drafts from 1949 onward and the final product of the 1960s. The ‘legislative history’ has come to mean the New York Law Revision Commission’s Report of 1954–56 on the 1952 Official Draft and the subsequent revisions The failure to examine the early drafts and early history of the Code has . . . led to confusion in the academic commentary about the intended scope and purpose of certain provisions of the current Code.” *Id.* at 466–69. *But cf.* Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 814 (1958) (arguing that the legislative history adds little to the official comments and is “helpful only in unusual cases”).

“supplemented,” but also the verb “explained” that immediately precedes UCC § 2-202 paragraphs (a) and (b). Section 2-202 is not only a parol evidence rule, but also a guide to interpretation.⁷¹

Under UCC § 2-202, either extrinsic evidence or parol evidence can be used to interpret a term (i.e., “explain”) in a written contract for the sale of goods. And UCC § 2-202’s provisions on contract interpretation are a “fundamental departure” from common law.

One such “fundamental departure” is the shift away from the “plain meaning rule” which is a part of the common law but not the UCC.⁷² Under the common law plain meaning rule, neither parol evidence nor extrinsic evidence can be considered in interpreting a word in a written contract that is unambiguous, i.e., a word whose meaning is plain.⁷³ The plain meaning rule requires courts to give unambiguous contract terms their seemingly unambiguous meanings.

Courts applying the common law plain meaning rule disagree as to how to determine whether a word in a written contract is ambiguous. Some courts take a “four corners approach,” looking only to the writing as a whole to determine whether there is an ambiguity.⁷⁴ Other courts take the position that, under common law, extrinsic evidence should be considered

71. See PATTERSON, *supra* note 46, at 601 (“Whether rules as interpretation by usage, dealings or course of performance should be included in a section on the parol evidence rule seems at least doubtful. It would seem less confusing to state clearly the rules as to exclusion or admission of utterances of the parties and to leave to other sections the rule as to usage and prior dealings and course of performance.”). *But cf.* Margaret N. Kniffin, *Conflating and Confusing Contract Interpretation and the Parol Evidence Rule: Is The Emperor Wearing Someone Else’s Clothes?*, 62 RUTGERS L. REV. 75, 110–20 (2009). Even though rules of interpretation are not a part of the various common law parol evidence rules, many courts seem to “conflate” questions of contract interpretation and contract supplementation and invoke the parol evidence rule instead of the common law plain meaning rule in answering questions of contract interpretation. And, according to Professor Kniffin, the conflation is both confusing and harmful. *Id.* Still other commentators believe that there is not a clear line between interpretation and supplementation. See, e.g., Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 801 (2002) (“[T]he parol evidence rule and the plain meaning rule are conjoined like Siamese twins. Even though many academics and more than a few judges have tried to separate them, the bulk of the legal profession views them as permanently intertwined.”).

72. See Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT’L L. 157, 157 (2004) (“In American contract law, plain meaning is more consistent with common law practice, while incorporation [of usage] is explicitly a part of the Uniform Commercial Code.”).

73. See BURTON, *supra* note 35, at 109.

74. E.g., *Sack Bros. v. Great Plains Coop., Inc.*, 616 N.W.2d 796, 804–05 (Neb. 2000); see also BURTON, *supra* note 35, at 126.

in determining whether there is an ambiguity but for that limited purpose only.⁷⁵

While most law professors criticize the common law plain meaning rule, most courts use the rule when interpreting a term in a written contract—unless that written contract is for the sale of goods.⁷⁶ Official Comment 1(c) to UCC § 2-202 expressly rejects the plain meaning rule.⁷⁷

More importantly, the appellate court cases interpreting written contracts for the sale of goods have generally permitted courts to consider extrinsic evidence without first finding that the language in the written contract is ambiguous.⁷⁸ For example, in *Columbia Nitrogen Corp. v. Royster Co.*,⁷⁹ the Fourth Circuit stated:

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. This rule, however, has been changed by the Uniform Commercial Code which Virginia has adopted. . . . The importance of usage of trade and course of dealing between the parties is shown by § 8.2-202, 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. . . . 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.⁸⁰

75. *E.g.*, *Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 702 N.W.2d 355, 376 (Neb. 2005) (Gerrard, J., dissenting); *see also* BURTON, *supra* note 35, at 128.

76. *See* BURTON *supra* note 35, at 138.

77. U.C.C. § 2-202 cmt. n.1(c) (2000) (“This section definitely rejects . . . [t]he requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.”).

78. *See, e.g.*, *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003) (“The U.C.C. therefore rejects the common law rule that parol evidence is admissible only where the terms of a contract are ambiguous.”); *Dawn Enters. v. Luna*, 399 N.W.2d 303, 306 n.3 (N.D. 1987) (“The Official Comment to [2-202] makes clear that a contract need not be ambiguous for the admission of evidence of course of performance, course of dealing or usage of trade”). There are, however, federal district court cases that seem to condition consideration of extrinsic evidence in interpreting a term in a written contract for the sales of goods on a finding of ambiguity. *See Mies Equip., Inc. v. NCI Bldg. Sys., L.P.*, 167 F. Supp. 2d 1077, 1082–83 (D. Minn. 2001), *discussed in* Robyn L. Meadows, Larry T. Garvin & Carolyn L. Dessin, *Sales*, 57 BUS. LAW. 1669, 1675 (2002) (“Despite the clear language of U.C.C. section 2-202 and the Official Comments, courts continue to apply the parol evidence rule based on the common-law concept of ambiguity.”).

79. 451 F.2d 3 (4th Cir. 1971).

80. *Id.* at 8–9 (citation omitted).

In so ruling, the Fourth Circuit also looked to UCC § 1-102 (now 1-103), which provides that “the continued expansion of commercial practices through custom, usage and agreement of the parties” is an underlying Code policy.⁸¹ Further support of the basic proposition that the UCC permits broader use of extrinsic evidence to supplement or interpret a written contract than common law can be found in UCC § 1-303 (formerly UCC § 1-205).⁸²

III. COMPARISON OF THE TREATMENT OF EXTRINSIC EVIDENCE IN UCC §§ 2-202 AND 1-303

UCC § 2-202 expressly refers to UCC § 1-303. There is no question that the two provisions need to be read together.⁸³ The open question is what exactly UCC § 1-303 adds to UCC § 2-202.

And this question remains open because appellate courts have not expressly addressed the issue. In the main, appellate court decisions simply cite to or quote from UCC § 1-303 or UCC § 2-202, or both. Law professors, not judges, have been exploring (if not explaining) the relationship.⁸⁴

There is language in the legislative history of the UCC that supports the argument that UCC § 1-303 (originally § 1-205) permits a more expansive use of extrinsic evidence than UCC § 2-202:

One of the key sections of the Code is 1-205 [The] Text [of section 1-205] and Comments evidence an important principle and philosophy that appears repeatedly throughout the Code. It is that the practices of businessmen and business houses are important

81. *Id.* at 8 (quoting VA. CODE ANN. § 8.1-102 (1965)).

82. U.C.C. § 1-303 is essentially the same as former U.C.C. § 1-205. The only significant change is the addition of language regarding course of performance. *See* Kathleen Patchel & Boris Auerbach, *The Article 1 Revision Process*, 54 SMU L. REV. 603, 610 (2001) (summarizing the revision as “adding course of performance to course of dealing and usage of trade as relevant in ascertaining the meaning of the parties’ agreement and supplementing its express terms”).

83. Professor Burton argues that because Article 2 specifically applies to sales of goods, only U.C.C. § 2-202 speaks to the use of extrinsic evidence in sale of goods contracts cases. BURTON, *supra* note 35, at 143. We cannot find a reported case that takes this position. And, of course, we can find an express reference to U.C.C. § 1-303 in U.C.C. § 2-202. U.C.C. § 2-202(a) (2001).

84. *See generally* Jack M. Graves, *Course of Performance as Evidence of Intent or Waiver: A Meaningful Preference for the Latter and Implications for Newly Broadened Use Under Revised U.C.C. Section 1-303*, 52 DRAKE L. REV. 235 (2004); Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, “Express Terms,” and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N.C. L. REV. 777 (1986).

factors in construing their contracts and actions in determining their rights and liabilities. Allied with this principle is another, namely, that many of the changes effected by the Code are designed to adapt rules of law to the way business is actually carried on.⁸⁵

More importantly, there is language in UCC §§ 1-303 and 2-202 that supports the argument that UCC § 1-303 permits a more expansive use of extrinsic evidence than UCC § 2-202. UCC § 1-303(d) provides:

A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.⁸⁶

Recall the similar but not identical language of UCC § 2-202. More specifically, note the verb that appears in UCC § 1-303(d) that does not appear anywhere in UCC § 2-202(b): “qualify.” The word “qualify” must be different from not only the word “supplement” that appears in both UCC § 1-303 and UCC § 2-202, but also from the word “contradict” that appears in UCC § 2-202, but not in UCC § 1-303.

The part of UCC § 1-303 that most directly corresponds to the UCC § 2-202 phrase “may not be contradicted by” is UCC § 1-303(e), which provides in pertinent part:

[T]he express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable: (1) express terms prevail over course of performance, course of dealing, and usage of trade.⁸⁷

85. ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW, REPORT OF THE COMMITTEE ON THE PROPOSED COMMERCIAL CODE, *reprinted in* Walter D. Malcolm, *The Proposed Commercial Code*, 6 BUS. LAW. 113, 125–26 (1951) (alteration in original) (emphasis added).

86. U.C.C. § 1-303(d) (2001) (emphasis added). U.C.C. § 1-303(d) replaces § 1-205(3) which read: “(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and *supplement or qualify* terms of an agreement.” (emphasis added).

87. U.C.C. § 1-303(e)(1) (2001).

Contracts scholars are divided as to the practical significance, if any, of these differences in wording. First, some legal scholars have taken the position that course of dealing, usage of trade or course of performance evidence that contradicts the writing is inadmissible.⁸⁸ Second, other scholars have concluded that course of dealing, usage of trade, or course of performance evidence that contradicts the writing is always admissible, but never controlling.⁸⁹ Third, still, others assert that such evidence is not only admissible, but can be controlling if the court concludes that was the intention of the parties.⁹⁰

The first two positions seem to lead to the same result—extrinsic evidence cannot contradict express terms. And that is the same result that would be reached by a court applying common law.

It is the last position that is a “fundamental departure” from common law. Professor Roger Kirst is generally regarded as the leading proponent of this position.⁹¹ According to Professor Kirst:

The introduction of evidence of a relevant usage of trade or course of dealing will sometimes develop an apparent conflict between the express term and an additional term. In these cases the conflict will have to be resolved to determine which term the parties intended to govern the dispute The direction to *construe consistently*⁹² assumes the existence of conflict between written terms and usage of trade or course of dealing. The problem is to determine the intention of the parties to the contract The writing contains a term that appears to state the intent of the parties. The usage of trade, or course of dealing, however, indicates a different intent. If a factfinder is to reconcile the conflicting evidence by reasonable consistent construction, both the evidence of the writing and the evidence of the usage of trade or course of dealing must be [considered] by the factfinder to determine which intent is controlling.⁹³

88. 1 WHITE, SUMMERS & HILLMAN, *supra* note 40, at 238–39 (citing to twelve cases to support this proposition).

89. JOSEPH M. PERILLO & JOHN D. CALAMARI, CALAMARI AND PERILLO ON CONTRACTS 146 (6th ed. 2009) (reading 2-202 as the basis for admissibility and 1-205(4) (now 1-303(e) as the basis for not controlling).

90. See, e.g., Kirst, *supra* note 67, at 824–25.

91. See 1 WHITE, SUMMERS & HILLMAN, *supra* note 40, at 239 n.54; James D. Gordon III, *Teaching Parol Evidence*, 1990 BYU L. REV. 647, 656 n.28 (1990); Hadjiyannakis, *supra* note 34, at 74 n.213.

92. Kirst’s phrase “construe consistently” is derived from U.C.C. § 1-205(4), which is now U.C.C. § 1-303(e), and which both use the phrase “wherever reasonable as consistent with each other.”

93. Kirst, *supra* note 67, at 816, 835 (emphasis added).

Professor Kirst's italicized phrase "consistently construed" is derived from the language of UCC § 1-205(4), now UCC 1-303(e): "*whenever* reasonable as consistent with each other."⁹⁴ Nonetheless, it is hard to find statutory support for Professor Kirst's position.

Note the word "whenever" in UCC § 1-303. There is no statutory direction that a court is always to "construe consistently" disparate express terms and extrinsic evidence and choose the one that better reflects the parties' intent.

Instead, the qualifying statutory term "whenever" means that in some instances the express term and the extrinsic evidence cannot be reasonably construed as consistent. The statutory language which follows—"If such a construction is unreasonable: (1) express terms prevail"—is even more problematic to Professor Kirst's position.

In sum, Professor Kirst argues that "section 1-205(4) [now section 1-303(e)] mandates a reasonable consistent construction."⁹⁵ We read that statutory language differently—we read that it instead mandates that a court make a determination as to whether there can be a reasonable consistent construction.

And, in construing and applying the phrase "reasonable as consistent" in UCC § 1-303(e), courts should consider the language of § 1-303(d): "may supplement or qualify the terms of the agreement."⁹⁶ In order to give meaning to this language in § 1-303(d), "course of dealing" or "trade usage" that "qualifies" a written term can reasonably be construed as consistent with that written term under § 1-303(e). That was, in part, the reasoning of the Ninth Circuit in *Nanakuli Paving & Rock Co. v. Shell Oil Co., Inc.*,⁹⁷ the "leading"⁹⁸ case interpreting and applying UCC § 1-205.⁹⁹

94. We have not been able to find any legislative history nor published materials in which Professor Llewellyn explained what he intended by "whenever reasonable as consistent with each other." Professor Kirst was similarly unsuccessful. *Id.* at 825 (emphasis added).

95. *Id.* at 832.

96. U.C.C. § 1-303(d) (2001).

97. 664 F.2d 772, 780 (9th Cir. 1981).

98. The phrase "leading case" is regularly used in judicial opinions and law review articles. According to our March 12, 2013, Westlaw search, opinions in the Westlaw database "allcases" referred to "leading case" 371 times since January 1, 2012, and law review articles in Westlaw database "jlr" referred to "leading case" 676 times. By this measure, according to our March 12, 2013, Westlaw search, 38 opinions in the Westlaw database "allcases" cited to the *Nanakuli* case. Moreover, *Nanakuli*, like other "leading cases" such as *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864) and *Frigalimont Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (1960), inspired Professor Telman to write a limerick, see D.A. Jeremy Telman, *Langdellian Limericks*, 61 J. LEGAL EDUC. 110, 114, 133 (2011), and to blog: "One cannot avoid feeling gobsmailed by the Ninth Circuit's insouciance as it uses parol evidence to alter a clear, unambiguous price term. And it's fun to say 'Nanakuli.'" Jeremy Telman, *Teaching Sales 4: What Could Be Better Than Nanakuli?*, CONTRACTSPROF BLOG (Jan. 21,

Nanakuli, a paving contractor in the highway construction business, bought asphalt from Shell under a series of long-term, requirements contracts. “Shell’s Posted Price at time of delivery” was the price term in the contracts.

In January 1974, Shell raised its Posted Price from \$44 a ton to \$76 a ton because of the Organization of the Petroleum Exporting Countries (“OPEC”) oil embargo. At the time of Shell’s price increase, Nanakuli had pending a bid on a state paving contract based on Shell’s Posted price at the time it made the bid. The state then accepted Nanakuli’s bid.

Nanakuli contended that there was an industry practice of price protection under which it could buy the asphalt needed for a state highway project at the price in effect at the time it made the bid. Nanakuli sued Shell for breach of contract when Shell failed to price protect Nanakuli.

The jury verdict for Nanakuli was set aside by the United States district court judge who granted Shell’s motion for judgment n.o.v. The Ninth Circuit reversed, finding “there was substantial evidence to support a finding by reasonable jurors that Shell breached its contract by failing to provide protection for *Nanakuli*.”¹⁰⁰

More specifically, the Ninth Circuit held “under these particular facts, a reasonable jury could have found that price protection was incorporated into the 1969 agreement between Nanakuli and Shell and that price protection was reasonably consistent with the express term of seller’s posted price at delivery.”¹⁰¹ The court gives three reasons for so holding: (1) an “underlying purpose” of the UCC is to “promote flexibility in the expansion of commercial practices and which rather drastically overhauls this particular area of the law,”¹⁰² (2) reported cases,¹⁰³ and (3) “the delineation”¹⁰⁴ by

2013), http://lawprofessors.typepad.com/contractsprof_blog/2013/01/what-could-be-better-than-nanakuli.html; see also Kastely, *supra* note 84 at 788–91.

99. E.g., Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 198 n.188 (1989) (“The [Ninth Circuit in *Nanakuli*] correctly held that trade usage may qualify the meaning of express terms.”); Christopher T. Wonnell, *The Abstract Character of Contract Law*, 22 CONN. L. REV. 437, 473 n.126 (1990) (“[T]he court brought in trade usage to qualify a seemingly absolute written price term in *Nanakuli* . . .”).

100. 664 F.2d at 777. The Ninth Circuit criticized the district court’s exclusion of evidence: “[T]he District Judge here mistakenly equated ambiguity with admissibility.” *Id.* at 796 n.35; see also *id.* at 783 n.16.

101. *Id.* at 805.

102. *Id.* at 780.

103. *Id.*

104. Here is the “delineation” of the “thoughtful commentators” referenced by the Ninth Circuit: “[U]sage may be used to ‘qualify’ the agreement, which presumably means to ‘cut down’ express terms although not to negate them entirely.” Joseph H. Levie, *Trade Usage and*

thoughtful commentators [including Kirst] of the degree of consistency demanded between express terms and usage is that a usage should be allowed to modify the apparent agreement, as seen in the written terms, as long as it does not totally negate it.”¹⁰⁵

Another “thoughtful commentator,” Professor Amy Kastely, looks to the Code policy on trade usage to criticize the *Nanakuli* total negation test as not going far enough in recognizing the difference between the UCC and common law:

The total negation test inverts the correct relationship between trade usage and express terms under section 1-205(4). The crucial issue in determining whether trade usage defines a term of an agreement is whether the parties have agreed to change the normal practice. Therefore, the appropriate question is whether the express agreement negates the trade usage, not whether the trade usage negates the express term. Because the parol evidence rule is designed to give priority to a final written statement, its test for consistency appropriately begins with the assumption that the written term governs. Section 1-205, in contrast, is based on the assumption that people expect to follow trade practices.¹⁰⁶

Professor Victor Goldberg offers a very different criticism of *Nanakuli*:

The problem that I have with *Nanakuli* is that it would have been so easy to write price protection into the contract if the parties so desired. And the fact that it was not there suggests that there was a problem that gave Shell the opportunity to waive the price, if they [sic] wanted, by giving price protection or not.¹⁰⁷

It would also have been possible, if not easy, for Shell to write trade usage out of the contract. Official Comment 2 to UCC § 2-202 expressly recognizes the possibility of a “careful negation” of trade usage. Perhaps the use of such explicit and expanded merger clauses explains why there have been no significant cases since *Nanakuli* applying UCC § 1-303’s “reasonable as consistent” test.¹⁰⁸

Custom Under the Common Law and the Uniform Commercial Code, 40 N.Y.U. L. REV. 1101, 1112 (1965). That is it.

105. *Nanakuli*, 664 F.2d at 780.

106. Kastely, *supra* note 84, at 790–91.

107. Mark P. Gergen, Victor Goldberg, Stewart Macaulay & Keith A. Rowley, *Transcript of Panel Discussion—Transactional Economics: Victor Goldberg’s Framing Contract Law*, 49 S. TEX. L. REV. 469, 494 (2007).

108. Cf. Adam B. Badawi, *Interpretive Preferences and the Limits of the New Formalism*, 6 BERKELEY BUS. L.J. 1, 37 (2009) (“[P]arties knowledgeable of decisions like *Nanakuli* will have to negotiate explicit terms about whether to use or ignore trade norms such as price protection.”). *But cf.* Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of*

IV. CONCLUSION

Courts should answer questions about adding terms to written contracts or interpreting terms in written contracts by balancing the weight to be given to text and the weight to be given to context. There is an unavoidable tension between the certainty or efficiency afforded by looking only to text and the accuracy or fairness afforded by also looking to context.

The UCC differs from the common law of most states on a principled basis as to where this balance should be drawn. The main differences are with respect to “course of dealing” and “usage of trade,” i.e., “extrinsic evidence,” and not “prior agreements or of a contemporaneous oral agreement,” i.e., “parol evidence.” An “underlying” policy of the UCC, if not the underlying policy of Article 2,¹⁰⁹ is “to permit the continued expansion of commercial practice through custom, usage and agreement of the parties.”¹¹⁰

Instead of the policy or the language of the UCC, courts in sale of goods cases too often use the terms “parol evidence,” “extrinsic evidence,” and the “parol evidence rule” to “explain” decisions—a strategy one commentator has termed “analysis by epithet.”¹¹¹ Courts should answer questions about adding terms to written contracts for sale of goods or interpreting terms in such contracts by looking to the policies of the Uniform Commercial Code and looking to the language of the Uniform Commercial Code.

the Uniform Commercial Code, 68 OHIO ST. L.J. 11, 47 (2007) (“[E]vidence that other sellers of supplies to Nanakuli gave such discounts would have been admissible no matter how ironclad its language.”).

109. Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 347 (1995) (“Article Two of the U.C.C. embodies ‘institutionalism’ by making the group behavior of merchants (trade usage) its central normative and interpretative concept.”). Some have questioned whether Article 2 made the right policy choice. *See generally, e.g.*, Lisa Bernstein, *The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999).

110. U.C.C. § 1-103(a)(2) (2001).

111. *Cf.* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 515 (2001) (“Instead of reasoned analysis, courts typically fall back on vague labels such as ‘alter ego’ or ‘lack of separation,’ which has been variously characterized as analysis by epithet and reasoning by pejorative.”). “Analysis by epithet”—great phrase. And, more “appropriate” than the phrase “safe words,” used originally by our senior author.