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THE PAROL EVIDENCE RULE: A LEGAL MASQUERADE

Judge Peter Flynn
Judge Lynn M. Egan (Ret.)

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After 30 years in practice, Peter Flynn was appointed an Illinois Circuit Judge in 1999, elected in 2000, retained in 2006, and retained again in 2012. He has served in the Chancery Division of the Cook County Circuit Court since December 2002. He is a life member of the American Law Institute, and an Adviser on its Restatement of the Law of Liability Insurance project. He is a founding member and past vice-chair and chair of the Chicago Bar Association's Commercial Litigation Committee. He taught Illinois Civil Procedure at The John Marshall Law School in Chicago from 2002 until 2015. He has been a panelist or speaker in various judicial and practitioner CLE programs. He is a fan of the Seventh Circuit Pilot Project and a strong (one might say relentless) proponent of the Sedona Conference Cooperation Proclamation.

SECTION A

- *"Parol Evidence," by Judge Peter Flynn, October 2017.*

PAROL EVIDENCE

By
Judge Peter Flynn
October 2017

Introduction

Judges are often called upon to adjudicate contract disputes. Often, the parties to the contract take different positions as to the meaning of a particular word or phrase contained in the contract. Just as common are cases where a party seeks to incorporate terms into the contract that, deliberately or otherwise, do not seem to be reflected in the contractual provisions or that the other side claims are not reflected in the contract terms. These disputed terms may or may not have been discussed during contract negotiations. In deciding these disputes, courts inevitably confront the issue of parol evidence — often in the form of the "parol evidence rule."

The parol evidence rule is, of course, egregiously misnamed. It is not really about "parol" (*i.e.,* oral) material. If it applies at all, it also applies to writings and even behavioral material. Also, it is not really a rule of evidence. Indeed, commentators tell us that it is not even a rule of contract interpretation. It is, rather, a rule of substantive law that must be applied before a contract may be interpreted.[1] The intended aim of the rule is to identify what is the proper subject matter for interpretation.[2] And to call it a "rule" is a stretch, given its limitations, exceptions, and overall murkiness.[3]

In theory, the parol evidence rule prevents the introduction of prior negotiations, whether

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1. *See* 11 Richard A. Lord, WILLISTON ON CONTRACTS § 33:3 (4th ed. 2012); 6 Peter Linzer, CORBIN ON CONTRACTS, § 25:1 (Joseph M. Perillo rev. ed., 2010).

2. 11 Lord, *supra* note 1.

3. *See e.g., infra* note 4, 7.

written or oral, as well as contemporaneous oral representations, to alter or supplement the meaning of facially unambiguous contract terms contained in the version of the agreement that has been reduced to a final, integrated writing.[4] This approach to contract interpretation is often referred to as the "four corners" approach.[5] The explanation of this approach includes many seemingly common terms whose definitions become increasingly fuzzy in the application of the parol evidence rule.[6]

The thrust of the four corners approach is that in divining the meaning of the contract and the intent of the parties, the court will initially look only to the language of the contract itself.[7] Under the four corners approach, if the contract language is facially unambiguous — that is, if the language used is clear, coherent, and not subject to more than one reasonable interpretation when the contract is viewed as a whole — then extrinsic evidence is strictly prohibited.[8] At the

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4. 6 Linzer, *supra* note 1, at § 25:7; 11 Lord, *supra* note 1, § 33:4. Supposedly, the parol evidence rule applies only to final, integrated writings (whatever that means). In order for the rule to apply, the court must first determine that these prerequisites have been met. This is most often accomplished through the presence of an integration clause in the contract. The rules as to non-final and nonintegrated writings vary from the strict four corners approach.

5. *Air Safety v. Teachers Realty Corporation,* 185 Ill.2d 457, 462 (1999) (citing *URS Corp. v. Ash,* 101 Ill.App.3d 229, 234 (4th Dist. 1981)).

6. For example, is any agreement ever truly "completely integrated?" (After all, one of the basic tenets of communication generally is that context matters. Many cases tell us that "the meaning of words cannot be ascertained in a vacuum." *See, e.g., Meyer v. Marilyn Miglin, Inc.,* 273 Ill.App.3d 882, 889 (1st Dist. 1999). How is "ambiguity" to be determined? (Just because the parties disagree doesn't necessarily show "ambiguity.") Is there any plain and principled difference between the terms "supplement" and "vary"? What exactly does "vary" mean? (One side says "I'm explaining." The other side says "No, you're varying.")

7. *Air Safety*, 185 Ill.2d at 462 (citing *Rakowski v. Lucente*, 104 Ill.2d 317, 323 (1984)).

8. *Id.* (citing *Farm Credit Bank v. Whitlock*, 144 Ill.2d 440 (1991)).

other extreme, if the contract language is facially ambiguous, in that the language easily lends itself to more than one reasonable interpretation (even without looking outside the face of the contract), then parol evidence, if available, may be considered to resolve the ambiguity.[9]

The preceding hints at some of the problems that result from relying on seemingly straightforward talismanic incantations. Simply reciting the verbiage of the rule obviously does not come to grips with the real meaning of its components, which are often (usually, one might reasonably argue) difficult to apply. For example, what is a "reasonable interpretation"? Who decides?[10] By what standards? We know, for example, that the parties' disagreement regarding how to interpret the terms of a contract, does not, in itself, render the contract ambiguous.[11] In other words, even though the parties, in good faith, read the terms differently, those divergent readings do not necessarily create differing "reasonable interpretations."[12] What then *does* give rise to differing "reasonable interpretations?" These are questions which judges must routinely address in "parol evidence" situations.

The parol evidence rule is based, at least in part, on the premise that written evidence is more accurate than human memory, especially in the context of the law's interest in evaluating

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9. *Id.* at 462-63.

10. The interpretation of a contract is a question of law for the court. But if the court finds an ambiguity, then it is usually a jury (if requested) which resolves the ambiguity. In this system, one might have both the court and the jury independently deciding whose interpretation is "reasonable."

11. *Meyer v. Marilyn Miglin, Inc.*, 273 Ill.App.3d at 888.

12. If they did, then in almost every contract case the parties would be entitled to a jury trial on the issue of what they agreed to. Such a system would be hopelessly unworkable, and irreconcilably at war with our desire to ensure stability and predictability in business transactions.

the reliability of evidence.[13] We are often told that a major aim of the rule is to protect parties to a contract from possible fraud or unintentional invention by witnesses.[14] It seems fair to say, however, that another – and perhaps primary – aim of the rule is to protect the "objective" theory of contract, *i.e.*, the view that a contract "means" what an objective outsider would think it means, regardless of what the parties actually intended. Here again, the desire for transactional stability rears its head – even at the price of paradox, summed up by A.P. Herbert in the aphorism "If Parliament does not mean what it says, it must say so."[15]

I. THE STATUS OF PAROL EVIDENCE IN ILLINOIS

A. The Road to *Air Safety*

1. *Provisional Admissions and "Ambiguity"*

In parol evidence cases, the initial inquiry focuses on evaluating the contract language and deciding whether the terms are ambiguous. Ambiguity can be either facial ("patent") or latent (not immediately apparent).[16] The easy cases are the ones involving true facial ambiguity. But in many cases, while the contract terms in themselves do not seem ambiguous, ambiguity becomes evident if the words are read in light of a particular context or extraneous facts. Such circumstances are usually put in the category of latent ambiguity.[17]

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13. Lawrence A. Cunningham, *Toward a Prudential and Credibility-Centered Parol Evidence Rule*, 68 U. Cin. L. Rev. 269, 283 (2000).

14. *Id.*

15. Quoted in *Matter of Wessberg v. Beckman,* 21 Misc.2d 382, 194 N.Y.S.2d 205 (N.Y. Sup. 1959).

16. Cunningham, *supra* note 13.

17. *Id.* at 295-296.

In general, Illinois courts have tended to espouse the "four corners" approach, refusing to entertain any extrinsic evidence (*i.e.,* evidence outside the four corners of the contract document) so long as the terms of the contract are facially unambiguous.[18] For a period of time in the later 1980s and 1990s, a number of appellate decisions downplayed the pure four corners approach, preferring instead the more flexible (and arguably more realistic) "provisional admission" approach.[19] Under this more flexible approach, even when confronted with what looks on its face like unambiguous contract language, courts allow the parties to offer parol evidence to demonstrate that an ambiguity exists when one looks beyond the four corners of the contract language itself. This makes sense. As the court noted in one such case, *Ahsan v. Eagle, Inc.*,[20] "the 'four corners' rule has two flaws: it assumes precision in language that cannot exist, and it requires the judge to determine the true intent of the parties in a transaction that is removed in time and circumstance."[21] To avoid these flaws, under the provisional admission approach a court may find that an extrinsic ambiguity exists "when someone who knows the context of the contract would know if the contract actually means something other than what it seems to mean."[22] Thus, under this approach the court provisionally considers the parol evidence solely for the purpose of determining whether, in light of that evidence, there is some extrinsic

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18. This has been so for many years. *See Sheridan v. Rouse & Co.*, 109 Ill.App.3d 841, 846-47 (1st Dist. 1982). *See also United Equitable Ins. Co.v. Reinsurance Co. of America, Inc.*, 157 Ill.App.3d 724, 730-31 (1st Dist. 1987).

19. Examples include *Zale Construction Co. v. Hoffman*, 145 Ill.App.3d 235, 241 (1st Dist. 1986), and *Meyer v. Marilyn Miglin, Inc.,* 273 Ill.App.3d at 889.

20. 287 Ill.App.3d 788 (3rd Dist. 1997).

21. *Id.* at 790 (citing *URS Corp. v. Ash,* 101 Ill.App.3d 229, 234 (4th Dist. 1981)).

22. *Ahsan*, 287 Ill.App.3d at 790.

ambiguity. If not, the evidence is rejected. If such an ambiguity is found, then the parol evidence is admitted generally to aid the trier of fact in resolving the ambiguity.

The provisional admission approach seems to have begun in Illinois with *Baird & Warner, Inc. v. Ruud*,[23] which cited 4 Samuel WILLISTON, WILLISTON ON CONTRACTS § 601 (3d ed. 1961) and a handful of Federal cases for the proposition that the trial court "properly admitted evidence of the preliminary negotiations initially to determine if there was an ambiguity in the contract and then, if there was, to determine the proper resolution of that ambiguity."[24] The Appellate Court's first extended discussion of the point appears in *URS Corp. v. Ash*.[25] In the ensuing two decades, the provisional admission approach met with mixed reception, even within the First District.[26] It was not until 1999 that the Illinois Supreme Court partially resolved the issue.

2. *Air Safety and Integration Clauses*

In *Air Safety, Inc. v. Teachers Realty Corp.*,[27] the Illinois Supreme Court held that "the four corners rule precludes the consideration of extrinsic evidence where a contract contains an

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23. 45 Ill.App.3d 223, 229 (1st Dist. 1976).

24. *Keep Productions, Inc. v. Arlington Park Towers Hotel Corp.*, 49 Ill.App.3d 258, 263 (1st Dist. 1977).

25. 101 Ill.App.3d 229, 234-35 (4th Dist. 1981).

26. *Compare, e.g., Sheridan v. Rouse & Co.*, 109 Ill.App.3d 841, 846-47 (1st Dist. 1982) (rejecting approach) and *United Equitable Ins. Co. v. Reinsurance Co. of America, Inc.*, 157 Ill.App.3d 724, 730-31 (1st Dist. 1987) (rejecting approach, partly on the basis of *Rakowski v. Lucente*, 104 Ill.2d 317, 323 (1984)), *with Zale Construction Co. v. Hoffman*, 145 Ill.App.3d 235, 241 (1st Dist. 1986) (approving approach) and *Meyer v. Marilyn Miglin, Inc.*, 273 Ill.App.3d 882, 889 (1st Dist. 1995) (approving approach, though noting the "split of authority").

27. 185 Ill.2d 457, 466 (1999).

integration clause and is facially unambiguous." This is usually considered to mean that in Illinois, courts cannot apply the provisional admission approach in cases involving contracts that contain integration clauses. However, there are at least two *caveats*. First, the court in *Air Safety* expressly declined to rule on whether the provisional admission approach may be applied to interpret a contract which does not contain an integration clause.[28] Second, despite its otherwise seemingly clear-cut language, the *Air Safety* court has not undertaken to define the approach courts should use in determining "facial ambiguity." Keep in mind that issues of this sort usually arise when litigants themselves disagree about what the contract words mean. That disagreement is not, in itself, proof of ambiguity – but, assuming good faith, neither is it irrelevant. As noted earlier, moreover, it can be difficult to tell whether a party is merely "explaining" contract language or trying (subtly or otherwise) to "change" it.

In *Air Safety*, the plaintiff, Air Safety Engineering ("Air Safety") entered into a contract with the defendant, Teachers Realty Corporation ("Teachers") on February 1, 1990. Air Safety was to perform numerous specified asbestos abatement projects on a high-rise office building owned by Teachers. Two sections of that contract are pertinent to this case. The first section, 12.1.2, allows changes to be made to the original agreement:

> The Owner, without invalidating the Contract, may order changes in any Unit of Work within the general scope of the Contract consisting of additions, deletions or other revisions, and the Contract Sum and the Contract time applicable thereto shall be adjusted accordingly. All such changes in Work shall be authorized by change orders, and shall be performed under the applicable conditions of the Contract Documents.

The second pertinent section of the contract, 14.7, is an integration clause, which stated that the contract "represents the entire and integrated agreement between the parties hereto and

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28. *Id.* at 464.

supersedes all prior negotiations, representations, or agreements, either written or oral."[29]

In 1991, during Air Safety's performance of the 1990 contract, Teachers solicited bids for 16 additional asbestos abatement projects at the same building. This solicitation specified that contractors submit two prices for each project—one price for the cost of performing an individual project without an award of all 16 projects, and another price reflecting a discounted amount for each project if the contractor were awarded all of the projects.

Air Safety won some, but not all, of the 16 bids. A new contract was never entered into; instead, the parties executed three change orders to the 1990 contract, reflecting: (*i*) a description of the work; (*ii*) the original 1990 contract cost; (*iii*) the contract sum prior to the change order; (*iv*) the increase in cost due to the change order; and (*v*) the new contract cost. The change orders also referenced letters sent by Teacher's agent, Miglin-Beitler, giving a fixed price for each project.

The fixed prices in the Miglin-Beitler letters and the change orders themselves were listed as the prorated bid amounts Air Safety submitted pursuant to the 1991 bid solicitations if it were awarded all sixteen projects. Air Safety, however, was never authorized to perform work on any other projects not authorized by the three change orders. The remainder of the 16 projects not awarded to Air Safety were awarded and completed by other contractors.

Consequently, Air Safety filed an action for declaratory relief, claiming that: (*i*) the 1991 bid solicitation ripened into a contract between Air Safety and Teachers for all 16 projects; and (*ii*) Air Safety was entitled to the non-prorated amounts for each project listed in its original bid

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29. *Id.* Note that this plainly forbids trying to *change* or *add* terms – but it does not say anything about *explaining* them. That distinction is often overlooked, and *Air Safety* itself may not have focused on it, as the discussion below perhaps suggests.

since it was not ultimately given all of the projects. Teachers filed a motion for partial summary judgment arguing that: (*i*) the merger doctrine and the parol evidence rule precluded the finding of a second contract; (*ii*) the evidence presented by Air Safety was meaningless, because those discussions merged into the 1990 contract via the 1990 contract's integration clause; and (*iii*) the change orders, being facially clear and unambiguous, made the extrinsic evidence presented by Air Safety inadmissible to contradict or vary the terms of the change orders. The circuit court agreed with Teachers and the appellate court affirmed.

The only question before the Illinois Supreme Court was whether extrinsic evidence could be provisionally admitted to show that an explicitly integrated, facially clear and complete written contract is actually ambiguous. The Court answered that question in the negative, broadly holding that extrinsic evidence is not admissible where the contract at issue contains an integration clause. The Court expressly declined to rule, however, on whether the provisional admission approach may properly be applied to interpret a contract which does not contain an integration clause.[30]

The Court's decision seems to rest on two primary ideas. First, when parties formally include an integration clause in their contract, they are explicitly manifesting their intention to protect themselves against misinterpretations which might arise from extrinsic evidence. Accordingly, considering the extrinsic evidence when both parties agree to an integration clause would be to ignore the express intentions of the parties.[31] Further, not considering the

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30. *Id.* Arguably this reads more into the typical integration clause than most contract drafters really have in mind when they insert them. *See* note 28 *supra.*

31. *Id.* at 464-465. One may question the real-world accuracy of this assertion in several contexts, including contracts of adhesion, form contracts, and contracts with unsophisticated parties.

integration clause essentially writes it out of the contract, which the Court does not want to do because that would impair parties' freedom to contract for (or against) integration clauses, and because eliminating the effect of integration clauses would diminish the value of written contracts.[32]

B. Beyond *Air Safety*: When There is No Integration Clause

Air Safety gave Illinois courts what purports to be a bright line rule for cases involving facially unambiguous contracts containing integration clauses. However, the question remains unanswered as to contracts without such clauses, because the *Air Safety* court expressly declined to rule on that issue. It is interesting to ask oneself whether, given the preceding discussion, a prudent contract drafter would think it wiser to include, or to omit, such a clause.

Though *Air Safety* left the matter open, in a line of cases beginning with *Bank of America Nat'l Trust & Savings Ass'n v. Schulson*,[33] the First District may have effectively barred the use of the provisional admission approach even in interpreting contracts which do not have an integration clause. In *Schulson*, even though the extrinsic evidence showed there was an alternative interpretation of some of the contract terms, the Court held that the provisional admission approach could only be used to clarify the definition of terms in determining whether the contract is ambiguous, but could not be used to change the meaning of unambiguous terms.[34] This may be thought to beg the question. Is a term "unambiguous," for *Schulson* purposes,

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32. *Id.* at 465.

33. 305 Ill.App.3d 941 (1st Dist. 1999).

34. *Id.* at 951.

because the court finds the extrinsic evidence unpersuasive (which seems circular)? On the other hand, if one cannot use the extrinsic evidence as a tool to determine ambiguity, then what is meant by *Schulson*'s reference to clarifying the definition of contract terms? Assuming the court's language means what it seems to say, *Schulson* and its progeny would seem to bar any parol evidence, even provisionally, so long as the agreement is superficially (albeit perhaps misleadingly) clear on its face – which would gut the provisional admission approach.[35]

Essentially, if the *Schulson* panel's interpretation of when the provisional admission approach may be used is the last word, the provisional admission approach will become coterminous with the already existing exception to the parol evidence rule that allows parties to supplement what is provided in the contract with extrinsic evidence when contract terms are ambiguous on their face.[36] That would defeat the whole purpose of the provisional admission approach, which is to allow parol evidence to be considered even when the contract is facially *unambiguous*.[37]

The Illinois federal courts do not seem to view *Air Safety* (let alone the First District's even more restrictive approach in *Schulson*) as a move in the right direction. In *Kinesoft*

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35. *Ahsan*, 287 Ill.App.3d at 790. As *Schulson* progeny, *see, e.g., Eichengreen v. Rollins, Inc.*, 325 Ill.App.3d 517 (1st Dist. 2001); *Lease Mgmt. Equipment Corp. v. DFO Partnership*, 392 Ill.App.3d 678 (1st Dist. 2009). *State Farm Mut. Auto. Ins. Co. v. Rodriguez*, 2013 IL App (1st) 121388, ¶¶ 33-36, seems to inject this view into a dispute about an insurance policy, though that is a somewhat unusual context because insurance policy interpretation follows a set of rules somewhat removed from general contract cases. For non-First District cases along the *Schulson* line, *see, e.g., River's Edge Homeowners' Ass'n v. City of Naperville*, 353 Ill.App.3d 874 (2d Dist. 2004); *Gassner v. Raynor Mfg. Co.*, 409 Ill.App.3d 995 (2d Dist. 2011).

36. *See, e.g., American Family Life Assurance Co. v. Tazelaar*, 135 Ill.App.3d 1069, 1075 (1st Dist. 1985).

37. *See Air Safety*, 185 Ill.2d at 463.

Development Corp. v. Softbank Holdings, Inc.,[38] the district court noted that *Air Safety* is at odds with Seventh Circuit decisions that have rejected the four corners rule as unsound and contrary to the well-established principle of extrinsic ambiguity.[39] The district court also noted that commentators have indicated that the four corners rule is unduly restrictive, and that the modern trend is to adopt the more liberal view articulated by the Seventh Circuit.[40]

II. THE PAROL EVIDENCE RULE IN PRACTICE

In applying the parol evidence rule, courts must grapple with many terms whose boundaries are hard to define.

A. What is "Parol Evidence"?

Perhaps the simplest way to determine what parol evidence is, is to filter out what it is not. A useful method of doing so is to analyze the proffered evidence and categorize it according to the following factors: timing, purpose, and content.

1. *Timing*

The parol evidence rule applies only to prior written negotiations and to prior or contemporaneous oral representations. It does not apply to events that occur subsequent to the execution of the contract in question and thus the rule does not apply to any oral or written modifications to the existing contract. Although this timing element is the simplest of the pertinent factors, it should not be overlooked. For example, this limitation on the parol

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38. 139 F.Supp.2d 869 (N.D. Ill. 2001).

39. *Id.* at 889. (citing *AM Int'l, Inc. v. Graphic Management Assocs., Inc.*, 44 F.3d 572, 574-575 (7th Cir. 1995)).

40. *Id. See also Union Pacific R.R. Co. v. Kansas City Southern Ry. Co.,* 2008 U.S. Dist. LEXIS 84611, 2008 WL 4190255 (S.D. Ill. 2008), for a useful overview of the post-*Air Safety* Illinois landscape.

evidence rule permits most "course of dealing" evidence of the sort contemplated by UCC §§ 1-303, 2-202.

2. *Purpose*

The parol evidence rule is difficult to understand and to apply. It is easy to become so preoccupied with the more complex aspects of the rule, that one forgets about the preliminary requirements that theoretically must be present before the rule even comes into play. A helpful way of narrowing down the issue is to ask for what purpose the evidence is being offered. If the purpose of the evidence is not to alter or supplement contract terms, then the rule does not apply.

Of course this is much easier to verbalize than to apply in practice. If the proffered evidence were not intended to "alter" or "supplement" some perception about the contract – some reading of the contract which, without the evidence, would seem "clear" – why would anyone bother to proffer it? Articulating the point in this way makes it easier to see that what we are really talking about is not "alter[ing] or supplementing] contract terms," but rather "altering or supplementing *our reading of* the contract terms." That "reading" is a matter not of the words, but of our perception of the words' meaning and purpose. After all, the words on the paper stay the same. It is how we perceive their meaning that may change, and that we hope will be affected by any external evidence we may proffer.

So maybe a more nuanced purpose test can be suggested. Suppose we ask: If the proffered evidence is accepted, would it (*i*) rewrite any of the words, or (*ii*) add any new words? If so, the parol evidence rule applies. This still leaves: (*iii*) change the meaning of the existing words. If the change is only "interpretive," the parol evidence rule may not be affected. But if the change in meaning would be "substantive" – if the new meaning would have a materially

different consequence than the "plain" (*i.e.,* without the evidence) meaning – then the parol evidence purist would say the rule bars it, because the parties should have written the contract words better at the time. (This may not be a terrible outcome. Remember that we are talking about *pre*-contract evidence, since the parol evidence rule doesn't apply to post-contract conduct or facts). But if the issue involves *pre*-contract evidence, then the proffering party is really saying that the contract was written down wrong if it says something different than the external evidence would call for. That problem can be fixed, by bringing a claim for reformation.

Professor Corbin makes a related point when he observes that for the parol evidence rule to apply at all, the court must first make the determination that the contract in question has been assented to by both parties as being the complete, final *and accurate* embodiment of their agreement.[41] Thus, if the extrinsic evidence is offered to show reasons why the contract is void or voidable, then it is not being offered for a purpose prohibited by the parol evidence rule. The rule cannot apply before the court has decided that a valid contract is in place. Not only must the contract be valid, but it must also be agreed that it is the final and complete agreement. Therefore, according to Corbin, if a party can show that the writing, though not wrong as far as it goes, is incomplete (and thus not the *entire* agreement), then that prerequisite is not met and the parol evidence rule should not apply. Further, as discussed above, if a party agrees that the contract is final and complete but asserts that it is not *accurate,* the parol evidence rule does not bar the resulting claim for reformation.

Reformation is, of course, an uphill battle. In Illinois, one must prove a reformation claim by clear and convincing evidence – the same test which apples to proving fraud. This

41. 6 Linzer, *supra* note 1, 25:2. In § 25:2, Corbin asserts that most courts do not discuss this initial step.

reminds us that we have good reasons to be reluctant to meddle with contractual clarity. Most would agree that a major purpose of contract law in general, and the parol evidence rule specifically, is to foster business stability. To this end, enforcing contracts as written is a valuable, indeed essential, tool in preserving party expectations and effectuating intent. As with the "plain meaning" rule of statutory construction, this is so even if the result is to ignore what the parties actually meant. To repeat A.P. Herbert's wonderful maxim: "If Parliament does not mean what it says, it must say so."

We see both sides of this dilemma with particular force in insurance litigation. An insurance policy is a contract. But it is often a contract between parties with different levels of understanding, written partly in "insurance-speak" in which ordinary words (like "occurrence") have specialized meanings familiar to insurers but not to most insureds. It is notoriously difficult for the average policyholder to understand the nuances of, say, a commercial liability insurance policy. But insurance law nevertheless imposes on policyholders a near-absolute rule that they are bound to read and understand their policies. This may seem as draconian as the "four corners" version of the parol evidence rule. But it is essential: insurance underwriting would be nearly impossible if underwriters had to guess at how individual juries (the usual deciders in contract "ambiguity" cases) would interpret what risks the policy language covers.

It is understandable, then, that even where there is no explicit integration clause, courts generally approach contract cases with the assumption that the written contract is complete and means whatever it seems plainly to say. If parties could routinely argue that "I didn't understand it that way," courts would be forced to spend substantial time on what amounts to retrospective reconstruction of what the parties intended when they wrote the contract -- a task difficult at best, and often flawed by parties' inevitable tendency to tailor their past recollection

to the needs of the present moment (which they may not even have thought about when the contract was written). The parol evidence rule protects against this quagmire. It does so by preferring the present, seemingly clear written word to the vagaries of reconstructing past intent on a case-by-case basis. That approach sometimes yields inaccurate or unjust results. But we tend to perceive that cost as less than the cost of never knowing what a contract "means" until a court says so.

The bottom line, then, is that extrinsic evidence is offered for different purposes and according to the purpose, the parol evidence rule may or may not apply. If the purpose is to show fraud, mistake or illegality, then the parol evidence rule does not apply at all. If the evidence is offered in an attempt to change or add to the terms of the contract (*caveat*: whatever that may mean), then the parol evidence rule does apply. If the evidence is offered only to "explain" the words used, but not to change or add to them, then it is arguable that the parol evidence rule does not apply, because despite our desire for contractual certainty, we know that (*see Meyer v. Marilyn Miglin, Inc., supra*) "the meaning of words cannot be ascertained in a vacuum."

3. *Content*

A common misconception is that parol evidence is limited to evidence of oral agreements. Actually, the rule applies to *all* extrinsic evidence of prior agreements, whether oral or written.[42] A more confusing aspect of content, and perhaps one that has not been discussed frequently, deals with objective but extrinsic "context" evidence, such as the nature of a party's business. Imagine a contract dispute where the provision in question seems facially

42. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. Pa. L. Rev. 533-34 (1998).

unambiguous, but would be ambiguous if the nature of one party's business were considered.[43] Is that obvious, and objective, fact the sort of "parol evidence" that cannot be considered unless a facial ambiguity exists?[44]

A strong argument can be made that objectively verifiable evidence, such as the nature of a party's business, should not constitute "parol evidence" at all. Certainly this makes sense if the main purpose behind the parol evidence rule is to prevent fraud and to promote enforcement of contracts and business stability. Prohibiting the admission of such objective evidence would hinder rather than further these goals. Thus, in analyzing these cases, it makes sense to categorize the "parol evidence" as either objective or subjective. If the evidence is objective, then arguably (though we have found no Illinois cases squarely and expressly accepting this view) the reasoning behind the rule does not apply and the court should refuse to bar the evidence.[45]

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43. Suppose two parties enter into a joint venture to manufacture oven doors. The contract includes a non-compete agreement which, as written, on its face prohibits either party from producing for others not only those types of oven doors, but any glass products whatsoever. Well, perhaps. But what if one of the parties is, and has been for a century, exclusively engaged in making a wide variety of glass products? Can it truly be that the parties meant to extinguish that party's entire business?

44. In the glass maker hypothetical, this would be an issue regardless of whether the contract contains an integration clause. Even in the face of such a clause, one would have to ask whether the nature of the party's business is the sort of "parol evidence" an integration clause is meant to bar.

45. As Jerome Frank reminded us over a half century ago, in the real world courts manipulate rules -- including the parol evidence rule (or rules) -- to reach an end result which is perceived as just on the facts of the particular case. This means that courts often do not fully articulate the reasons for their decisions. Although the given case may reach a visibly "fair" result, other courts are left in the dark as to the true reasons behind the result. A better approach would be to discuss issues in the open, including the difference between evidence which is perceived as "subjective" and therefore unreliable, and evidence which is perceived as "objective" and therefore reliable. Should not such a difference matter? If it should matter,

B. What is an "Ambiguity"?

As previously noted, the parties' disagreement regarding how to interpret the terms of a contract does not, in itself, render the contract ambiguous. That said, how should a court define "ambiguity?" In *Meyer v. Marilyn Miglin, Inc.*,[46] the court noted that "a contract is properly found ambiguous 'when the language is susceptible to more than one meaning or is obscure in meaning through indefiniteness of expression.'"[47] However, this definition does not address the issue of latent versus facial ambiguities, or the role of provisional admission in finding ambiguities.

Should the provisional admission approach be employed in Illinois in contract cases where no integration clause is present? *Meyer* would say Yes, and though the majority of post-*Air Safety* cases go the other way, we think *Meyer* is convincing. As noted in *Meyer,* "the meaning of words cannot be ascertained in a vacuum"[48] – a point with which even *Air Safety* did not disagree. Although words in a contract are to be given their "plain meaning," this is almost impossible to do without reference to a specific context.[49] As one commentator has written, the meaning of any word or phrase varies with the unique characteristics and experience of the

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ought we not openly to promote the distinction, rather than giving lip service to an outdated and unhelpful rule?

46. 273 Ill.App.3d at 882 (though *Meyer* is a pre- *Air Safety* case, it contains a good discussion on the pros and cons of the provisional admission approach).

47. *Id.* (citing *Wald v. Chicago Shippers Ass'n*, 175 Ill.App.3d 607, 617 (1st Dist. 1988)).

48. *Id.* at 889 (citing *URS Corp. v. Ash*, 101 Ill.App.3d at 233-35).

49. Margaret N. Kniffen, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 Or. L. Rev. 643, 644-45 (1995).

writer.[50] Realistically, words do not have "fixed meanings." However, the intended meaning for a word in a given instance can be narrowed down with the use of context and circumstances.[51]

As previously noted, however, *Bank of America Nat'l Trust & Savings Ass'n v. Schulson*[52] and its progeny seem to reach the opposite result from *Meyer*. *Schulson*, discussed at pages 10-11 *supra*, would effectively eviscerate the provisional admission approach by limiting its use to cases where the parol evidence rule probably would not (due to a facial ambiguity) apply anyway. It seems likely that *Schulson* better expresses the current trend than *Meyer*. But – to return to a consistent theme – this may reflect a form of legal wishful thinking. We tell ourselves that the major goal of contract interpretation is to ascertain and give effect to the parties' intent at the time they entered the contract.[53] The parol evidence rule also seeks to give effect to party intent, albeit in a sort of backhanded way. The rule effectuates this purpose by prohibiting evidence of party intent that is not reduced to written form. The reasoning behind this is that if the parties intended a certain result or meaning, they would have expressed it clearly in the contract. This may be a necessary dogma. But any court knows it is wishful thinking. People do not always, or even usually, express themselves clearly. In particular, at the time of contracting they do not usually express themselves clearly with respect to problems they do not anticipate at that point – a constant problem in contract litigation. Courts frequently

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50. *Id.* at 645.

51. *Id.*

52. 305 Ill.App.3d at 941.

53. Even *Meyer*, 273 Ill.App.3d at 888, recites this mantra.

must ask not "what did the parties intend?," but rather "what would the parties have intended if they had actually thought about this situation at the time they contracted?" The parol evidence rule is functionally useless in that context.

Although the goals of contract interpretation and the parol evidence rule are similar, in many instances, the application of the rule paradoxically prohibits the admission of the very evidence that might better allow the court to approximate the actual intent of the parties. This is so because, as previously mentioned, parties often simply assume that certain terms will be implied or presumed from the circumstances and context of the agreement. As such, the parties will not bother to include the definitions/terms into the written contract. This does not necessarily mean that the parties did not intend the circumstances/context to form part of the agreement. (This thought underlies, for example, the Uniform Commercial Code's recognition that a court's approach to interpreting contracts "between merchants" should differ from interpreting contracts where the parties do not share a common commercial vocabulary or context.)

The bottom line, then, is that the term "ambiguous" is itself ambiguous. Words do not have fixed meanings; rather, meanings change according to context and party expectation. In order to truly effectuate party intent, it makes better sense for courts to allow – that is, to be at least willing to consider – the provisional admission of parol evidence to determine whether an "ambiguity" is present.

C. What Is Meant By "Supplement"?

Parol evidence can be offered to explain, and perhaps to supplement, the ambiguous

terms of a written contract.[54] There appears to be a fine line between "supplementing" and "contradicting or varying" a contract.[55] There are extremes which offer limited guidance. For example, a court cannot use parol evidence to flatly contradict what a contract says. (But is this in fact a principle, or just a way to explain the court's result?[56])

In practice, courts most likely label the proffered evidence according to whether or not the court is going to admit the evidence. If the court is going to admit the evidence, it will be described as merely "explaining" the contract, but if the court is not going to admit the evidence, it will be described as "contradicting/varying" the terms of the contract. Thus, there is in effect no plain and principled basis for distinguishing between these labels. In the end, "vary" versus "explain" does more to describe the results the courts reach than to analyze how they got there.

This is underscored by the obvious similarity between saying that a term "supplements" a contract and saying that it "modifies" a contract. Clearly, any supplement is also, *pro tanto*, a modification. But we tend to distinguish the two terms by time; evidence that is used to supplement a contract is derived from the time before a contract is fully completed, while evidence to modify a contract is derived after the contract is completed. This suggests that a "supplement" claim tends to involve the parol evidence rule, while a "modification" claim does

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54. *See American Family Life Ass. Co. v. Tazelaar*, 135 Ill.App.3d 1069, 1073 (1st Dist. 1985). Even an unambiguous contract can sometimes be supplemented by parol evidence, if the contract itself is demonstrably incomplete as to a particular point.

55. Indeed, *Bank of America v. Schulson,* 305 Ill.App.3d 941 (1st Dist. 1999), can be said to have skirted that fine line, which may explain the difficulty in determining the Court's reasoning in the case. *See Id.* at 951.

56. For example, suppose in a particular industry it is well known that "black" means "white." Does evidence of that trade usage "contradict" the contract, or merely "explain" it? One suspects the *Schulson* court would say the former; most commentators would say the latter.

not.

III. STATUTES AND PUBLIC POLICY

The parol evidence rule and its nuances are challenging in themselves. The difficulty of dealing with them is increased, however, by their intersection with other factors. The most directly influential other factors are statutes which affect the application of the parol evidence rule, and public policy concerns which sometimes undercut the rule. Both of these are untidy; identifying them can be obscure. Statutes may affect non-legislative doctrines such as the parol evidence rule; but statutory drafting does not often explicitly address (or perhaps even think about) such ancillary effects. Similarly, public policy concerns, even when they play an overt role in decision-making, do not always tidily identify their incidental impact on other legal rules.

No doubt many statutes and public policy concerns affect the application of the parol evidence rule in one way or another. Because the effects tend to be secondary and incidental, compiling a comprehensive list would be difficult, if not impossible. Very few statutes, or decisions based on public policy, expressly acknowledge that they are varying the application of the parol evidence rule. To illustrate the point, however, we will provide three examples – two from statutes (the Uniform Commercial Code and the Illinois Consumer Fraud Act), and one based on public policy (as stated in the case law concerning insurance contracts).

A. The Uniform Commercial Code

Article 2 of the Uniform Commercial Code ("UCC"), 810 ILCS 5/1-101 *et seq.*) codifies significant variations and partial repudiation of the common-law parol evidence rule. 810 ILCS 5/2-202 states as follows:

"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 (Section 1-303) [810 ILCS 5/1-303]; 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."

The Official Comments to § 2-202 make clear that the UCC "***definitely rejects***:"

> "(a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;
> "(b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and
> "(c) The 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."[57]

Obviously, § 2-202 has a drastic impact on the parol evidence rule. The section overall, each of its subparts, and the Official Comment, all represent a specific and pointed rejection of much of *Air Safety*'s rationale. Even § 2-202's initial acceptance of the parol evidence rule limits it to prior or contemporaneous agreements which "contradict" (as opposed to explain or supplement) the contract at issue; this is a significant narrowing of the *Air Safety* approach.

By their nature, "course of dealing" and "usage of trade" call for parol evidence. Both course of dealing (as opposed to course of performance) and trade usage, moreover, address what the parties presumably intended when they entered into the contract. Yet it may well be that neither contracting party ever explicitly mentioned either of those topics when making the

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57. 810 ILCS 5/2-202, Comment 1 (a), (b) and (c) (emphasis added).

contract; instead, both may simply have assumed the other understood them as part of the contractual context; and under the UCC, a court expressly need not make a finding of "ambiguity" before considering such evidence.

Thus, under the UCC, a court can liberally admit evidence of usage of trade to assist it in evaluating the writing and deciding what the true understanding between the parties was at the time the contract was executed.[58] This makes excellent sense – even necessary sense, given the UCC's recognition that many enforceable sale-of-goods contracts are informal, "back of the envelope" deals which actually write down only a bare minimum of terms. Any such agreement relies heavily on unstated, but mutually expected, business understandings and presumptions. Such common trade practices should, and in fairness must, be considered in deciding party intent, even if they are not expressly written into the contract.

This is most obviously true, of course, in dealings between those whom the UCC calls "merchants," *i.e.*, "persons[s] who deal[] in goods of the kind" and therefore can be assumed to be familiar with trade terms and usages.[59] But the Code's liberal admission of trade usage is not confined to dealings between merchants. Should such admissibility be more restricted where only one party can be assumed to be familiar with arcane trade terms? A contrary approach might argue that when one contracting party is not a "merchant," it is incumbent on him to make sure he understands any odd trade terms which are used. That is reasonable enough if the term is itself not part of normal usage. But what if it is a normal word, *used* in a peculiar way?

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58. 12 Lord, *supra* note 1, § 34:7.

59. UCC § 2-104(1), 810 ILCS 5/2-104(1).

Parol evidence of usage is also admissible to supply a missing or omitted term or provision to a contract when the contract is silent as to that particular term or provision.[60] For example, both under the UCC and at common law, when a time for payment is not specified, a reasonable time will be implied by the court.[61] Although a UCC court need not first make a finding of ambiguity before turning to trade usage and course of dealing, there are limitations. For example, evidence of usage may not be considered where it is inconsistent with the express terms of the contract.[62] However, the line between supplementation and explaining, which is allowed, and contradicting, which is not allowed, is fuzzy at best.[63]

B. The Illinois Consumer Fraud Act

The Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* ("Consumer Fraud Act"), may also significantly affect the application of the parol evidence rule. That is so less because of the statute itself than as a consequence of case law. Perhaps the most dramatic illustration of this impact is *Duran v. Leslie Oldsmobile, Inc.*[64] In *Duran*, the plaintiff bought what the dealer represented as a new demo vehicle, but was in actuality a used car. Plaintiff had spent several hours speaking with the dealer, inspecting the car, and negotiating the price of the vehicle. Plaintiff stressed to the dealer that the car had to be new or

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60. 12 Lord, *supra* note 1, § 34:7.

61. *See Meyer*, *supra,* 273 Ill.App.3d at 890 (citing *Clay v. Harris*, 228 Ill.App.3d 475 (4th Dist. 1992)). This may not be a true instance of resort to trade usage, since courts not infrequently supply such omissions even if there is no settled trade usage to invoke. *See also* 810 ILCS 5/2-309 (a).

62. 12 Lord, *supra* note 1, § 34:7.

63. *Id.*

64. 229 Ill.App.3d 1032 (2nd Dist. 1992).

a demo, and the dealer repeatedly assured plaintiff that the car was new.

When plaintiff asked to see the paperwork of the car's history, however, the dealer told her that the paperwork was locked up for the weekend. Shortly thereafter, the salesman filled in the blanks on a preprinted retail order form. The dealer included such items as the price, plaintiff's deposit, and the transfer of the remaining manufacturer's warranty. However, the dealer did not fill out the area of the form that indicated whether the car was new or used. Thus, when plaintiff signed this order form, she had no reason to know that the car in question was actually used. (It seems that plaintiff overlooked the statutorily-required warning, printed on the contract form, not to sign the form if it was incomplete or contained any blank spaces. *See, e.g.*, 815 ILCS 375/3(c)(3).) Later, when the actual sales forms were completed (indicating that in fact the car was used), plaintiff was asked not to review the forms until the transaction was complete, "so that the documents would not get out of order."

Although the final sales contract forms plainly stated that the car was used, *Duran* squarely held that plaintiff was not bound by those written terms, and held that that she could still assert a claim under the Consumer Fraud Act, because her reliance on the dealer's contrary oral representations was reasonable in light of the omissions from the contract forms at the time she signed them.[65] This may well seem reasonable given the circumstances, but it has some breathtaking implications. *Duran* effectively holds that a consumer is not necessarily bound by what the contract says -- indeed, that a consumer is free to *contradict* the *express terms* of the contract by introducing evidence of contrary oral representations. This, of course, nullifies the parol evidence rule. (Even if it is viewed as based on a claim of fraudulent inducement, to

65. The lower court had previously held that her reliance was unreasonable in light of her signature on the sales forms that expressly contradicted the alleged misrepresentations.

which the parol evidence rule itself would not apply, it would seem to scuttle the usual fraud requirement of reasonable reliance: how could one reasonably rely on an oral representation, in the face of a directly contrary written statement?) Indeed, *Duran* also seems to clash with the basic principle, a key underpinning of the parol evidence rule, that any contracting party has a duty to read the contract that she signs.[66] However, the duty to read (which is surely fundamental to our entire scheme of contract law) can be squared with the holding in *Duran* if we read *Duran* to hold, not that there is no duty to read, but rather (and more sensibly) that there are circumstances where a defendant is estopped to insist that the plaintiff breached her duty to read. Such circumstances could be, as in *Duran,* where the defendant actively, and fraudulently, induced the plaintiff not to read the contract.

All that aside, it is extremely difficult to reconcile *Duran* with *Air Safety*. *Air Safety* (which did not articulate any exception for the Consumer Fraud Act, nor even for the UCC) is premised on the view that the written contract is the end of the story, at least where it contains an integration clause. However, according to *Duran*, in Consumer Fraud Act cases, the written contract may just be the starting point. The *Duran* approach is certainly understandable. Consumers are more likely than sophisticated businessmen to rely on representations made by sales representatives; and consumers are unlikely to understand, let alone perceive the implications of, standard "integration" clauses written in legalese. If the representations played

66. *See Paper Express, Ltd. v. Pfankuch Maschinen GMBH*, 972 F. 2d 753, 757 (7th Cir. 1992) (it is a fundamental principle of contract law that a person who signs a contract is presumed to know its terms and consents to be bound by them, citing 3 Arthur L. Corbin, CORBIN ON CONTRACTS 607 (1989), and13 Samuel Williston, WILLISTON ON CONTRACTS 1577 (1988)). This duty to read is inextricably interwoven with the parol evidence rule. If there is no duty to read, how can one sensibly enforce a rule holding the parties to what the document says?

a material role in inducing the consumer to enter into the contract, evidence of such representations should be admitted so long as the consumer was not given the opportunity to fully inspect the contract.

This approach, based as it is on an underlying claim of fraudulent inducement, has been applied even outside the confines of the Consumer Fraud Act – and notwithstanding the presence in the challenged contract of an express integration clause – in other Illinois cases.[67] *W.W. Vincent* is one of a long line of Illinois cases holding that parol evidence is always admissible to show fraudulent inducement to contract, notwithstanding the parol evidence rule.[68]

C. Insurance Cases

The non-statutory but important effect of public policy concerns on the parol evidence rule can be seen in the case law regarding insurance contracts. For example, in *Dobosz v. State Farm Fire & Casualty Co.*,[69] the implication of the court's holding is that at least until the insured receives the policy, he is entitled to rely on representations that are not contained in, and may be contrary to, the policy. In *Dobosz*, the plaintiff was sent a brochure which contained

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67. *See, e.g., W.W. Vincent & Co. v. First Colony Life Ins. Co*, 351 Ill.App.3d 752, 760-61 (1st Dist. 2004). The *W.W. Vincent* court cited and quoted Judge Posner's reasoning in *Vigortone AG Products Inc. v. PM AG Products Inc.*, 316 F.3d 641, 644 (7th Cir, 2002): "Fraud is a tort, and the parol evidence rule is not a doctrine of tort law and so an integration clause does not bar a claim of fraud based on statements not contained in the contract. Doctrine aside, all an integration clause does is limit the evidence available to the parties should a dispute arise over the meaning of the contract. It has nothing to do with whether the contract was induced *** by fraud."

68. *See Grand Tower & Cape Girardeau Ry. Co. v. Walton*, 150 Ill. 428 (1894); *Supreme Council Catholic Knights, etc. v. Beggs,* 110 Ill.App. 139, 149 (1st Dist. 1903); *General Electric Credit Auto Lease, Inc. v. Jankuski.* 177 Ill.App.3d 380, 386 (1st Dist. 1988) (noting that otherwise, claims of fraudulent inducement would be all but impossible because such allegations "always go beyond the four corners of the contract").

69. 120 Ill.App.3d 674 (2d Dist. 1983).

illustrations of the types of available coverage. One such illustration was captioned "water damage" and depicted rain falling through an open window. Based on this illustration, the insured bought the insurance coverage. However, when the insured sought payment for subsequent water damage, the insurance company claimed that water damage was not covered in the policy.

In *Dobosz*, the insured did not read the actual policy until after the water damage had occurred. As such, the plaintiff was not aware that the representations and illustrations were not a part of the policy. The court recognized that an insured is typically charged with notice of the contents of the insurance policy, especially if it were available to him or her, regardless of a failure to read the policy.[70] However, where the insured has not been provided with an opportunity to read the policy, the court held that the insured may be allowed to rely on outside representations.

The court's reasoning was cast in terms of estoppel, due to the lack of any "warning in [the insurer's] brochure that the policy terms are materially variant from the representations in the brochure."[71] The court's language is reminiscent of *Duran, supra*:

> ... Dobosz' negligence in failing to obtain or read the policy itself does not preclude a finding that State Farm is estopped to deny coverage here, given the contrary representations made in the brochure and the ambiguities created thereby.[72]

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70. *Id.* at 682 (citing *Florsheim v. Travelers Indemnity Co.*, 75 Ill.App.3d 298, 307 (1st Dist.1979)). As discussed at page 15 *supra,* this rule is generally necessary to prevent *ad hoc* alteration of insurance policies due to policyholder misunderstandings. But the rule has its limits, as *Dobosz* makes clear.

71. *Id.* at 682.

72. *Id.*

The reference to "ambiguities," while seeming to pay lip service to the parol evidence rule, is once again hard to square with a rigorous reading of *Air Safety*. The "ambiguities" existed only when one considered the brochure -- *i.e.,* evidence extrinsic to the policy. But there was clearly a "contradiction" between the brochure and the policy itself; in addition, the brochure contained a sort of reverse integration clause, providing (in small print) that what it said was "not a statement of contract" and was "subject to the ... policy itself."[73] The *Air Safety* reasoning would seem, then, to call for exclusion of the brochure.

Whether consistent with *Air Safety* or not, the holding in *Dobosz* is fully in keeping with the tendency of the courts to be more lenient with consumers in the application of the parol evidence rule. This is especially so in circumstances where the consumer either has not had a meaningful opportunity to take part in negotiating or drafting the contract terms, or has not been afforded an adequate opportunity to read the policy/contract itself.

Conclusion

The more one studies the parol evidence rule, the more confusing it seems to become. However, it is possible to glean several helpful general propositions from this complex quagmire. First, the goal of the parol evidence rule is to ensure business stability and to effectuate party intent by preventing fraud. Second, courts are more likely to relax the application of the parol evidence rule in favor of consumers, than in favor of presumably more sophisticated business parties. Third, in cases where we can infer that parties brought the same expectations and assumptions to the table (such as where both parties are "merchants"), it is more likely that they will have taken those shared expectations for granted and not fully

73. *Id.* at 677, 679.

expressed them in the agreement itself. In these cases, it makes sense to admit extrinsic evidence to aid the court in determining the intent of the parties at the time the contract was executed.

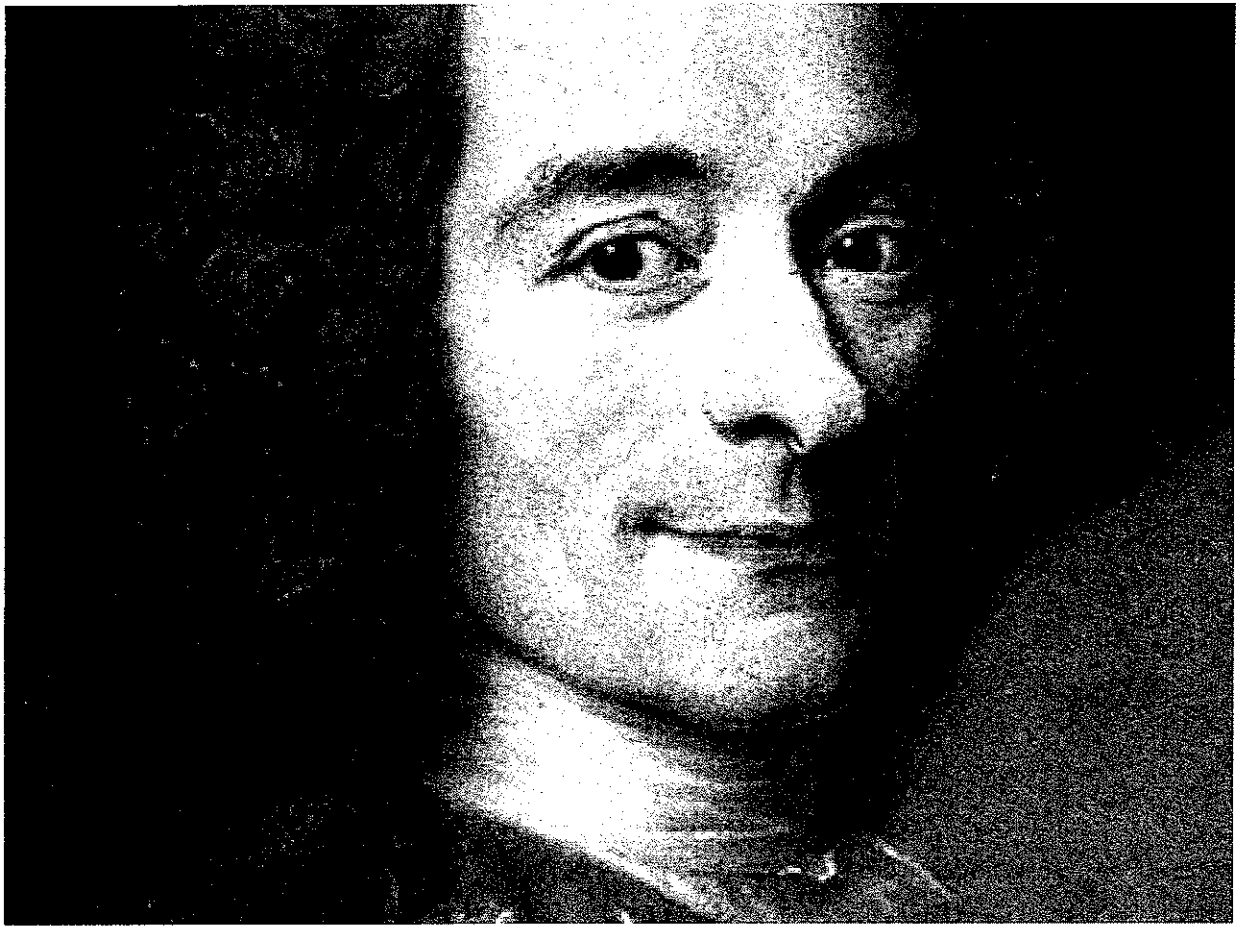
Contract law is inextricably linked with party intent and expectations. As such, it is difficult to devise a set of hard and fast rules to govern contract interpretation issues. And as with any area of law, a court should analyze the rules that do exist and decipher the reasoning behind the rule rather than applying the rule just because it exists. To that end, the components of the "rule" should be closely analyzed and understood. Blind application of any talismanic rule – let alone one with as much fraught terminology in it as the parol evidence rule – disserves proper analysis and exacerbates the rule's inherent problems.

SECTION B

- *PowerPoint Presentation: "Legal Charade: The Parol Evidence Rule," by Judge Peter Flynn, October 2017.*

The Parol Evidence Rule:

A LEGAL MASQUERADE



Jean-Marie Arouet

(aka Voltaire)

--Not "Parol"

—... Actually applies to *any* pre-contract data, oral, written, or behavioral

--Not "Evidence"

– It's actually a rule of substantive law

What Does That Mean?

- Evidence is about (1) information and (2) reliability.
- Saying "it's a rule of substantive law" really means: "… so we won't listen to that information *even if it's reliable.*"
- (Is that a bit scary? What, exactly, are we trying to do here? Shouldn't parties be able to tell us what they meant?)

--Not Really a "Rule"

- More like a dogma, larded with fuzzy words and riddled with exceptions and disputes

Here's The "Rule":

- "An agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence."
- *URS Corp. v. Ash,*

101 Ill.App.3d 229, 234 (4th Dist. 1981)

Or, Even More Tersely:

- The "four corners" rule states that if a contract is clear on its face, no evidence outside the contract may be considered.

- *Ahsan v. Eagle, Inc.,*

287 Ill.App.3d 788, 790 (3d Dist. 1997)

OK, Here's the *Full* Version:

- Traditional contract interpretation principles in Illinois require that "an agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence." [Citation omitted.].
- This approach is sometimes referred to as the "four corners" rule. [Citation omitted.]
- In applying this rule, a court initially looks to the language of a contract alone.... If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence. [Citation omitted.] If, however, the trial court finds that the language of the contract is susceptible to more than one meaning, then an ambiguity is present. [Citation omitted.] Only then may parol evidence be admitted to aid the trier of fact in resolving the ambiguity.

- *Air Safety, Inc. v. Teachers Realty Corp.,*

185 Ill.2d 457, 462-63 (1999)

All
Of
These
Versions
Are
Unclear
And
Wrong
!!!

For Example:

- What about **agreed-upon modifications**?
- What if the parties **add new provisions**

partway through the contract performance?

("Under Illinois law, parties to a written contract may alter or modify its terms by a subsequent oral agreement, even though the terms of the contract preclude oral modification."

A.W. Wendell & Sons v. Qazi, 254 Ill.App.3d 97, 105 (2d Dist. 1993); *Estate of Kern v. Handelsman,* 115 Ill.App.3d 789, 794 (1st Dist. 1983))

And More:

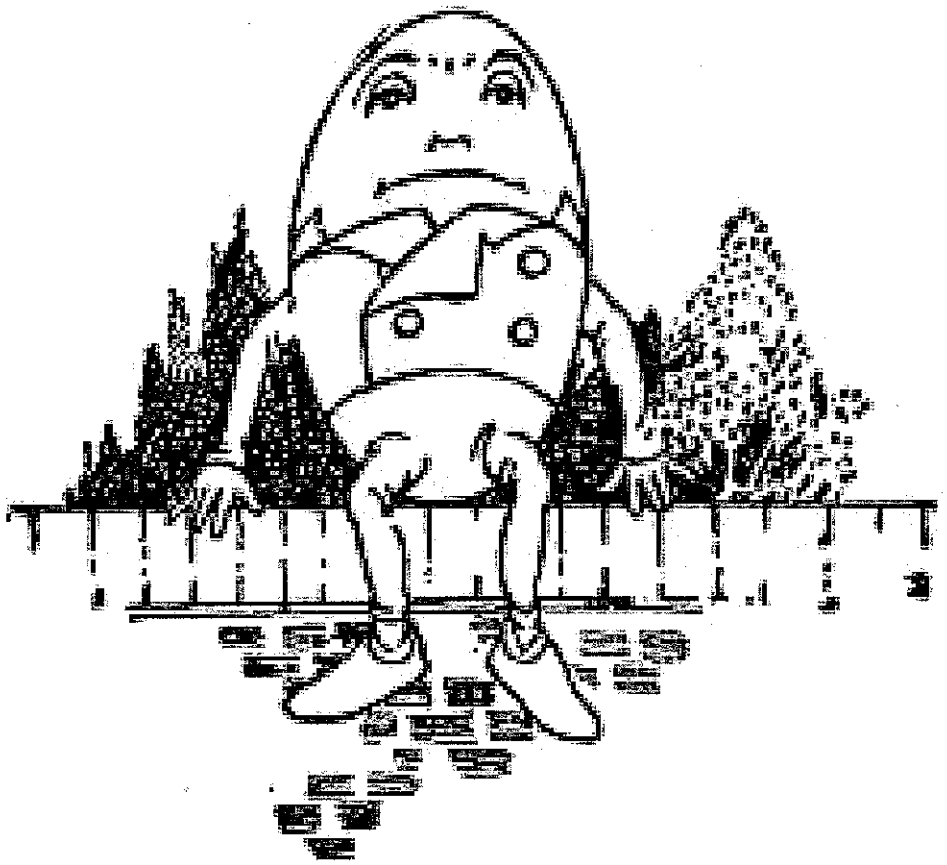
- What does "unambiguous" mean? Does it matter that the parties read sharply different meanings into the disputed term(s)?
- What if the parties' consistent **course of performance** of the contract, over time, is different from the contract provisions?
  - *See* the UCC (810 ILCS 5/) sec. 1-303(a)
  - This is not the same as course of ***dealing***, as to which *see* UCC sec. 1-303(b)

… And Still More …

- What if some of the words used have **specialized meanings** in the parties' business?
  - *See* UCC sec. 1-303(c) ("usage of trade")
  - If we allow evidence of this, are we *changing* the contract or just *explaining* the words?
  - **Why should explaining the words be a no-no?**
    - **"coal"**
    - **"concrete"**
    - **"standard"**

Is This Really A Good Idea?

Even If "Words Mean What I Want Them to Mean"?



Here's How the UCC Does It:

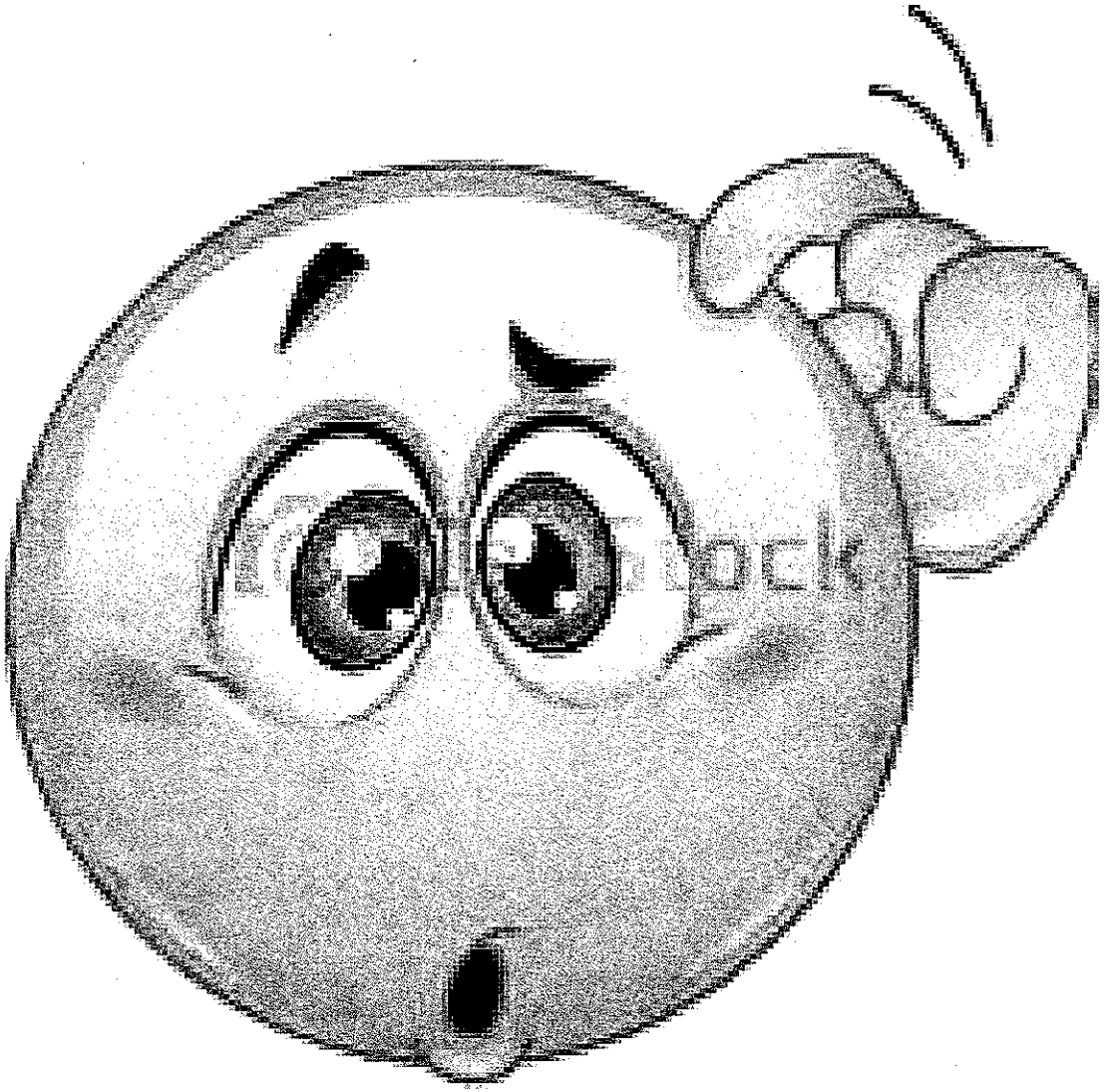
- Per UCC sec. 1-303(d), "A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement." **Isn't this just common sense?**

OK, Here's A Fairly Typical Integration Clause:

- "This Contract represents the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, either written or oral."
- (from *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill.2d 457, 460 (1999))

Does That Really Say What the "Rule" Claims?

- What does it actually exclude?
- The *Air Safety* Court says that by including an integration clause, contracting parties "are explicitly manifesting their intention to protect themselves against misinterpretations which might arise from extrinsic evidence." 185 Ill.2d at 464.
- What kind of "misinterpretation" does the quoted clause actually cover?
- Does it say anything at all about *explaining*?



The *Air Safety* Saga

- It begins with the "provisional admission" cases. (*See* your written materials.) They hold that even if a contract seems unambiguous, a party can proffer outside evidence to "show[] that an ambiguity exists which can be found only by looking beyond the [seemingly] clear language of the contract."

"Provisional Admission"

- Thus, the provisional admission cases say that "an extrinsic ambiguity exists 'when someone who knows the context of the contract would know if the contract actually means something other than what it seems to mean.'"
  - Note that this allows *explaining* the contract words by using outside evidence of "context," such as trade usage. That's different from *changing* the contract or adding new terms.

Air Safety's Facts

- In early 1990 Air Safety signed a contract with Teachers Realty to do asbestos abatement projects at a high-rise building.
- The contract allowed the Owner (Teachers) to "order changes" in the form of additions or deletions to the work. "All such changes in Work shall be authorized by change order, and shall be performed under the applicable conditions of the Contract Documents."

Air Safety's Facts (cont'd)

- The contract also had an integration clause, quoted earlier. (It barred "all *prior* negotiations, representations, or agreements.")
- In 1991 – over a year after the contract was signed, and while it was ongoing – Teachers separately sought bids for 16 additional asbestos abatement projects. The solicitation for bids required bidders to submit two prices for each project: one just for that project, and another for a discount on that project if the bidder were awarded all 16 of the further projects.

Air Safety's Facts (still cont'd)

- Air Safety bid on all 16 additional projects. Teachers' engineer recommended that Air Safety be given all 16.
- "However, no written contract was ever executed … respecting an award of all the new projects to Air Safety. Rather, three change orders to the 1990 contract were executed" covering "only *some* of the projects." The other projects were awarded to other bidders.

Air Safety's Facts (Still Cont'd)

- Though Air Safety only got *some* of the projects, the change orders explicitly priced those projects at the discounted amounts Air Safety bid if it got all 16 projects.
- Air Safety sued, arguing that the 1991 bid process actually "ripened into a contract between Air Safety and Teachers for all 16 projects," - or, if it didn't get all 16 projects, it should be paid the *un*-discounted amounts which it had bid on a per-project basis.

Teachers' Argument

- "Teachers posited that because the change orders were executed pursuant to the 1990 contract, the evidence presented by Air Safety merged into the 1990 contract via the 1990 contract's integration clause."
- Teachers also argued that "because the change orders are facially clear and unambiguous changes to the 1990 contract, the extrinsic evidence presented by Air Safety is inadmissible to contradict or vary the terms of the change orders."

Air Safety's Argument

- "Air Safety argues that this court should abandon the four corners rule and instead adopt the 'provisional admission' approach to contract interpretation (sometimes also referred to as the 'extrinsic ambiguity' approach)."

The Court's Holding

- The Supreme Court refused to adopt the provisional admission approach, "because the contract in the case before us contains an explicit integration clause." 185 Ill.2d at 464.
- The Court declined to decide whether the provisional admission approach would be proper for a contract which does not contain an integration clause. (*Id.* at 464 n.1.)

The Court's Reasoning

- "[C]onsidering extrinsic evidence of prior negotiations to create an 'extrinsic ambiguity' where *both* parties *explicitly* agree that such evidence will *not* be considered ignores the express intentions of the parties and renders integration clauses null."
- "An integration clause such as the one in the present case is a clear indication that the parties desire the contract be interpreted solely according to the language used in the final agreement."
- **(Is this really true on the facts of the Air Safety case?)**

The Court's Actual Mindset, Maybe?

- *Air Safety,* 185 Ill.2d at 464, quotes *Armstrong Paint & Varnish Works v. Continental Can Co.,* 301 Ill. 102, 106 (1921):
  - "When parties sign a memorandum expressing all the terms essential to a complete agreement they are to be protected against the doubtful veracity of the interested witnesses and the uncertain memory of disinterested witnesses concerning the terms of their agreement, and the only way in which they can be so protected is by holding each of them conclusively bound by the terms of the agreement as expressed in the writing."

The Post-*Air Safety* Landscape

- Your written material points out that after *Air Safety,* the appellate courts have backed off the provisional admission rule even in non-integration-clause cases.
- But the provisional admission rule isn't dead.
- For one thing, it is strongly supported by the UCC (quoted in your written materials).
- Also, in the 18 years since *Air Safety,* the Supreme Court has never dropped the other shoe.

Post-*Air Safety*

- In addition, it is hard to disagree with Justice Scariano's observation in *Meyer v. Marilyn Miglin, Inc.*, 273 Ill.App.3d 882, 889 (1st Dist. 1992), that "the meaning of words cannot be ascertained in a vacuum."
- Parties don't necessarily write things down in such a way that a judge – a stranger to the transaction – knows right away what they meant.

A Closing Puzzle

- Integration clause or no, a lot of judicial contract interpretation isn't about what the parties *did* intend. It's about what they *would have* intended – *if* they had thought, at the time of contracting, about the mess they're in now. (In some cases, like long-tail insurance liability, you can guarantee that they *never* thought along those lines.)
- An integration clause does not and cannot speak to that sort of "retrospective divination."

Another Closing Puzzle

- Maybe the parol evidence rule – *both sides* of it, from "no extrinsic evidence" to "whatever bears on intent" – is an artifact of the great underlying paradox of contract law:
- The chief rule of contract interpretation is to discern the intent of the parties;
- Except that the other chief rule is to *ignore* the intent of the parties unless they stated it in the contract.

Course Evaluation Form

Title of Course: "THE PAROL EVIDENCE RULE: A LEGAL MASQUERADE"

Date of Course: October 4, 2017 Location: James R. Thompson Center Assembly Hall Auditorium

Directions: On a scale of 1 to 5, (5 being the highest or best and 1 being the lowest or worst), please rate the program:

Rate how well this course satisfied your personal objectives **5 4 3 2 1**

Comments:_____

Rate how well the environment contributed to the learning experience **5 4 3 2 1**

Comments:_____

Rate how well the written materials contributed to the learning experience **5 4 3 2 1**

Comments:_____

Rate the level of significant intellectual, educational or practical content **5 4 3 2 1**

Comments:_____

Please rate the faculty using the same 1 – 5 scale:

	Overall Teaching Effectiveness					Effectiveness of Teaching Methods					Significant Current Intellectual or Practical Content				
Name: JUDGE PETER FLYNN	5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
Comments:															
Name: JUDGE LYNN M. EGAN (Ret.)	5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
Comments:															

SUGGESTIONS FOR FUTURE SEMINARS:_____