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Cover Page Footnote

The author wishes to thank the Fordham law students who provided research assistance for this article: Michael Getzler, Owen Kalt, Steven Feinmen, Sara Culp and John Caulfield.

THE PAROL EVIDENCE RULE AND IMPLIED TERMS: THE SOUNDS OF SILENCE

HELEN HADJIYANNAKIS*

INTRODUCTION

WHEN a client asks his lawyer what his duties are under a particular written contract, the lawyer's first words of response are usually: "Show me the contract." Yet a party's contractual obligations cannot be determined solely from a literal reading of a contractual document. The obvious first step is to interpret the document's language in light of all relevant circumstances, including any prior dealings between the parties and usages of the trade. Assuming that interpretation reveals no provision in the writing covering a particular issue, should the lawyer advise the client that he has no obligations other than those listed in the contract? Definitely not.

A seller of goods, for example, may have made no express warranties, yet be liable for breach of implied warranties arising from the circumstances of the sale.¹ Furthermore, an obligation of good faith and fair dealing, which exists in all contracts,² requires in some cases only absence of interference in the other party's performance³, but in others, affirmative conduct to cooperate in enhancing the other party's profits

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1. See *infra* note 184.

2. U.C.C. § 1-203 (1978); Restatement (Second) of Contracts § 205 comment d (1979) [hereinafter cited as Second Restatement]; see Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 Iowa L. Rev. 497, 498-501 (1984) [hereinafter cited as *More on Good Faith*]; Burton, *Good Faith Performance of a Contract within Article 2 of the Uniform Commercial Code*, 67 Iowa L. Rev. 1, 4-6 (1981); Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 666-79 (1963); Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 830-31 (1982); Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 207-08 (1968) [hereinafter cited as *Good Faith*]. For a list of cases representing jurisdictions that have explicitly recognized as a common law proposition that such a duty exists in every contract, see Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 404 app. (1980).

3. See, e.g., *Concrete Specialties v. H.C. Smith Constr. Co.*, 423 F.2d 670, 672 (10th Cir. 1970) (duty of cooperation); *Ligon v. Parr*, 471 S.W.2d 1, 3 (Ky. 1971) (same); *Mortgage Corp. v. Manhattan Sav. Bank*, 71 N.J. Super. 489, 502, 177 A.2d 326, 334 (1962) ("Though a court balks at making a contract for the parties, it will, where justice and expediency demand, infuse the contract with a spirit of good faith and fair dealing in order to justify the implication of a covenant which will prevent one party from impairing the right of the other party to receive the fruits of the contract.") (quoting *Price v. Spielman Motor Sales Co.*, 261 App. Div. 626, 629, 26 N.Y.S. 2d 836, 839 (1941)) (quoting 25 Cornell L.Q. 615, 615-16 (1940)).

under the contract.⁴ Assuming that the parties intend a contract, terms absent from the agreement of the parties⁵ but necessary for the resolution of the parties' contractual rights and obligations may be supplied by the court.⁶ The purpose of this Article⁷ is to explore the relationship between the implication of terms, sometimes called "the process of implication,"⁸ and the parol evidence rule. Although each topic has been the subject of considerable scholarly examination,⁹ the relationship between the two has received scant attention.¹⁰

The parol evidence rule states that if the parties assent to a writing as the final and complete expression of the terms of their agreement, evidence of prior or contemporaneous agreements may not be admitted to contradict, vary, or add to the terms of the writing.¹¹ Although the

4. See *Havel v. Kelsey-Hayes Co.*, 83 A.D.2d 380, 383, 445 N.Y.S.2d 333, 335 (1981) (implied covenant of good faith requires that exclusive licensee exploit license); *Kubick v. J. & R. Foods, Inc.*, 282 Or. 179, 183, 577 P.2d 518, 520 (1978) (good faith under U.C.C. § 2-306(2) requires use of "best efforts to supply or promote the product"); see also generally *Good Faith*, *supra* note 2.

5. A phenomenon recognized by the sales article of the Uniform Commercial Code (UCC or Code) is that generally parties consciously bargain over only a few important terms of a contract for the sale of goods: quantity, description and price. *Hawkland, Sales Contract Terms under the U.C.C.*, 17 U.C.C. L.J. 195, 196 (1985).

6. U.C.C. § 2-204(3) & official comment (1978); Second Restatement, *supra* note 2, § 204; *Hawkland, supra* note 5, at 196-97; see, e.g., U.C.C. § 2-305(1) (1978) ("reasonable price at the time for delivery"); *id.* § 2-308(a) (delivery at "seller's place of business"); *id.* § 2-309(1) (delivery within "a reasonable time"). Acceptance of this principle by the Second Restatement can be attributed to Professor Farnsworth's influential article, *Farnsworth, Disputes over Omission in Contracts*, 68 Colum. L. Rev. 860 (1968). See 47 A.L.I. Proc. 473, 480-82 (1970) (remarks of Professor Robert Braucher) [hereinafter cited as 1970 ALI Proceedings]. For a recent discussion of the Second Restatement approach, see Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 Cornell L. Rev. 785, 792-809 (1982).

7. The parol evidence rule has few, if any, supporters among academic commentators. Corbin wished that the rule had "[n]ever been stated." 3 A. Corbin, *Corbin on Contracts* § 582, at 455 (1960). Professor Sweet urges a major overhaul. See Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 Cornell L. Rev. 1036, 1062-63 (1968). Others have urged its abolition. See Note, *The Parol Evidence Rule: Is It Necessary?*, 44 N.Y.U. L. Rev. 972, 985-87 (1969) [hereinafter cited as *Is It Necessary?*]. This Article does not seek to add yet another voice to the throng of critics.

8. See 3 A. Corbin, *supra* note 7, § 562, at 286.

9. For commentary on the process of implication, see *id.* §§ 561-572A; 4 S. Williston, *A Treatise on the Law of Contracts* § 610B, at 532-53 (3d ed. 1961); Farnsworth, *supra* note 6, at 876-81. For a list of commentary on the parol evidence rule, see 9 J. Wigmore, *Evidence in Trials at Common Law* § 2401, at 7-8 n.1 (Chadbourn rev. ed. 1981). For a listing of commentary on the UCC parol evidence rule, see *infra* note 78.

10. Some aspects of the issue have been addressed by Professor Farnsworth in Farnsworth, *supra* note 6, at 887-90 and by the Second Restatement, *supra* note 2, § 204 comment e & ill. 1.

11. For various formulations of the parol evidence rule, see U.C.C. § 2-202 (1978); 3 A. Corbin, *supra* note 7, § 573, at 357; 4 S. Williston, *supra* note 9, § 631, at 948-51.

The statement in the text referring to contemporaneous agreements requires some explanation and qualification. A contemporaneous written agreement is generally deemed part of the final writing and is therefore operative. See *Brown v. Financial Serv. Corp.*, 489 F.2d 144, 149 (5th Cir. 1974); Restatement of Contracts § 237 comment a (1932)

courts traditionally assumed such assent from the mere fact that an apparently complete writing was entered into,¹² the Uniform Commercial Code and the Second Restatement of Contracts (Second Restatement) no longer make that assumption.¹³ The increased willingness of courts to supply terms to fill gaps in parties' agreements and the liberalization of the parol evidence rule mean that one who enters into an apparently complete written contract has no assurance that his only obligations are those expressed in the writing. A court might "imply" a term, or permit the other party to prove a term agreed to during negotiations but not included in the final written agreement. This Article explores the dynamic between the two possibilities.

Part I of this Article considers whether a rule of law that applies to the agreement as written is protected by the parol evidence rule. This issue arises when a party seeks to introduce proof of an oral agreement displacing a rule of law that would apply to the agreement as written. Parts II through V pose the opposite question: Does the parol evidence rule exclude a term implied by law? Whereas the issue addressed in Part I assumes that the court has already decided that a legal obligation exists, Parts II through V do not. Part II considers whether the parol evidence rule applies to obligations imposed by law. In other words, does the fact that the parties have entered into a written agreement affect the court's ability (or willingness) to supply a term? Parts III through V consider whether the parol evidence rule bars proof of the negotiations of the par-

[hereinafter cited as First Restatement]; 4 S. Williston, *supra* note 9, § 628, at 913-14. As to contemporaneous oral agreements the prevailing view is that their proof is subject to exclusion by the parol evidence rule. See U.C.C. § 2-202 (1978); First Restatement, *supra*, § 237; 4 S. Williston, *supra* note 9, § 637, at 1036. Corbin disagrees presumably because the substantive basis of the parol evidence rule, intention to supersede and discharge a prior agreement, is inapplicable to simultaneous agreements. See 3 A. Corbin, *supra* note 7, § 577, at 400-01. His reasoning appears to be as follows: If "contemporaneous" means "simultaneous," two results follow. First, the existence of a consistent oral agreement is relevant to show the writing is incomplete. *Id.* at 401. If the oral agreement exists, the writing must necessarily be incomplete because "[o]ne cannot express simultaneous assent to two things and at the same instant agree that one of them supplants and nullifies the other." *Id.* Second, by the same reasoning, the existence of a contradictory oral agreement is relevant to show that a writing was not assented to as final. See *id.* § 583, at 469-70, § 573, at 203-04 n.1 (1971 Supp.). If "contemporaneous" does not mean "simultaneous," the oral agreement is either prior or subsequent to the writing. See *id.* § 577, at 401. The parol evidence rule does not apply to subsequent agreements. *Id.*; J. Calamari & J. Perillo, *The Law of Contracts* § 3-6, at 113-14 (2d ed. 1977).

The Second Restatement position appears to be that the parol evidence rule does apply to contemporaneous agreements. See Second Restatement, *supra* note 2, § 215 (evidentiary effect is to exclude "evidence of prior or contemporaneous" agreements). *But see id.* § 213(1), (2) (substantive effect is to discharge only prior agreements). The Reporter declined to follow Corbin's view because terms can be "relatively contemporaneous." See 48 A.L.I. Proc. 441, 449 (1971) (remarks of Professor Braucher) [hereinafter cited as 1971 ALI Proceedings].

12. See 4 S. Williston, *supra* note 9, § 633, at 1014-15. See *infra* note 46 and accompanying text.

13. See *infra* notes 78-79, 93, 95 and accompanying text.

ties to establish a legal obligation (Part III), to give definition to a legal obligation (Part IV) or to negate a legal obligation (Part V).

The inquiry into the relationship between the parol evidence rule and implied terms is complicated by the lack of uniformity of scholarly and judicial opinion as to the scope of the rule.¹⁴ This lack of uniformity in turn reflects divergent opinions on the theoretical bases of the rule.¹⁵ Although most authorities agree that the parol evidence rule is not a rule of evidence,¹⁶ there is no agreement as to whether it is a rule of substantive law based on the intention of the parties,¹⁷ a rule of form which operates to limit freedom of contract,¹⁸ a rule of estoppel,¹⁹ a rule of procedure²⁰ or a rule of judicial convenience.²¹

A second complication arises because this inquiry requires careful identification of the basis on which the particular obligation is implied. An obligation may be implied as an inference of the intention of the parties, i.e., implied in fact, or as a duty imposed by law to fill a gap in the parties' agreement, i.e., implied in law.²² The courts, though, are seldom

14. See Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 Duke L.J. 881, 884; Palmer, *Reformation and the Parol Evidence Rule*, 65 Mich. L. Rev. 833, 834-36 (1967).

15. See generally Calamari and Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 Ind. L.J. 333 (1967); Sweet, *supra* note 7.

16. See Rinaudo v. Bloom, 209 Md. 1, 5-6, 120 A.2d 184, 187-88 (1956); 3 A. Corbin, *supra* note 7, § 573, at 357-58; First Restatement, *supra* note 11, § 237 comment a; Second Restatement, *supra* note 2, § 213 comment a; 9 J. Wigmore, *supra* note 9, § 2400, at 4; 4 S. Williston, *supra* note 9, § 631, at 955. Wigmore has stated of the parol evidence rule:

It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all.

9 J. Wigmore, *supra* note 9, § 2400, at 4.

17. See 3 A. Corbin, *supra* note 7, § 573, at 357, § 582, at 448.

18. See Calamari & Perillo, *supra* note 15, at 337-40 (discussing Williston).

19. See Comment, *The Parol Evidence Rule and Third Parties*, 41 Fordham L. Rev. 945, 951 (1973).

20. See McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 Yale L.J. 365, 366 (1932).

21. See Murray, *The Parol Evidence Process and Standardized Agreements under the Restatement (Second) of Contracts*, 123 U. Pa. L. Rev. 1342, 1347 (1975).

22. See Farnsworth, *supra* note 6, at 865.

Implied terms have been divided into three categories: (1) terms that the parties intended, (2) terms that the parties would have intended had they thought about it and (3) terms that are fair. The first involves a search for the parties' intention, the second involves a search for the parties' hypothetical intention, the third has nothing to do with the parties' intention, except that the court will generally not imply a term in the face of the parties' expressed intent to the contrary. See Williams, *Language and the Law—IV*, 61 L.Q. Rev. 384, 401 (1945). "Implied in law" or "constructive" terms, see *infra* note 25, include the second and third categories. See Farnsworth, *supra* note 6, at 865.

A variation of the first category avoids the inquiry into the actual intention of the parties by relying on an objective approach: Would a reasonable person in the position of the other party be justified in concluding that such a promise was made? See *Stop & Shop, Inc. v. Ganem*, 347 Mass. 697, 701, 200 N.E.2d 248, 251 (1964); *Havel v. Kelsey-*

clear as to whether "implied" terms are imposed by law or implied in fact.²³ The distinction, however, may have certain consequences on the operation of the parol evidence rule.²⁴ This Article will generally adopt the Second Restatement approach that "implied" terms are usually imposed by law,²⁵ but will also consider the consequences of treating those terms as implications of fact.

I. ARE RULES OF LAW PROTECTED BY THE PAROL EVIDENCE RULE?

The parol evidence rule proceeds from the premise that if the parties to a contract so intend, they can fully integrate²⁶ their agreement by as-

Hayes Co., 83 A.D.2d 380, 382, 445 N.Y.S.2d 333, 335 (1981); 11 S. Williston, A Treatise on the Law of Contracts § 1295, at 37 (3d ed. 1968).

23. See, e.g., *Zone Co. v. Service Trans. Co.*, 137 N.J.L. 112, 117-18, 57 A.2d 562, 565 (1948); *Haines v. City of New York*, 41 N.Y.2d 769, 772, 364 N.E.2d 820, 822, 396 N.Y.S.2d 155, 157-58 (1977); *Lake L.B.J. Mun. Util. Dist. v. Coulson & C.A.E., Inc.*, 692 S.W.2d 897, 906 (Tex. Ct. App. 1985). "[I]t is very often unnecessary for the court to distinguish . . . between promise implied in fact and promise 'implied by law' . . . in order to make a just decision." 3 A. Corbin, *supra* note 7, § 561, at 280.

24. If the term is implied in fact, but not from the writing alone, it is part of the parties' agreement not reduced to writing. Thus, it could conceivably be subject to the parol evidence rule. See *supra* text accompanying note 11. This result is often avoided by a process of interpretation. See *infra* note 179 and accompanying text. If the term is "implied in law," it is an obligation imposed by law on the parties' agreement and is not subject to the parol evidence rule. See *infra* note 156 and accompanying text.

25. See Second Restatement, *supra* note 2, § 204 comment d. Such terms may be called "constructive" terms, see 3A A. Corbin, *supra* note 7, § 632, at 22; Farnsworth, *supra* note 6, at 865, or "gap fillers," see E. Farnsworth, *Contracts* § 7.16, at 523 n.12 (1982), or simply "rules" of law, Nicholas, *Rules and Terms—Civil Law and Common Law*, 48 Tul. L. Rev. 946, 948-49 (1974). This Article uses the expression "implied in law" for the sake of convenient grouping of implied in fact and implied in law terms under the general heading of "implied terms."

26. The term "integration" is Wigmore's. See 9 J. Wigmore, *supra* note 9, § 2425, at 75-76. He defines "integration" as the "process of embodying the terms of a jural act in a single memorial." *Id.* at 75-76. In connection with this definition, Corbin stated:

Wigmore, whose experience was immense and whose opinion is worth as much as another's, thought it advisable to adopt the unfamiliar word "integration" in place of "writing" or "written contract" and to give it his own definition so that his own meaning in his discussion of the law might be accurately apprehended by his readers. It is not certain how well he succeeded in this; and in adopting the new term it is quite possible that new confusion was caused and that it has been used according to the system of Humpty Dumpty rather than with the meaning of Wigmore. It certainly has not yet simplified the application of the "parol evidence rule" or eliminated the previously prevailing variations and inconsistencies.

3 A. Corbin, *supra* note 7, § 588, at 528. "Integration" is used by both Corbin, see *id.* § 573, at 357, and Williston, see 4 S. Williston, *supra* note 9, § 631, at 949, as well as by both Restatements, see First Restatement, *supra* note 11, § 228; Second Restatement, *supra* note 2, § 209, and numerous judicial opinions, see, e.g., *Farmer v. Arabian Am. Oil Co.*, 277 F.2d 46, 49 (2d Cir.), cert. denied, 364 U.S. 824 (1960); *Chism v. Omlie*, 239 Miss. 576, 582, 124 So. 2d 286, 289 (1960); *Black v. Evergreen Land Developers, Inc.*, 75 Wash. 2d 249, 257, 450 P.2d 470, 475 (1969).

The First Restatement and other authorities have used the term "integrated" to mean "fully integrated." See, e.g., *Masterson v. Sine*, 68 Cal. 2d 222, 225, 436 P.2d 561, 563,

sending to a writing as the final and complete expression of their agreement. All agreements reached during negotiations but not included in the final and complete writing are superseded.²⁷ It is also possible for the parties to integrate their agreement partially by assenting to the writing as the final expression of only those terms contained in the writing.²⁸ In the latter case, inconsistent agreements of the parties are superseded²⁹ but consistent additional terms may be proved.³⁰ When the parties decide to express their agreement in a final writing, are the rules of law that apply to their agreement as written deemed integrated as well? That is, does the court read the written contract as though applicable rules of law are a part of it?

A. "Implied in Law" Terms

Consider a written contract for the repair of a structure. The writing states no completion date. The owner seeks to introduce evidence of an oral agreement made prior to the execution of the written contract that the repairs would be completed within three months. If the parties had not agreed on a completion date the law would imply an obligation to complete within a reasonable time.³¹ May the parties' actual agreement be proved?³² Because the writing is silent on time for performance, the fixed completion date is a consistent additional term, operative if the

65 Cal. Rptr. 545, 547 (1968) (en banc); First Restatement, *supra* note 11, § 228; 4 S. Williston, *supra* note 9, § 636, at 1033. This use is misleading because an agreement may be unintegrated, partially integrated or fully integrated. E. Farnsworth, *supra* note 25, § 7.3, at 452. The Second Restatement carefully distinguishes an integrated agreement (one expressed in a final writing) from a fully integrated agreement (one expressed in a final and complete writing). See Second Restatement, *supra* note 2 §§ 209-10. The UCC makes a similar distinction, but without using the words "integrated" or "integration." See U.C.C. § 2-202 (1978) (initial paragraph refers to "final expression"; subsection (b) refers to "complete and exclusive statement"). This Article maintains the distinction between an integrated agreement and a fully integrated agreement.

27. See J. Calamari & J. Perillo, *supra* note 11, § 3-2, at 99; 3 A. Corbin, *supra* note 7, § 573, at 368-69, § 582, at 447-48; First Restatement, *supra* note 11, § 237; Second Restatement, *supra* note 2, § 213; 4 S. Williston, *supra* note 9, § 631, at 952-53.

28. See J. Calamari & J. Perillo, *supra* note 11, § 3-2, at 101. Corbin agrees but advocates abandoning the term "partial integration," because "it . . . seem[s] unlikely that the parties intended the partial writing to be conclusive as to anything." 3 A. Corbin, *supra* note 7, § 581, at 441.

29. See 4 S. Williston, *supra* note 9, § 636, at 1035 ("[I]f a contract is even partially reduced to writing, the written portion is no more subject to contradiction by parol than the entire contract would be had it been wholly reduced to writing.").

30. *Id.* § 636, at 1033.

31. See J. Calamari & J. Perillo, *supra* note 11, § 2-13, at 46; see also U.C.C. § 2-309(1) (1978) (reasonable time for shipment or delivery of goods).

32. Courts disagree on this question. Compare *Kansas City Bridge Co. v. Kansas City Structural Steel Co.*, 317 S.W.2d 370, 373 (Mo. 1958) (actual agreement prevailed over reasonable time rule) and *Brazil v. Dupree*, 197 Or. 581, 597-98, 254 P.2d 1041, 1045 (1953) (same) with *California Drilling & Mach. Co. v. Crowder*, 58 Cal. App. 529, 532-33, 209 P. 68, 69 (1922) (reasonable time rule prevailed over alleged actual agreement) and *Gordon v. Great Lakes Bowling Corp.*, 18 Mich. App. 358, 366-67, 171 N.W.2d 225, 230 (1969) (same) and *Metropolitan St. Ry. v. Broderick & Bascom Rope*

agreement is partially integrated, superseded if the agreement is fully integrated. If, however, the "reasonable time" rule is deemed to be integrated, the written contract is read as though it stated in writing: "The repairs will be completed within a reasonable time." Proof of the agreed fixed completion date is, therefore, automatically excluded because it contradicts "reasonable time."³³ The court need never reach the difficult question of whether the agreement is fully or partially integrated.

The law governs the parties' agreement; it does not write the agreement. The scope of contractual obligation comprises two components: the parties' agreement and the rules of law or obligations a court imposes to fill gaps in the agreement.³⁴ To the extent that the rules of law are not

Co., 156 Mo. App. 640, 644, 137 S.W. 633, 635 (1911) (same), *overruled*, Kansas City Bridge Co. v. Kansas City Structural Steel Co., 317 S.W.2d 370 (Mo. 1958).

This division is not limited to time to render a performance. On duration of a continuing performance, compare *Reiss v. Usona Shirt Co.*, 174 A.D. 181, 183, 159 N.Y.S. 1031, 1032-33 (1916) (actual agreement prevailed over hiring at will rule) with *Foster v. Atlas Life Ins. Co.*, 154 Okla. 30, 33-34, 6 P.2d 805, 808-09 (1931) (hiring at will rule prevailed over alleged actual agreement). On time of payment, compare *Sivers v. Sivers*, 97 Cal. 518, 520-21, 32 P. 571, 572 (1893) (actual agreement prevailed over rule that payment of debt is due on demand) with *Balon v. Hotel & Restaurant Supplies, Inc.*, 6 Ariz. App. 481, 484-85, 433 P.2d 661, 664-65 (1967) (rule that payment is due on receipt of goods prevailed over alleged actual agreement), *vacated*, 103 Ariz. 474, 445 P.2d 833 (1968) (en banc).

The issue frequently arises in sale of goods contracts but is not limited to any particular type of transaction. See 3 A. Corbin, *supra* note 7, § 593, at 556. It is the subject of annotations at 85 A.L.R.2d 1269 (1962) (time for performance) and *id.* at 1331 (duration of performance).

The issue can be avoided by taking an interpretation approach. See *Delta Dynamics, Inc. v. Arioto*, 69 Cal. 2d 525, 527-29, 446 P.2d 785, 786-87, 72 Cal. Rptr. 785, 786-87 (1968) (en banc). See *infra* note 124 and accompanying text.

33. Presumably, the offered term will always be, to some extent, inconsistent with the implied term. Otherwise its introduction into evidence would be superfluous.

34. See U.C.C. § 1-201(3), (11) (1978); see also 3 A. Corbin, *supra* note 7, § 541, at 95-96 n.69 (discussing the obligation of good faith and fair dealing and citing Lord Wright's remarks that courts are in a sense making a contract for the parties by compelling payment of a reasonable price); E. Durkheim, *The Division of Labor in Society* 214 (1964) (Contract law "forces us to assume obligations that we have not contracted for, in the exact sense of the word, since we have not deliberated upon them"). But see 1 S. Williston, *A Treatise on the Law of Contracts* § 3A, at 14 (3d ed. 1957) ("Accuracy of reasoning requires a recognition of such obligations . . . as quasi contracts."); Speidel, *The New Spirit of Contract*, 2 J. L. & Comm. 193, 208 (1982) ("[A] duty of good faith in performance and enforcement of a contract imposed without the parties' consent . . . [is a form of tort].").

Within the context of a contract, so-called "implied in law" obligations should properly be called contractual obligations though not strictly based on intention. Any reference to intent merely means absence of intent to the contrary. These obligations are governed by contract remedies. See *Seaman's Direct Buying Serv. v. Standard Oil Co.*, 36 Cal. 3d 752, 768, 686 P.2d 1158, 1166, 206 Cal. Rptr. 354, 362 (1984) (contract remedies for breach of implied covenant of good faith have included specific performance, rescission and damages). Of course, the breach of an implied covenant may also create tort liability. See *id.*, 686 P.2d at 1166, 206 Cal. Rptr. at 362; *Diamond, The Tort of Bad Faith Breach of Contract: When, If at All, Should It Be Extended beyond Insurance Transactions?*, 64 Marq. L. Rev. 425, 425-29 (1981); *Kornblum, Recent Cases Interpreting the Implied Covenant of Good Faith and Fair Dealing*, 30 Def. L.J. 411, 431-32 n.50

mandatory, the agreement prevails over rules of law.³⁵ When, as in the repair contract, the parties have reached an agreement displacing the rule of law, the rule of law is not applicable.³⁶ Thus, courts holding that rules of law are integrated despite the parties' contrary agreement reverse fundamental priorities in determining the terms of the agreement.

If a court holds that the rule of law prevails over the parties' agreement to the contrary, it is because the parol evidence rule which the court is applying prohibits the court from taking into account the actual agreement of the parties.³⁷ The parol evidence rule could exclude proof of the actual agreement on one of two bases: contradiction—the rule of law is integrated as part of the writing³⁸—or total integration—the parties intend their writing to express their complete agreement.³⁹

Many cases that purported to use the first basis actually used the second.⁴⁰ Therefore, in order to understand the cases concluding that the implied in law term is integrated, it is necessary to review briefly the approaches of various authorities in deciding whether an agreement is fully or partially integrated and to consider how each approach would treat the offered specific time agreement.⁴¹ At least in theory, resolving

(1981). For a case in which the court declined to imply a term and instead granted relief in restitution, see *Nelson v. Gish*, 103 Idaho 57, 60, 644 P.2d 980, 983 (1982).

35. E. Farnsworth, *supra* note 25, § 7.1, at 446; Hawkland, *supra* note 5, at 206. Because there are no parol evidence rule issues where an alleged term contradicts a mandatory rule of law, all references to rules of law in this Article refer to supplementary, that is non-mandatory, rules of law. See E. Farnsworth, *supra* note 25, § 7.1, at 446.

36. See *Kansas City Bridge Co. v. Kansas City Structural Steel Co.*, 317 S.W.2d 370, 375 (Mo. 1958) (“‘when an ordinary contract does not state the time for performance, and the parties orally agree on a particular time,’ the legal implication that they intended a reasonable time is an implication ‘fictitiously invented by the law’”) (quoting 3 S. Williston, *Williston on Contracts* § 640, at 1840 (rev. ed. 1963)).

37. Although the parol evidence rule may not require an “agreement to the contrary” to be in writing, a specific statute might. See *Masterson v. Sine*, 68 Cal. 2d 222, 229, 436 P.2d 561, 566, 65 Cal. Rptr. 545, 550 (1968) (en banc) (“[A] statute may preclude parol evidence to rebut a statutory presumption.”); *Martel Constr. Inc. v. Gleason Equip., Inc.*, 166 Mont. 479, 482-83, 534 P.2d 883, 884-85 (1975) (where parties entered into written contract, statute providing that time not of the essence unless contract terms expressly so provided barred proof of oral agreement that time was of the essence and took precedence over more “general” UCC parol evidence rule); see also 3 A. Corbin, *supra* note 7, § 593, at 561 (statutes which fill gaps in the parties’ agreement are “not in aid of the ‘parol evidence rule’”). Under the UCC, an agreement contrary to a rule of law need not necessarily be in writing. See *Brunswick Box Co. v. Coutinho, Caro & Co.*, 617 F.2d 355, 360 (4th Cir. 1980) (court may look beyond written document to determine whether parties “otherwise agreed”).

38. See *supra* notes 28-29 and accompanying text.

39. See *supra* notes 26-27 and accompanying text.

40. See *infra* notes 44-53 and accompanying text.

41. How a court decides whether an integration is total or partial is generally recognized as a key issue under the parol evidence rule. See *Calamari & Perillo, supra* note 15, at 337; *Murray, supra* note 21, at 1351-54. This Article addresses this issue only tangentially as it relates to the question of whether implied terms are deemed integrated. For commentary comparing the differing views, see *Calamari & Perillo, supra* note 15, at 337-45 (comparing Williston and Corbin); Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 Vand. L. Rev. 1383, 1392-97 (1983) (comparing Williston,

the issue of whether an agreement is fully or partially integrated depends on the intent of the parties.⁴² Accordingly, we should consider in each case what test of intent is used and what extrinsic evidence of intent is considered by the court.⁴³

1. The "Four Corners" Rule

Under the earliest approach,⁴⁴ the question of total or partial integration was decided solely by the apparent completeness of the writing—the "four corners" approach.⁴⁵ If the writing appeared complete on its face, the agreement was conclusively presumed to be fully integrated.⁴⁶ If the writing was incomplete on its face, the agreement was only partially integrated.⁴⁷

The difficult question under the "four corners" approach was deciding whether a particular writing was facially incomplete. When the writing itself referred to a separate agreement or indicated that other agreements existed, for example, by referring to a telephone conversation, the agreement generally was held to be partially integrated.⁴⁸ But when the writing simply omitted an essential term such as time for performance, the decisions were not uniform.⁴⁹ Most courts excluded proof of the offered

Corbin, the UCC and the Second Restatement); Wallach, *The Declining "Sanctity" of Written Contracts—Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 Mo. L. Rev. 651, 656-68 (1979) (comparing pre-Code approaches to parol evidence rule).

42. See E. Farnsworth, *supra* note 25, § 7.3, at 452.

43. The question of intent, ordinarily a question of fact, is decided by the court. *Id.* at 460. But see *infra* note 86 (discussing Corbin's view).

44. See McCormick, *supra* note 20, at 369-71 (1932); Wallach, *supra* note 41, at 656-58; *Is It Necessary?*, *supra* note 7, at 973-75.

45. See, e.g., *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U.S. 510, 517 (1891); *In re Simplot's Estate*, 215 Iowa 578, 582, 246 N.W. 396, 398 (1933); *Grant v. King*, 117 Minn. 54, 57, 134 N.W. 291, 292 (1912); *Thompson v. Libbey*, 34 Minn. 374, 377, 26 N.W. 1, 2 (1885); *Davis v. Ferguson*, 111 Neb. 691, 696, 197 N.W. 390, 392 (1924); *Naumberg v. Young*, 44 N.J.L. 331, 339 (1882). The "four corners" approach has been applied relatively recently. See *Gulf Atl. Towing Corp. v. Dickerson, Inc.*, 271 F.2d 542, 545-46 (5th Cir. 1959). But see *United States v. Clementon Sewerage Auth.*, 365 F.2d 609, 613-14 (3d Cir. 1966) (criticizing "four corners" approach); J. Murray, *Contracts* § 108, at 236 (2d rev. ed. 1974) ("[T]here is no modern court which would not listen to evidence of the extrinsic matter (as well as inspecting the writing itself) to determine the integration questions."); Wallach, *supra* note 41, at 656 (rule today is "largely of historical interest").

46. See, e.g., *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U.S. 510, 517 (1891); *In re Simplot's Estate*, 215 Iowa 578, 582, 246 N.W. 396, 398 (1933).

47. See, e.g., *Sutton v. Weber*, 127 Iowa 361, 366-67, 101 N.W. 775, 777-78 (1904); *Caputo v. Continental Constr. Corp.*, 340 Mass. 15, 18, 162 N.E.2d 813, 816 (1959); *Winn v. Chamberlin*, 32 Vt. 318, 320-22 (1859).

48. See, e.g., *American Bridge Co. v. Crawford*, 31 F.2d 708, 710 (3d Cir. 1929); *Caputo v. Continental Constr. Corp.*, 340 Mass. 15, 18 & n.1, 162 N.E.2d 813, 814-16 & n.1 (1959).

49. Compare *Stahelin v. Sowle*, 87 Mich. 124, 132-34, 49 N.W. 529, 532 (1891) (partial integration) and *Winn v. Chamberlin*, 32 Vt. 318, 320-22 (1859) (same) with *First State Bank v. Noel*, 94 Mo. App. 498, 503, 68 S.W. 235, 236 (1902) (total integration) and *Gale Mfg. Co. v. Finkelstein*, 59 S.W. 571, 571-72 (Tex. Civ. App. 1900) (same).

term,⁵⁰ apparently assuming from the writing's silence that the parties had not agreed to a specific time for performance. But because the test of total integration was the facial completeness of the document, these courts frequently justified their holdings by stating that the rule of law, "reasonable time," was read into the writing and thereby completed it.⁵¹ On the other hand, a minority of cases decided under the "four corners" approach concluded that a writing omitting an essential term was incomplete on its face (a partial integration), and thus admitted proof of the offered term to supplement the written agreement.⁵²

Though the two lines of cases reached opposite results, the reasoning of both was based on the same incorrect premise: that the writing is the contract.⁵³ The former found it necessary, in order to complete the writing, to treat the rules of law as though they were part of the document. The latter failed to recognize that if the parties have agreed to only three terms, a writing that expresses those terms is complete though the contract would include obligations supplied by law to fill the gaps. The basic failing of both lines of decisions stems from the attempt to decide the

50. See, e.g., *First State Bank v. Noel*, 94 Mo. App. 498, 503, 68 S.W. 235, 236 (1902); *Cameron Coal & Mercantile Co. v. Universal Metal Co.*, 26 Okla. 615, 616-17, 110 P. 720, 720 (1910); *Retailers Serv. Bureau v. Smith*, 165 S.C. 238, 246-47, 163 S.E. 649, 652 (1932); *Hayden v. Hoadley*, 94 Vt. 345, 348, 111 A. 343, 344-45 (1920).

51. See, e.g., *Gardiner v. McDonogh*, 147 Cal. 313, 319, 81 P. 964, 966 (1905) (en banc) (read in "reasonable time" to perform); *California Drilling & Mach. Co. v. Crowder*, 58 Cal. App. 529, 531, 209 P. 68, 69 (1922) (same); *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 750, 103 P. 938, 939-40 (1909) (same); *Metropolitan St. Ry. v. Broderick & Bascom Rope Co.*, 156 Mo. App. 640, 644, 137 S.W. 633, 635 (1911) (same), *overruled*, *Kansas City Bridge Co. v. Kansas City Structural Steel Co.*, 317 S.W.2d 370 (Mo. 1958); see also *Union Special Sewing Mach. Co. v. Lockwood*, 110 Ill. App. 387, 390 (1903) (parol evidence inadmissible to contradict legal presumption of hiring at will).

As Justice Traynor explained in a leading case rejecting this approach: "Virtually every writing leaves some terms to be implied and almost none would qualify as [total] integrations without implying some terms. The decision[s] [were] therefore a product of an outmoded approach to the parol evidence rule, not of any compulsion to give conclusive effect to presumptions of implied terms." *Masterson v. Sine*, 68 Cal. 2d 222, 229-30 n.3, 436 P.2d 561, 566 n.3, 65 Cal. Rptr. 545, 550 n.3 (1968) (en banc). In *Masterson*, the argument was made that parol evidence to show restricted transferability of the grantor's option to repurchase property would contradict the deed creating the option because under California law the unrestricted option was freely transferable. The court rejected the argument stating, "the fact that there is a written memorandum . . . does not necessarily preclude parol evidence rebutting a term that the law would otherwise presume." *Id.* at 229, 436 P.2d at 565, 65 Cal. Rptr. at 549. For a discussion of *Masterson*, see Note, *Chief Justice Traynor and the Parol Evidence Rule*, 22 Stan. L. Rev. 547, 553-55 (1970); *Is it Necessary?*, *supra* note 7, at 977-82; 56 Cal. L. Rev. 1671, 1671-76 (1968).

52. See, e.g., *Stahelin v. Sowle*, 87 Mich. 124, 132-35, 49 N.W. 529, 532 (1891); *Dunnett & Slack v. Gibson*, 78 Vt. 439, 443-44, 63 A. 141, 142 (1906), *overruled*, *Hayden v. Hoadley*, 94 Vt. 345, 111 A. 343 (1920).

53. The total contractual obligation comprises both the agreement of the parties and obligations imposed by law. See *supra* note 34 and accompanying text. A written contract, if complete, expresses the entire agreement between the parties, but not the entire contractual obligation.

question of whether an agreement is fully or partially integrated by looking within the "four corners" of the document.

2. Williston and the First Restatement

Williston's test for determining whether an integration is total or partial is a liberalization of the "four corners" test⁵⁴ because, under Williston's test, facial completeness of the writing does not necessarily result in finding a total integration.⁵⁵ Under Williston's highly influential test, adopted by the Restatement of Contracts (First Restatement),⁵⁶ even if a written contract is deemed complete on its face, a consistent additional term may be proved if the term is one that parties similarly situated would naturally make and not include in the writing.⁵⁷ The First Restatement drafters recognized that "there are cases where it is so natural to make a separate agreement, frequently oral, in regard to the same subject matter, that the Parol Evidence Rule does not deny effect to the collateral agreement."⁵⁸

Williston's rule is similar to the "four corners" approach in at least one respect, however. It is a formalistic test of presumed, not actual, intention of the parties to fully integrate their agreement.⁵⁹ Little or no extrinsic evidence need be considered because the question is not what the parties did but what parties similarly situated might normally do.⁶⁰

54. See Wallach, *supra* note 41, at 660.

55. See J. Calamari & J. Perillo, *supra* note 11, § 3-3, at 105; 4 S. Williston, *supra* note 9, § 633, at 1014-16; see also First Restatement, *supra* note 11, § 229 comment a.

56. See First Restatement, *supra* note 11, § 240(1)(b).

57. See 4 S. Williston, *supra* note 9, § 638, at 1039-42; see also First Restatement, *supra* note 11, § 240(1)(b).

58. First Restatement, *supra* note 11, § 240 comment d. If the alleged collateral agreement can stand alone as an independent contract between the same parties, it is admissible to provide consistent additional terms without inquiring whether it would have been naturally included in the writing. See J. Calamari & J. Perillo, *supra* note 11, § 3-3, at 105; 3 A. Corbin, *supra* note 7, § 584, at 477; First Restatement, *supra* note 11, § 240; Second Restatement, *supra* note 2, § 216(2)(a). The discussion throughout this Article assumes that the offered agreement depends for its validity on the consideration stated in the writing.

59. See 4 S. Williston, *supra* note 9, § 638, at 1037-42; see also Calamari & Perillo, *supra* note 15, at 337-45 (distinguishing Williston's test of presumed intention from Corbin's inquiry into actual intent). The test has been called a "reasonable man" test of intention, see Wallach, *supra* note 41, at 659, the "normal and natural" test, see Sweet, *supra* note 7, at 1038, the "naturalness" test, see Strahorn, *The Parol Evidence Rule and Warranties of Goods Sold*, 19 Minn. L. Rev. 725, 728 (1935) and the "natural omission" test, see Murray, *supra* note 21, at 1366.

60. See 4 S. Williston, *supra* note 9, § 638, at 1041 ("The point is not merely whether the court is convinced that the parties before it did in fact do this, but whether parties so situated generally would or might do so."). Comments to the First Restatement, however, seem to be more liberal and to permit broader inquiry into the parties' intent. See First Restatement, *supra* note 11, § 240 comment d ("It is not essential that a particular provision would always or even usually be made in a separate collateral agreement. It is enough that making such a provision in that way is not so exceptional as to be odd or unnatural."); see also *id.* § 228 comment a ("That a document was or was not adopted as an integration may be proved by any relevant evidence."). Corbin argues that "[w]hether

As a practical matter, Williston's "naturalness" test is a test not only for admission of the evidence but also for exclusion of the evidence. If a consistent additional term would naturally be omitted from the writing it may be proved (the agreement is only partially integrated), but if it would naturally be included in the writing proof of it is barred (the agreement is fully integrated).⁶¹

How does Williston's rule apply in the case in which the parties have agreed to a stated completion date but have not included the date in the writing? Williston severely criticized the cases that, under the four corners approach, read in the rule of law "reasonable time" in order to exclude proof of the actual agreement.⁶² He approved the results of cases that admitted proof of the actual agreement in preference to applying the "reasonable time" rule, but it is not clear from his discussion on what basis proof of the oral agreement is admissible.⁶³ It would seem that his "naturalness" test would be even more restrictive than the "four corners" or "facial completeness" test when applied to a case in which an essential term, such as time of performance, is omitted from the writing. The absence from the writing of a term fixing the time for performance is an important omission. By the same token, an alleged agreement fixing a time for performance is such an integral part of the transaction that if the agreement were intended to be part of the contract, one might ordinarily expect the parties to have included it in the writing. Therefore, a court applying an approach to total integration which depends on the facial completeness of the writing could conceivably conclude that the agreement is only partially integrated, whereas a court applying an approach that depends on whether the term is natural to include would generally conclude that the agreement is fully integrated. Thus, if the agreed completion date had to pass Williston's "naturalness" test, its proof would ordinarily be barred, a result contrary to that which Williston intended.⁶⁴

Presumably to avoid this anomalous conclusion and reach the desired result, the First Restatement indicates that the agreed fixed time term is a naturally omitted term. It uses the following illustration to exemplify an agreement that "'might naturally be made' without inclusion in an integrated contract".⁶⁵

or not it was 'natural' for the parties to do as they did bears only on the credibility of the evidence offered." See 3 A. Corbin, *supra* note 7, § 584, at 480.

61. See 4 S. Williston, *supra* note 9, § 638, at 1040-42; see also First Restatement, *supra* note 11, § 240 & comment c. The statement in the text assumes that the writing is deemed apparently complete. See *supra* text accompanying notes 55-57 and *infra* text accompanying note 71.

62. See 4 S. Williston, *supra* note 9, § 640, at 1054-60.

63. See *id.* § 640, at 1051-63.

64. See *id.* § 640, at 1057 n.8 ("more progressive and realistic" to admit evidence of actual agreement "instead of imposing the harsh and arbitrary *reasonable* time doctrine") (emphasis in original).

65. First Restatement, *supra* note 11, § 240 comment d. The First Restatement's "naturalness" test, when applied in this context, seems so out of place that it is hard to imagine that it would have been used absent the necessity of including the case within the

A and B in an integrated contract respectively promise to sell and to buy specified goods. No time or place for delivery is specified. If no agreement is made as to these matters the rule of law is that the goods are deliverable in a reasonable time at the seller's place of business. A contemporaneous oral agreement that the goods shall be delivered within thirty days, at the buyer's place of business, is operative.⁶⁶

Not surprisingly, the courts have not found the "naturalness" test helpful in this context.⁶⁷ The few cases that cite the First Restatement on this issue appear to place their reliance primarily on the illustration⁶⁸ rather

black letter. Williston's treatise avoids the issue but, if anything, indicates blanket admissibility: "[T]he written memorial does not purport to be complete upon its face and the extrinsic evidence does not therefore serve to vary or contradict it." 4 S. Williston, *supra* note 9, § 640, at 1061 (quoting *Marcus & Co. v. K.L.G. Baking Co.*, 122 N.J.L. 202, 207, 3 A.2d 627, 630 (1939)).

The First Restatement's conclusion that the time for performance is a naturally omitted term reveals the underlying purpose of the test as a threshold test of credibility of the evidence: It is not unusual for parties to fix a time for performance, and, it is therefore natural to conclude that some such agreement was made. The test is thereby satisfied.

Thus, the "naturalness" test is not necessarily limited to the question of whether it would have been natural for the parties to include the term in the writing. Rather, it questions whether it is natural to conclude that such an agreement was reached and continues to be a viable part of the agreement despite the writing. A contemporaneous oral agreement, as in the illustration, might meet the test more easily than one reached very early in the negotiating process. See First Restatement, *supra* note 11, § 240 comment d; see also *id.* § 240(1)(b) ill. 2-7 (five of six illustrations of agreements that "might naturally be made" are "contemporaneous oral" terms); Sweet, *supra* note 7, at 1065 (written agreement less likely to be fully integrated if oral agreement was made after final contract was prepared for execution).

66. First Restatement, *supra* note 11, § 240(1)(b) ill. 4; see *id.* § 240(1)(b) ill. 5 (omission of route of shipment agreement from writing).

The First Restatement illustration could indicate that the completion date agreement is always operative because such a term is natural to omit from the writing. A comment, however, injects initial doubt by indicating that the offered term must still meet the test of consistency with the integration. See First Restatement, *supra* note 11, § 240 comment c. The offered term would be inconsistent with the integration if there is "a clear implication of fact from the writing that it fully expresses the whole bargain in regard to the matter in question." *Id.*; see 4 S. Williston, *supra* note 9, § 639, at 1048 (discussing same implication). Can a writing that omits an essential term ever contain an implication of fact that it "expresses the whole bargain in regard to the matter in question" without an express statement to that effect in something like a merger clause? See *infra* note 91. The First Restatement illustration, see *supra* text accompanying note 66, and Williston's treatise suggest that the answer is no. See 4 S. Williston, *supra* note 9, § 640, at 1061.

This implication may be merely another way of asking the "naturalness" question. See *Mitchell v. Lath*, 247 N.Y. 377, 385-86, 160 N.E. 646, 649 (1928) (Lehman, J., dissenting). Williston recognized that there is an overlap between the "naturalness" test and the consistency test:

Whether . . . a collateral agreement tends to contradict the implications of the writing . . . will depend in large measure on the question whether a reasonable person making such an agreement as is set up both in the writing and in the proffered parol evidence might naturally have separated the matters into two parts.

4 S. Williston, *supra* note 9, § 639, at 1051.

67. See *infra* notes 68-69.

68. See, e.g., *Kansas City Bridge Co. v. Kansas City Structural Steel Co.*, 317 S.W.2d 370, 375 (Mo. 1958); *Brazil v. Dupree*, 197 Or. 581, 597, 254 P.2d 1041, 1044-45 (1953).

than on the "natural to omit" rationale, but most cases that admit proof of the oral agreement resort to the "incomplete on its face" approach.⁶⁹

Even Williston does not apply the "naturalness" test in this context. On the contrary, he appears to approve of the cases which have used the "incomplete on its face" rationale.⁷⁰ Thus, Williston seems to be substantially in accord with the minority "four corners" cases that concluded that the omission of an essential term indicated that the writing was a partial integration.⁷¹ Interestingly, the First Restatement's solution is exactly the opposite. It indicates that a written contract which lacks only a time for performance term is complete on its face but an oral agreement fixing time for performance is natural to omit, and may therefore be proved.

3. Wigmore's Rule

The Wigmore approach to the question of total or partial integration departs from both the "four corners" and the Williston approaches because Wigmore seeks the actual intent of the parties based on all relevant evidence.⁷² However, Wigmore's "chief and most satisfactory" test for determining the parties' intent is a formalistic one: "whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all in the writing.*"⁷³ In the illustration under consideration the answer is no, and therefore the offered term is "probably" admissible.⁷⁴ Although the "four corners" and the Williston approaches generally assume total inte-

69. See, e.g., *Stahelin v. Sowle*, 87 Mich. 124, 130, 49 N.W. 529, 532 (1891); *Marcus & Co. v. K.L.G. Baking Co.*, 122 N.J.L. 202, 207, 3 A.2d 627, 630 (1939); *Dunnett & Slack v. Gibson*, 78 Vt. 439, 443-44, 63 A. 141, 142 (1906), *overruled*, *Hayden v. Hoadley*, 94 Vt. 345, 111 A. 343 (1920).

70. See 4 S. Williston, *supra* note 9, § 640, at 1061 (discussing *Marcus & Co. v. K.L.G. Baking Co.*, 122 N.J.L. 202, 3 A.2d 627 (1939)).

71. See *supra* note 52 and accompanying text.

The First Restatement uses two primary criteria for admitting evidence of an extrinsic agreement: 1) the writing is incomplete on its face and 2) the term is one that would naturally be omitted. See First Restatement, *supra* note 11, § 240 comments a, d. The First Restatement, however, emphasizes that the first criterion may be used only if the writing itself shows that it is incomplete. See *id.* comment a. The First Restatement's use of the second criterion to admit proof of the oral agreement indicates that it views a writing omitting time for performance as complete on its face (though not containing an implication of fact that it expresses the whole bargain, see *supra* note 66) because the "naturalness" test comes into play only when the writing is complete on its face. Williston uses the same two criteria, see 4 S. Williston, *supra* note 9, § 633, at 1014-15, § 638, at 1041, but appears to admit the term because the writing "does not purport to be complete upon its face." See *id.* § 640, at 1061.

72. See 9 J. Wigmore, *supra* note 9, § 2430, at 98 ("This intent must be sought where always intent must be sought, namely, in the *conduct and language* of the parties and the *surrounding circumstances.*") (emphasis in original) (citations omitted).

73. *Id.* § 2430, at 99 (emphasis in original). The truth of the offered evidence is assumed for the purpose of making a ruling on its admissibility under the parol evidence rule. See *id.*

74. See *id.* ("If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation.")

gration when a writing is apparently complete,⁷⁵ Wigmore's test does not seem to assume that the integration is either total or partial.⁷⁶ Instead, Wigmore's test attempts to determine whether the parties' "writing was intended to cover a *certain subject* of negotiation."⁷⁷

4. The Uniform Commercial Code Section 2-202

The Code rejects the 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"⁷⁸ Under the Code, an agreement is assumed to be partially integrated "unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."⁷⁹ Although neither the Code nor the official comments state what extrinsic evidence the court should consider, many decisions have held that the court should consider all relevant evidence on the issue of intent.⁸⁰ Thus, in a sale of goods case, agreement on a specific date should be provable unless the parties intend a total integration.⁸¹

75. See *supra* note 46 and accompanying text ("four corners") and 4 S. Williston, *supra* note 9, § 633, at 1014-15 (ordinarily, written contract must be incomplete on its face before evidence of an additional term is admissible).

76. Wigmore's test avoids the quandary under the "four corners" approach of attempting to decide on the basis of facial completeness alone whether an agreement is fully or partially integrated. See *supra* notes 50-53 and accompanying text. Williston criticizes Wigmore's test because it is difficult to identify "the particular element of the [alleged] extrinsic negotiation." See 4 S. Williston, *supra* note 9, § 639, at 1049. But it is equally difficult to identify "the matter in question" in Williston's "implication . . . that [the writing] fully expresses the whole bargain in regard to the matter in question." *Id.* at 1048. See *supra* note 66.

77. See 9 J. Wigmore, *supra* note 9, § 2430, at 99 (emphasis in original).

78. U.C.C. § 2-202 official comment 1(a) (1978). Thus the Code clearly rejects the "four corners" approach. See Wallach, *supra* note 41, at 667.

For commentary on the Code's parol evidence rule, see J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* §§ 2-9 to -12 (2d ed. 1980) [hereinafter cited as J. White & R. Summers]; Axelrod, *Application of U.C.C. 2-202—The Integrated Agreement*, 12 Cap. U.L. Rev. 1 (1982); Broude, *supra* note 14; Hawkland, *supra* note 5, at 208-19; McDonough, *The Parol Evidence Rule in South Dakota and the Effect of Section 2-202 of the Uniform Commercial Code*, 10 S.D.L. Rev. 60 (1965); Wallach, *supra* note 41.

79. U.C.C. § 2-202(b) (1978). The Code eliminates the presumption that a written contract is a total integration. See *S. M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363, 1371 (9th Cir. 1978); *Michael Schiavone & Sons, Inc. v. Securallloy Co.*, 312 F. Supp. 801, 804 (D. Conn. 1970); *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 180, 595 P.2d 709, 714 (1979); *Zwierzycki v. Owens*, 499 P.2d 996, 997 (Wyo. 1972).

80. See, e.g., *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 400 F. Supp. 273, 277-78 (E.D. Wis. 1975); *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 180, 595 P.2d 709, 714 (1979); *Morgan v. Stokely-Van Camp, Inc.*, 34 Wash. App. 801, 808, 663 P.2d 1384, 1389 (1983); see also Wallach, *supra* note 41, at 668 (trial judge is to look at all surrounding circumstances to determine the intent of the parties at the time of execution of the contract).

81. See *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 181, 595 P.2d 709, 715 (1979) (evidence of oral delivery date admissible unless parties intended total integration); *George v. Davoli*, 91 Misc. 2d 296, 298-99, 397 N.Y.S.2d 895, 897 (Civ. Ct.

Although the intention of the parties is the only textual limitation to the introduction of evidence of a consistent additional term, an official comment adds: "If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact."⁸² This statement has generally been construed as adding a second ground of exclusion to the intention test stated in the text.⁸³ Could proof of the specific time for performance agreement be excluded under the "certain to include" test? The answer should be no. The test is obviously derived from the First Restatement test.⁸⁴ If it was not a term that would have been naturally included in the writing under the First Restatement test, then a fortiori it is not a term that would certainly be included under the official comment to UCC section 2-202.⁸⁵

1977) (same). The UCC makes clear that *both* parties must evidence this intent. See U.C.C. § 2-202 official comment 3 (1978).

82. U.C.C. § 2-202 official comment 3 (1978).

83. See, e.g., *Luria Bros. & Co. v. Pilet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103, 111 (7th Cir. 1979); *Braund, Inc. v. White*, 486 P.2d 50, 56 (Alaska 1971); *Birsner v. Bolles*, 20 Cal. App. 3d 635, 637-38, 97 Cal. Rptr. 846, 847-48 (1971); *Hawkland*, *supra* note 5, at 219; *Wallach*, *supra* note 41, at 668. Under this construction the UCC official comment seems objectionable as going beyond the text. Although this issue was raised by the New York State Law Revision Commission, 1 New York State Law Revision Commission, Report and Appendices Relating to the Uniform Commercial Code 368 app. IV (1956), the courts have not expressed the same concern. The reason may be that the courts are accustomed to excluding evidence of offered terms by applying fictitious tests of intent to fully integrate the agreement. See *Calamari & Perillo*, *supra* note 15, at 339-40.

84. As Professor Murray explained, "[t]his is the Williston test in a different garb." Murray, *supra* note 21, at 1369.

85. For a rare case that considered the certainty test in this context, see *George v. Davoli*, 91 Misc. 2d 296, 397 N.Y.S.2d 895 (Civ. Ct. 1977). Plaintiff (buyer) bought jewelry from defendant (seller) on approval pursuant to a memorandum of sale that did not state any time limit for return if the goods were found unacceptable. *Id.* at 296-97, 397 N.Y.S.2d at 896. Absent agreement of the parties, the Code would require return within a reasonable time. *Id.* at 298, 397 N.Y.S.2d at 897; see U.C.C. §§ 2-326, -327 (1978). At trial, seller was permitted to testify, over objection, that the parties had reached a contemporaneous oral agreement that the goods had to be returned by a specific date. See *George*, 91 Misc. 2d at 297, 397 N.Y.S.2d at 896. In deciding to admit the oral agreement as a consistent additional term the court, after stating "it cannot be said that the written memorandum is a complete and exclusive statement of the terms of the agreement since the time of return is an important part of the arrangement between the parties," proceeded to ask: "Is it therefore such an additional term that the parties would certainly have included it in the written document if it had been agreed upon . . . ?" *Id.* at 298, 397 N.Y.S.2d at 897. Relying on *Hunt Foods and Indus. v. Doliner*, 26 A.D.2d 41, 270 N.Y.S.2d 937 (1966), the court held that it is not such a term because the alleged oral agreement "cannot be precluded as a matter of law or as factually impossible. It is not sufficient that [its] . . . existence . . . is implausible. *It must be impossible.*" *George*, 91 Misc. 2d at 299, 397 N.Y.S.2d at 897 (emphasis in original) (citation omitted). The *Hunt Foods* criterion for certainty has been criticized as eliminating the last vestige of a rule of form from the UCC parol evidence rule because under the *Hunt Foods* definition, the certainty test becomes a pure test of credibility. See *Wallach*, *supra* note 41, at 671-72.

5. Corbin's Approach

Under Corbin's approach proof of the offered term should ordinarily not reach the trier of fact⁸⁶ if no credible evidence supports it or if the parties intended to discharge it by their subsequent agreement.⁸⁷ The first question, credibility, should be addressed squarely, without resort to the parol evidence rule as a subterfuge. The second question should be decided using all relevant evidence.⁸⁸ Because the second question is based on the actual expressed intentions of the particular parties involved, what similarly situated parties would normally have done is not determinative.⁸⁹

Corbin makes clear that the rule of law, reasonable time, is not integrated and that therefore a contemporaneous oral agreement stating a completion date is operative.⁹⁰ Whether a prior agreement on a specific completion date is operative would presumably depend on whether the parties intended to discharge the prior agreement. A merger clause assented to by both parties could, of course, evidence that intention.⁹¹

6. The Second Restatement Rule

The Second Restatement was intended to liberalize the First Restatement rule but not to go quite as far as Corbin would have wished.⁹² Like

86. See 3 A. Corbin, *supra* note 7, § 595, at 570-71; see also *id.* at 571, ("There must be many cases, however, in which the evidence of what the parties said and did, before and at the time of preparing or delivering a writing, is so nearly equal in weight and credibility that the court will desire the aid of a jury's verdict. If so, there is no law against getting such aid.")

87. See *id.* § 582, at 457. For further commentary on the parol evidence rule by Corbin, see *id.* §§ 532-96; Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161 (1965); Corbin, *The Parol Evidence Rule*, 53 Yale L.J. 603 (1944).

88. See J. Calamari & J. Perillo, *supra* note 11, § 3-3, at 108-09; 3 A. Corbin, *supra* note 7, § 588, at 529.

89. See 3 A. Corbin, *supra* note 7, § 584, at 480; see also *United States v. Clementon Sewerage Auth.*, 365 F.2d 609, 613-14 (3d Cir. 1966) (following Corbin's approach, court admitted evidence of an oral cost limit even though it would be usual to include it in the writing).

90. See 3 A. Corbin, *supra* note 7, § 593, at 556-57 (weight of authority and better reason support this view). But under Corbin's view, evidence of a simultaneous oral term is always relevant. See *supra* note 11.

91. See 3 A. Corbin, *supra* note 7, § 578, at 402-03, 411; see also Comment, *The "Merger Clause" and the Parol Evidence Rule*, 27 Tex. L. Rev. 361, 362-364 (1949) (merger clause is a "clear answer" to the question of the parties' intent) [hereinafter cited as *Merger Clause*]. A merger or integration clause is a provision that states that the writing "contains the entire agreement of the parties." J. Calamari & J. Perillo, *supra* note 11, § 3-3, at 104. For examples of merger clauses, see *Willson v. Riddle*, 128 Conn. 100, 102, 20 A.2d 402, 403 (1941) ("There is no agreement, verbal or otherwise, which is not set down herein.") and *Rinaudo v. Bloom*, 209 Md.1, 9, 120 A.2d 184, 189 (1956) ("This Contract contains the final and entire Agreement between the parties.").

92. The Reporter of the Second Restatement, Judge Robert Braucher, has explained:

I had started with the original formulation in the First Restatement, and with Professor Corbin's notes which left very little of the parol evidence rule, and took, I think, a ground that went somewhat short of what Professor Corbin

the Code, the Second Restatement assumes a partial integration "unless the court finds that the agreement was completely integrated."⁹³ Like Corbin,⁹⁴ it directs the court to decide the question of total integration by determining the actual intent of the parties based on all relevant evidence.⁹⁵

It is somewhat surprising, therefore, to find that the Second Restatement's illustration involving a specific time for performance is more restrictive than that in the First Restatement:

In May A and B exchange properties and agree orally that A will make certain repairs on the property to be conveyed by A to B, the repairs to be finished by October 1. A and B then draw up and sign a memorandum of the repair agreement, specifying all the terms except that the memorandum is silent as to time of performance. If the memorandum is a binding completely integrated agreement, the agreement to finish by October 1 is discharged, and the repairs are to be finished within a reasonable time. The oral agreement as to October 1 may be relevant evidence as to what is a reasonable time.⁹⁶

The illustration is based on the 1920 case of *Hayden v. Hoadley*,⁹⁷ which applied the "four corners" approach to exclude the oral agreement.⁹⁸

would have liked. I took my lead in this draft largely from the section of the Uniform Commercial Code which deals with the parol evidence rule [section 2-202] as it applies to contracts for the sale of goods.

1971 ALI Proceedings, *supra* note 11, at 442.

93. Second Restatement, *supra* note 2, § 216(1).

94. A notable departure from Corbin's approach is the Second Restatement's application of the parol evidence rule to contemporaneous expressions. See Second Restatement, *supra* note 2, § 215. See *supra* note 11.

Although the Second Restatement primarily reflects the Corbin view, scattered throughout the comments are references to other approaches including the "appearance of the writing" test, Wigmore's test, and, most notably, Williston's "naturalness" test. See Murray, *supra* note 21, at 1356-72. "[T]o the detriment of courts and lawyers who look to the [Second] Restatement for guidance, virtually every view appears to be represented." Murray, *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 Cornell L. Rev. 735, 738 (1982).

In fact it may be virtually impossible to have any more than a partial integration under the Second Restatement. Comment a of Section 213 states: "Where writings relating to the same subject matter are assented to as parts of one transaction, both form part of the integrated agreement. Where an agreement is partly oral and partly written, the writing is at most a partially integrated agreement." Second Restatement, *supra* note 2, § 213 comment a.

95. Second Restatement, *supra* note 2, § 210 comment b, § 214(b).

96. Second Restatement, *supra* note 2, § 213 ill. 3.

97. 97 Vt. 345, 111 A. 343 (1920).

98. *Id.* at 348, 111 A. at 344-45 ("A written contract which contains no latent ambiguity cannot be qualified, controlled, contradicted, enlarged, or diminished by any contemporaneous or antecedent understanding or agreement; and oral testimony can no more be received to vary or contradict the legal intentment of such a contract than to vary or contradict its express terms."). The Second Restatement uses this case to illustrate the effect of § 213, comment c on the scope of the integration. Compare *id.* at 347-48, 111 A. at 344, with Second Restatement, *supra* note 2, § 213 ill. 3. Professor Murray argues that because the Second Restatement agrees with Corbin and Williston that gap fillers are not integrated and are therefore not protected by the parol evidence rule, see

Thus, the illustration appears not only more restrictive than the First Restatement⁹⁹ but also more restrictive than those cases applying the "four corners" approach which admitted the evidence on the reasoning that the document was incomplete on its face.¹⁰⁰

To understand the illustration we must understand the broad outlines of the Second Restatement's rules on total integration. Under the Second Restatement, an agreement cannot be totally integrated if the writing omits an offered term that is: beyond the scope of the writing¹⁰¹ agreed to for a separate consideration¹⁰² or naturally omitted from the writing.¹⁰³ The Second Restatement carries forward the First Restatement's "naturalness" test but solely as a test of admissibility of proof of the offered term.¹⁰⁴ Under the First Restatement, the test operates as a test of exclusion as well; i.e., if the term would have naturally been included in an apparently complete written contract proof of the term was barred.¹⁰⁵ Under the Second Restatement, the "naturalness" test is solely a rule of admission, not a rule of exclusion. The Second Restatement adopts the Corbin approach, stating:

[T]here is no rule or policy penalizing a party merely because his mode of agreement does not seem natural to others. Even though the omission does not seem natural, evidence of the consistent additional terms is admissible unless the court finds that the writing was intended as a complete and exclusive statement of the terms of the agreement.¹⁰⁶

The Reporter's Note makes clear that only a consistent additional term that would be natural to include in the writing could be rendered inoperative by the parol evidence rule and even then, only on a finding that the agreement is fully integrated.¹⁰⁷ Thus, the Second Restatement's illustration recognizes that, as a matter of logic, an agreed time for perform-

Second Restatement, *supra* note 2, § 216 comment b, it would have been possible for the Second Restatement to have declared that the agreement fixing time is outside the scope of the integration. See Murray, *supra* note 21, at 1365-66. The illustration indicates, however, that the agreement fixing time is within the scope of the integration. Professor Murray points out that the scope test is really part of the natural to omit test. *Id.* at 1366-67.

99. See *supra* notes 65-66 and accompanying text.

100. See *supra* note 52 and accompanying text. For Williston's approach, see *supra* notes 70-71 and accompanying text.

101. See Second Restatement, *supra* note 2, § 213 comment c.

102. *Id.* § 216(2)(a). See *supra* note 58.

103. Second Restatement, *supra* note 2, § 216(2)(b). Professor Murray states that the first and second criteria are examples of the third. See Murray, *supra* note 21, at 1366-67.

104. See Second Restatement, *supra* note 2, § 216(2)(b) ("An agreement is not completely integrated if the writing omits a consistent additional agreed term which is . . . such a term as in the circumstances might naturally be omitted from the writing."). See *infra* notes 106-07 and accompanying text.

105. See *supra* note 61 and accompanying text.

106. Second Restatement, *supra* note 2, § 216 comment d.

107. See *id.* § 216 reporter's note ("This Section carries forward the substance of former § 240(1), revised . . . to make clear that oral terms which are not "natural" are excluded only on a finding that the agreement is completely integrated.") (emphasis added).

ance is natural to include in the writing¹⁰⁸ but the unwritten term is nevertheless operative unless the court makes an affirmative finding that the parties intended a fully integrated agreement.¹⁰⁹

A review of the various approaches used to decide whether an agreement is fully integrated shows that only under the now discredited "four corners" approach was it concluded that the rule of law, "reasonable time," was integrated. The presumption of total integration, combined with the unwillingness of courts to look beyond the writing itself to determine partial integration, built an almost impenetrable barrier to admission of evidence of the offered term. The statement, commonly seen in these cases, that parol evidence is inadmissible to contradict or vary the legal effect of a writing, was simply another way of stating that the agreement was fully integrated. It was a statement of the effect of the rule's operation rather than a statement of the basis for excluding evidence of the offered term. "Reading in" the rule of law was merely part of courts' overzealous attempts to protect written contracts from supplementation by additional terms. Under the "four corners" approach, it mattered little which rationale the court gave for its decision, contradiction or total integration, because the result was the same—exclusion of the offered term.

With the liberalization of the rules used to determine partial integration and the increasing willingness of the courts to consider extrinsic evidence on the matter, the concept of partial integration has gained tremendous importance. This is, of course, especially true of the UCC and the Second Restatement which assume partial integration, but it is also true under the First Restatement "naturalness" test, which, though formalistic, nevertheless distinctly liberalizes the "four corners" approach.

With the increased importance of partial integration, however, the concept of contradiction also gains in importance as the primary means

108. Such a term is also within the scope of the integration. See *supra* note 98. Illustration 6 of § 216 of the Second Restatement is not to the contrary:

A and B sign a standard form of written agreement for the sale of goods, complete on its face except that a blank for time and place of delivery is not filled in. It is claimed that the writing was signed on the oral understanding that delivery would be made within 30 days at the buyer's place of business. Under Uniform Commercial Code §§ 2-308 and 2-309, the goods would be deliverable, unless otherwise agreed, within a reasonable time at the seller's place of business. The written agreement is not completely integrated, and the oral understanding is admissible in evidence to supplement its terms.

Second Restatement, *supra* note 2, § 216 ill. 6. Apparently the illustration hinges on the blank space and the use of a standardized form. See Second Restatement, *supra* note 2, § 216 comment d; see also *Cargill, Inc. v. Fickbohm*, 252 N.W.2d 739, 741-42 (Iowa 1977) (contract with blank space for delivery time can be supplemented by oral agreement).

109. Professor Murray suggests that proof of the term should be admitted under a "negative 'appearance' test. The matter is simply not mentioned in the writing and, using the Wigmore aid, the evidence is presumably admissible because it neither contradicts, varies, nor adds to the terms of the writing." Murray, *supra* note 21, at 1365.

of excluding evidence of the offered term based on the appearance of the writing itself.¹¹⁰ Whether an agreement is fully or partially integrated is logically irrelevant on this issue. Even a partial integration discharges inconsistent agreements of the parties. Therefore, if a rule of law is deemed integrated, any offered term displacing it is automatically deemed discharged without inquiry into the parties' intent to merge all their agreements into the writing.

As stated above, only under the discredited "four corners" approach to partial integration was the rule of law, "reasonable time," deemed integrated. Can a rule of law ever be integrated under current legal thought? It is possible, of course, for parties to state expressly the rule of law in the written agreement.¹¹¹ But assume the writing is silent. If the parties are aware of the rule of law, it may be possible to infer *as a fact* that they adopted the rule of law as part of their agreement. Is this inference deemed part of the writing and therefore protected against contradiction by the parol evidence rule? Some authorities have said yes. In other words, according to these authorities, a rule of law may be part of the integration by implication of fact. This issue is considered below in connection with implications of fact.

B. "Implied in Fact" Terms; Rules of Law as Implications of Fact

1. Williston and the First Restatement

In contrast to an implication of law, a term supplied by law, an implication of fact is part of the agreement of the parties because it is based on an inference of actual assent of the parties.¹¹² According to Williston and the First Restatement, parol evidence is admissible to contradict implications of law but it may not be used to contradict the implied in fact

110. The issue of contradiction of express terms is not within the scope of this Article. Suffice it to note that the issue is one of the most difficult under the parol evidence rule and has not received uniform treatment. See Wallach, *supra* note 41, at 669-76.

111. See *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 260 (S.D.N.Y. 1978) (exclusive distributor expressly covenanted to use best efforts), *aff'd*, 601 F.2d 609 (2d Cir. 1979); *Jenkins v. Lykes*, 19 Fla. 148, 150 (1882) (purchaser given reasonable time to cut and remove timber).

112. That the area of implications of fact is a murky one, to say the least, is evidenced by the error in the First Restatement comment on the issue that gives it a meaning contradictory to that intended and that apparently has gone unnoticed for over 50 years:

Even where the extrinsic agreement is not in terms contradictory of the integration, there may be a clear implication of fact from the writing that it fully expresses the whole bargain in regard to the matter in question. To contradict such an implication of fact by extrinsic evidence is no more permissible than to contradict the direct words of the writing. In either case the writing is inconsistent with the oral agreement. An implication, however, that is *not [sic]* based on an inference of actual manifestation of assent must be distinguished from an implication made by the law to fill a gap in what has been expressed.

First Restatement, *supra* note 11, § 240 comment c (emphasis added). Compare the above comment with 4 S. Williston, *supra* note 9, § 640, at 1051-52 ("[A] distinction must be noted between an implication based upon an inference of actual manifestation of assent and an implication made by the law to fill a gap in what has been expressed.").

terms of the writing.¹¹³ Williston specifically addresses the possibility that an implication of law might be part of the integration by implication of fact. The implication of law is part of the integration if it can be inferred from the writing that the parties (1) were aware of the rule of law, (2) contracted with reference to it and (3) adopted it as part of their agreement.¹¹⁴

Recognizing that making the distinction between rules of law that become part of the writing and those that do not may be difficult,¹¹⁵ the First Restatement gives, as an example of the latter, a rule of law designed to fill gaps in the parties' agreement,¹¹⁶ and as an example of the former, the following: "When a promissory note, and even more clearly a check, states no date of payment, the implication that the instrument is payable on demand is doubtless the only reasonable inference."¹¹⁷ Although most adults know the rule of law that a check with the date left blank is payable on demand,¹¹⁸ why does the First Restatement infer from the writing that the parties adopted the rule as part of their agreement? Presumably, when it is clear that the parties are aware of the rule of law it can be inferred that they adopted it as part of their agreement unless they manifest an intention to exclude it. But this inference cannot be drawn when the parties have reached an agreement to the contrary. If, for example, the parties orally agreed to postpone payment of the check for three months and that oral agreement is taken into account,

113. See 4 S. Williston, *supra* note 9, § 640, at 1051-52; see also First Restatement, *supra* note 11, § 240 comment c (Implications of fact, those "based on an inference of actual manifestation of assent" are integrated and may not be contradicted. "To contradict such an implication of fact . . . is no more permissible than to contradict the direct words of the writing.")

114. See 4 S. Williston, *supra* note 9, § 615, at 605.

115. See First Restatement, *supra* note 11, § 240 comment c ("shadings are almost imperceptible").

116. See *id.*; see also 4 S. Williston, *supra* note 9, § 640, at 1058-60.

117. First Restatement, *supra* note 11, § 240 comment c.

Williston's treatise was less definitive on the point. See 4 S. Williston, *supra* note 9, § 640, at 1058 ("The parties to a negotiable note or a check which does not specify a time of payment *probably* understand and recognize that the writing is equivalent to a promise to pay on demand . . .") (emphasis added); see also *Unsinn v. Wilson*, 285 F.2d 273, 275 (D.C. Cir. 1960) (where note stated no maturity date, parol evidence of agreed maturity date inadmissible because Negotiable Instruments Law completes instrument).

As a further example, Williston mentions the obligation implied from a blank indorsement of a negotiable instrument. See 4 S. Williston, *supra* note 9, § 640, at 1058 ("The legal implication from a blank indorsement also is perfectly understood by the parties, and the implication may well be given the same effect as if the indorsement were filled out . . ."); see also *Johnson Hardware Co. v. Kempf*, 188 Minn. 109, 110, 246 N.W. 663, 663 (1933) (parol evidence inadmissible to qualify unqualified indorsement). *But see Alban Tractor Co. v. Harrison*, 228 Md. 632, 636, 180 A.2d 862, 864 (1962) (evidence of oral agreement that indorser would not be responsible for payment admissible in suit by payee against indorser).

The Reporter of the Second Restatement suggested more examples: The drawer's obligation to make the check good and his right to stop payment if he does not receive the merchandise. 1971 ALI Proceedings, *supra* note 11, at 456.

118. See U.C.C. § 3-108 (1978).

then there is no implication of fact that the parties intended that the instrument be paid on demand. In other words, because the parties are aware of the rule of law, they are aware of the need to "contract out" if they do not wish the rule to apply to their agreement. Why should they also be aware that they must "contract out" in writing on the check?¹¹⁹

Williston criticized courts that purported to exclude evidence of the offered term, "three months for repairs," because it contradicted "reasonable time," a term that the law would imply only absent agreement to the contrary.¹²⁰ These courts were obviously reasoning in a circle. But it is no less circular to state that evidence of the term, "wait three months to cash the check," is excluded because it contradicts "payable on demand"—an inference that only a non-party reader of the check would draw about the intent of the parties. Yet Williston criticized the circular reasoning in the former case but not the latter.

Williston's underlying assumption may be that parties who agree to postpone payment on a check ordinarily postdate the check; they do not leave the date blank and make a separate oral agreement on the matter. In other words, an oral agreement postponing payment is not "such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."¹²¹ Williston's implication of fact that the parties adopted the rule of law as part of their agreement would seem to be, therefore, another application of his "naturalness" test.¹²² If so, Williston perpetuates the confusion created under the "four corners" view when the courts did not make clear whether proof of a term was excluded because of contradiction or because of total integration.¹²³ Just as "reasonable time" should not be "read into" the contract when the parties have agreed to the contrary, "payable on demand" should not be "read in" when the parties have agreed to the contrary. In both cases excluding evidence of the offered term "three months" is based on the use of a formalistic test of total integration rather than on contradiction of the integration.

2. Corbin

Corbin views implications of fact as a matter of interpretation of the

119. Awareness of the parol evidence rule, not awareness of the rule of law, could lead the parties to put their agreement in writing. "The average layman . . . is probably unaware of the [parol evidence] rule's existence." *Is it Necessary?*, *supra* note 7, at 983-84. If the parties are businessmen or are represented by counsel, it is more likely that their agreement was fully integrated. See Childres & Spitz, *Status in the Law of Contracts*, 47 N.Y.U. L. Rev. 1, 7-8 (1972); Sweet, *supra* note 7, at 1065-66. That question need not be considered at all if the term is deemed inconsistent.

120. See *supra* notes 62-63 and accompanying text. "[T]he contradiction is one fictitiously invented by the law when an ordinary contract does not state the time for performance, and the parties orally agree on a particular time." 4 S. Williston, *supra* note 9, § 640, at 1058-60.

121. 4 S. Williston, *supra* note 9, § 638, at 1041.

122. See *supra* notes 56-61 and accompanying text.

123. See *supra* notes 35-52 and accompanying text.

writing.¹²⁴ Parol evidence is always admissible to help define the meaning of the parties' language.¹²⁵ For example, the express terms of the writing, as interpreted, may show that a particular time for performance was agreed to. If so, the writing is not in fact silent. Furthermore, just as parol evidence may be introduced to show that the written contract as interpreted does cover the term, parol evidence would also be relevant to show that the writing is silent. Suppose, for example, that an actor is hired, as evidenced by a letter agreement, to perform in a play. Duration is not stated in the writing but the parties had orally agreed that the commitment was for three months. Without knowledge of the oral understanding, it could be inferred from the writing that the parties intended the hiring to be for the run of the play.¹²⁶ Parol evidence would be admissible to help determine the meaning of the parties' agreement. The fact that the parties orally agreed that the duration of employment is three months is relevant to show that the writing was not intended to cover the term of duration. Because the writing, by a process of interpretation, is shown to be silent on the term of duration of the employment, the agreed duration is operative as a consistent additional term. Corbin would conclude that the writing is at most a partial integration.

In the First Restatement's check example, the inference that the parties adopted the rule of law "payable on demand" is based on an inference of the parties' intent derived from their written agreement¹²⁷ and therefore is a question of interpretation. Under Corbin's view, the parol evidence rule would not bar evidence of the actual agreement to show that the check was not intended to cover the term of payment date to negate the implication of fact that the check is payable on demand.¹²⁸

124. See 3 A. Corbin, *supra* note 7, § 579, at 412-31; *id.* § 593, at 559-60 & n.91; see also *id.* § 593, at 556 ("[P]resumptions of law or fact, or the inferences by which the court fills gaps in a contract that is in all other respects in writing, do not themselves constitute any part of the 'integration' that is supposed to be protected against variance or contradiction by the 'parol evidence rule.'") (emphasis added).

For a case that avoided the parol evidence rule issue of whether the right to sue for breach of contract is part of the integration by taking an interpretation approach, see *Delta Dynamics, Inc. v. Arioto*, 69 Cal. 2d 525, 527-29, 446 P.2d 785, 786-87, 72 Cal. Rptr. 785, 786-87 (1968) (en banc) (extrinsic evidence considered to determine whether contractual provision providing for termination in case of failure to meet minimum quota was exclusive remedy for breach).

125. 3 A. Corbin, *supra* note 7, § 543, at 133-34; Calamari & Perillo, *supra* note 15, at 352.

126. The assumption of the text is that the inference can be made from the writing itself. In many cases such inferences have been based on trade practices. See *Pfiester v. Western Union Tel. Co.*, 282 Ill. 69, 75, 118 N.E. 407, 409 (1917) (custom of contracting with baseball players for the duration of the baseball season); *Wilson v. Hitchcock*, 174 N.Y.S. 673, 674 (Sup. Ct. 1919) (custom in theater business of giving actors two weeks notice of termination).

127. See *supra* notes 117-18 and accompanying text.

128. See 3 A. Corbin, *supra* note 7, § 587, at 293 n.42 (1971 Supp.).

3. Second Restatement

The Second Restatement adopts Corbin's position that all relevant evidence including parol evidence is admissible on the issue of interpretation.¹²⁹ It also adopts Corbin's view that even if a term is one that would naturally be included in the writing, evidence of it is barred only if the term contradicts the writing or the writing is fully integrated.¹³⁰ Nevertheless, the Second Restatement continues the First Restatement approach on implications of fact. It provides the following illustration, obviously derived from the First Restatement's check example:¹³¹

A check states no date of payment, but it is orally agreed that the check will be paid only after six months. The oral agreement contradicts the check. Under Uniform Commercial Code § 3-108 the check is payable on demand, and most competent adults in the United States have reason to know the rule.¹³²

The illustration states as a fact that the parties have agreed to postpone payment of the check for six months. Therefore, the inference drawn by the illustration—that because the parties are aware of the rule of law, they have adopted it as part of their agreement—can only be based on an interpretation of the intent of the parties based on the writing alone, out of the context of the parties' actual agreement. Yet the Second Restatement emphasizes that “[t]he determination whether an alleged additional term is consistent or inconsistent with the integrated agreement requires interpretation of the writing in the light of all the circumstances, *including the evidence of the additional term.*”¹³³ The inference that the parties contracted with reference to the rule of law and adopted it as part of their agreement would be negated by interpreting the writing in light of the “additional term.” Setting up an implication of fact as an absolute barrier to admitting evidence of the actual agreement of the parties is clearly out of step with the Second Restatement's position on interpretation.¹³⁴

129. See Second Restatement, *supra* note 2, § 212 comment b (“Any determination of meaning or ambiguity should only be made in light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.”). See *supra* note 125 and accompanying text.

130. See Second Restatement, *supra* note 2, § 216 comment d. See *supra* note 87-89 and accompanying text.

131. See *supra* note 117 and accompanying text.

132. Second Restatement, *supra* note 2, § 216 ill. 1.

133. *Id.* § 216 comment b (emphasis added).

134. The topic of “private codes,” a topic on the borderline of integration and interpretation, is illustrative of the Second Restatement's position on interpretation. See Second Restatement, *supra* note 2, § 212 ill. 3-4. Can a party to an apparently complete written agreement introduce evidence of a prior agreement to use the word “buy” to mean “sell”? The original Restatement said no. See First Restatement, *supra* note 11, § 231 ill. 2. Corbin disagreed, stating that it is impossible to know whether an extrinsic term contradicts an integrated agreement until that agreement is interpreted. See 3 A. Corbin, *supra* note 7, § 543, at 130-31; Calamari & Perillo, *supra* note 15, at 352. The Second Restate-

Such a barrier is also out of step with the Second Restatement's provisions on partial integration.¹³⁵ While the First Restatement position on implications of fact is consistent with its assumption that an apparently complete written contract ordinarily represents a fully integrated agreement,¹³⁶ the Second Restatement rejects this assumption.¹³⁷ Logically, any approach which rejects the traditional assumption of total integration should also conclude that implications of fact are not part of the integration.¹³⁸ The question of whether an agreement is totally or partially integrated should be asked and resolved before deciding whether an alleged extrinsic term is inconsistent with the implied in fact terms of a writing.¹³⁹

Arguably, the First Restatement's provisions on implications of fact are consistent with its "naturalness" test.¹⁴⁰ If the parties are unaware of

ment adopts the Corbin position on private codes, so that evidence of the prior agreement that the word "buy" is used to mean "sell" is admissible. See Second Restatement, *supra* note 2, § 212 ill. 4; *id.* § 212 comment c. The net effect of this position is: 1) an additional agreement not contained in the writing (the private code) is operative and 2) this additional agreement contradicts the meaning that would be given the instrument by one unacquainted with the private code. The Second Restatement justifies the admission of evidence of the private code because the extrinsic agreement does not relate to performance under the contract but only to the meaning of its language. See Second Restatement, *supra* note 2, § 212 comment b, reporter's note (citing 3 A. Corbin, *supra* note 7, § 540, at 93-94, where Corbin makes this distinction). The Second Restatement's position on private codes, see Second Restatement, *supra* note 2, § 212 ill. 3-4, seems to indicate that the meaning of the writing has no life of its own apart from the expressed intent of the parties. But the Second Restatement position on implications of fact contradicts this approach. See *supra* notes 131-33 and accompanying text.

135. See Second Restatement, *supra* note 2, § 216 comment b.

136. See First Restatement, *supra* note 11, § 240(1)(b) comment d; see also 4 S. Williston, *supra* note 9, § 633, at 1014-15.

137. See *supra* note 93 and accompanying text.

138. The UCC parol evidence rule, U.C.C. § 2-202 (1978), also rejects the assumption mentioned in the text. See *supra* note 78 and accompanying text. The initial paragraph of § 2-202 describes what in Second Restatement terminology is an integrated agreement, see Second Restatement, *supra* note 2, § 209(1), and states the rule that an integrated agreement may not be contradicted, see U.C.C. § 2-202 (1978). The thrust of the paragraph is clearly directed to express terms of the writing: "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 . . ." U.C.C. § 2-202 (1978) (emphasis added). In contrast, UCC § 2-202(b), which describes what the Second Restatement would call a fully integrated agreement, see Second Restatement, *supra* note 2, § 210(1), clearly refers to the entire agreement (including express and implied in fact terms). See American Law Institute, 1956 Recommendations of the Editorial Board for the Uniform Commercial Code 26; Broude, *supra* note 14, at 886-88; see also U.C.C. § 1-201(3) (1978) (defining "agreement"). See *infra* note 197 and accompanying text.

139. The Second Restatement states that the issue of total or partial integration is to be decided before the question of interpretation or application of the parol evidence rule. See Second Restatement, *supra* note 2, § 210(3). However, the provisions on partial integration apply only to a consistent additional term. See *id.* § 216 comment a. Illustration 1 to § 216, see *supra* text accompanying note 132, indicates that the offered term is inoperative because it contradicts the implication of fact (payment on demand) without inquiry as to whether the agreement (on the instrument) is totally or partially integrated.

140. See First Restatement, *supra* note 11, § 240(1)(b).

the rule of law, it is not necessarily natural to include in the writing a term that has the effect of changing the rule of law. On the other hand, if the parties are aware of the rule of law, it may be natural to include the contrary agreement in writing. The Second Restatement, however, has eliminated use of the "naturalness" test to exclude evidence of consistent additional terms.¹⁴¹ If this test is not conclusive on the issue of intent to merge all agreements into the writing, why should it be conclusive on the issue of consistency? By continuing the First Restatement provision on implications of fact, the Second Restatement has perpetuated a relic.

It has been forcefully argued elsewhere that proof of terms contradicting even the express terms of a writing should not be automatically excluded by the parol evidence rule.¹⁴² Even in the absence of invalidating cause such as fraud or mistake,¹⁴³ an oral agreement contradicting the writing could show that the writing was not assented to as a final expression of the agreement.¹⁴⁴ With the increased confidence in the reli-

141. See *supra* notes 104-09 and accompanying text.

Surprisingly, the remarks of the Reporter of the Second Restatement suggest that he incorrectly believed that the Second Restatement's "naturalness" test is both a test of admission and a test of exclusion as it was under the First Restatement:

[C]arrying forward the principle that was in the original Restatement . . . is the piece in [Section 216(2)(b)] which says that you can show as a side agreement . . . something which in the circumstances might naturally be omitted from the writing. [Professor Corbin] asserts in his treatise, that [it] was Professor Williston's contribution to the law, there is some support in the cases for it, of course, but there is no rule of law, said Professor Corbin, or if there is there ought not to be, that requires people to do things which are natural to other people.

Well, I think with all deference that he is wrong about that, that if you do things in the usual way, it is not surprising that you were thought to have the usual meaning, and to have made the contract that would usually be made in the situation.

Now, what is natural gets very troublesome. One of the leading cases in the New York Court of Appeals [*Mitchell v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928)]—they divide four to three on whether it was natural or not—sold a piece of farm real estate, residence and farm, with an elaborate written purchase and sale agreement and a side oral agreement that as part of the deal the unsightly icehouse across the street would be torn down.

Now, that was oral, the icehouse agreement. And the trial judge had gone through and made findings that there was such an agreement, it was very clear. Four to three the Court of Appeals said this was too long an agreement to have an oral side agreement like that, and it was superseded by the written agreement and could not be given effect. . . .

Well, the three dissenting judges accepted the principle, but they thought it was quite natural to omit this one.

So I don't know that I have taken sides between the four judges and the three by the formulation here. It is substantially the formulation that was in the original Restatement.

1971 ALI Proceedings, *supra* note 11, at 454-55. Compare the Reporter's remarks with Second Restatement, *supra* note 2, § 216 comment d, which clearly adopts the Corbin approach.

142. McLauchlan, *The Inconsistent Collateral Contract*, 3 Dalhousie L.J. 136, 162 (1976).

143. Second Restatement, *supra* note 2, § 214(d).

144. See *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 400 F. Supp. 273,

ability of oral testimony and the concomitant decreased belief in the sanctity of written contracts,¹⁴⁵ the arguments in favor of protecting writings against direct contradiction weaken. When the express terms of the writing are silent on the term in question, those arguments should virtually disappear. Wigmore contended that the question of consistency cannot be asked to determine admissibility of an offered term, for if consistency were the test, no offered term would be admitted.¹⁴⁶ His argument is particularly apt when it is claimed that the offered term contradicts a term on which the writing is silent.

The example of the check was used in the above discussion because it is the example that was used by Williston and both Restatements. But these authorities do not limit their reasoning to that context.¹⁴⁷ Thus, their reasoning could extend to a tremendous range of potential implications of fact. Parties in a particular trade are assumed to contract with reference to various practices in the trade.¹⁴⁸ When the parties are clearly aware of those practices, the Restatements' view would seem to be that the practices are part of the parties' written contract by implication of fact.¹⁴⁹ Thus, an oral agreement that changes the implication of fact would be barred as inconsistent even though the writing is only a partial integration.¹⁵⁰ Scholars have long debated whether certain "implied terms" are implications of law or implications of fact.¹⁵¹ Why should

278 (E.D. Wis. 1975); 3 A. Corbin, *supra* note 7, § 583, at 469-70; Comment, *Contracts—Warranties, Unconscionability, and the Parol Evidence Rule—Industralease Automated & Scientific Corp. v. R.M.E. Enters., Inc.*, 27 Buffalo L. Rev. 521, 532 (1978). For an analysis of judicial treatment of inconsistencies with express terms, see Wallach, *supra* note 41, at 669-70.

145. See generally E. Farnsworth, *supra* note 25, § 7.2, at 449 (1982) (courts increasingly receptive to oral testimony because faith in written statements has declined); Wallach, *supra* note 41 (same).

146. See 9 J. Wigmore, *supra* note 9, § 2431, at 102 (questions of whether offered terms "vary," or "contradict," or are "inconsistent," involve the same futility").

147. In the context of a negotiable instrument, the result may be justified if one considers third parties. Negotiable instruments involve particularized policy considerations, e.g., the need for certainty and the ability to rely on a written unconditional promise. See Jordan, "Just Sign Here—It's only a Formality": *Parol Evidence in the Law of Commercial Paper*, 13 Ga. L. Rev. 53, 55-57 (1978).

148. See U.C.C. § 2-202 official comment (1978); First Restatement, *supra* note 11, § 246 comment c; Second Restatement, *supra* note 2, §§ 222-23. On whether proof of the trade usage to supplement the written agreement can itself be barred by the parol evidence rule, see *Nanakuli Paving and Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 796-805 (9th Cir. 1981); First Restatement, *supra* note 11, § 246 comments b-c; Second Restatement, *supra* note 2, § 220 comment c; 9 J. Wigmore, *supra* note 9, § 2440, at 131; Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. Ill. L.F. 811, 832-36.

149. See Second Restatement, *supra* note 2, § 222.

150. See *supra* notes 112-14 and accompanying text.

151. Compare Kuntz, *Professor Merrill's Contribution to Oil and Gas Law*, 25 Okla. L. Rev. 484, 485 (1972) (covenants in mineral leases implied in law) with R. Hemingway, *The Law of Oil and Gas* § 8.1, at 413 (2d ed. 1983) (implied in fact is majority view) and Walker, *The Nature of Property Interests Created by an Oil and Gas Lease in Texas*, 11 Tex. L. Rev. 399, 402-08 (1933) (implied in fact). See Salim, *Implied Covenants Between Assignors and Assignees of Oil and Gas Leases: Policy and Precedent*, 31 Sw. L.J. 905, 912

substantive rights depend on subtleties that noted scholars are incapable of resolving? Even if such terms are implications of law, when does it become obvious to a court that an implication of law has become so well known that the parties are deemed to adopt it as part of their agreement?¹⁵²

As both Restatements recognize, the distinction between rules of law designed to fill gaps and rules of law adopted by the parties by implication of fact may involve "almost imperceptible shadings."¹⁵³ When an almost imperceptible shading results in constructing the fiction that the parties contracted with reference to a rule of law even though there is credible evidence that they did not, the law has not progressed far beyond the state of "primitive formalism."¹⁵⁴

Under modern approaches to partial integration and interpretation, it should never be appropriate to exclude automatically as contradictory, evidence of a term as to which the writing is silent. Proof of the offered term should not be barred unless the parties intended to discharge the offered agreement. In other words, the issue of whether an agreement is totally or partially integrated should be addressed before automatically

(1977) (discussing whether implied covenants in mineral leases are implied in fact or law); Comment, *The Amoco Case: The Implied Covenant to Seek Favorable Administrative Action*, 14 Tex. Tech L. Rev. 459, 464-66 (1983) (same). For consideration of the issue in the context of an obligation to perform a contract in good faith, see *More on Good Faith*, *supra* note 2, at 497, 498-504. Was the implied promise by the exclusive agent to use best efforts to promote defendant's designs in *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), implied in law or in fact? Compare *Broude*, *supra* note 14, at 887-88 (implied in fact) with *Mandel v. Liebman*, 303 N.Y. 88, 94, 100 N.E.2d 149, 152-53 (1951) (implied in law, but apparently based on the rule that interpretation of a writing is a matter of law) and U.C.C. § 2-306(2) (1978) (obligation imposed by statute unless otherwise agreed).

For an example of a case that did not treat an implied best efforts obligation as an implication of fact for parol evidence rule purposes, see *Garden Park Homes Corp. v. Martin Marietta Corp.*, 507 S.W.2d 368 (Mo. 1974) (per curiam). In that case, a mineral lease provided for extraction of sand for twelve years at a royalty of twelve cents per ton, from the terms of the writing alone, there would have been an implied covenant to use reasonable diligence in extracting sand. *Id.* at 374. Nevertheless, the court held that the trial court should have admitted evidence that the parties had orally agreed on a yearly minimum royalty of \$15,000 even though the oral agreement had the effect of negating the implied term. See *id.* at 373. See *infra* notes 239-40.

152. See *Walker*, *supra* note 151, at 406 (even if originally implication of law, "[t]he implied covenants, at least in their broad outlines, have become so well established and so widely recognized that it may fairly be said that the parties usually contract with them in mind"); see also 1970 ALI Proceedings, *supra* note 6, at 481 ("Which came first? Was it the law that made the meaning that people normally have, or was it the meaning that people normally have that led to the rule of law?").

153. First Restatement, *supra* note 11, § 240 comment c; Second Restatement, *supra* note 2, § 216 comment b.

154. See *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91, 118 N.E. 214, 214 (1917) ("The law has outgrown its primitive stage of formalism . . ."); *Metzger*, *supra* note 41, at 1386 (parol evidence rule traced to "a primitive formalism which attached mystical and ceremonial effectiveness to the *carta* and the seal.") (quoting C. McCormick, *Handbook of the Law of Evidence* § 211, at 430 n.4 (1954)).

excluding evidence of additional terms on the ground of inconsistency with the "implied" terms of the writing.

II. DOES THE PAROL EVIDENCE RULE APPLY TO OBLIGATIONS IMPOSED BY LAW?

Although the parol evidence rule can exclude extrinsic evidence to prove agreements made prior to or contemporaneously with a writing to which the parties have assented,¹⁵⁵ authorities agree that the parol evidence rule does not exclude obligations imposed by law.¹⁵⁶ Even though the court's implication of a term has the effect of adding to the parties' obligations under a written contract, the parol evidence rule is not an objection. Otherwise all applicable rules of law would have to be spelled out in the writing or risk exclusion by the rule. Obviously, no policy served by the parol evidence rule is advanced by reducing the power of the court to govern the contractual relation of the parties.

Nevertheless, when the parties have reduced the terms of their agreement to writing, the courts seem to apply the same criteria to the implication of a term as they do to the admissibility of an oral agreement of the parties.¹⁵⁷ The mere existence of the written agreement,¹⁵⁸ its appar-

155. See *supra* note 11 and accompanying text.

156. See *Tyus v. Resta*, 328 Pa. Super. 11, 25, 476 A.2d 427, 434 (1984) (implied warranty of habitability not excluded by integration clause because parol evidence rule does not apply to obligation imposed by law); see also 3 A. Corbin, *supra* note 7, § 593, at 563; 4 S. Williston, *supra* note 9, § 643, at 1084. The UCC parol evidence rule, U.C.C. § 2-202 (1978), is in accord. See *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888, 891 (E.D. Pa. 1962) (implied warranty of merchantability not excluded by written contract that purported to state the entire agreement of the parties), *aff'd in part, rev'd in part on other grounds*, 320 F.2d 130 (3d Cir. 1963); Appeals of *Reeves Soundcraft Corp.*, 2 U.C.C. Rep. Serv. (Callaghan) 210, 219 (A.S.B.C.A. 1964) (parol evidence admissible to establish implied warranty though written agreement fully integrated); Moyer, *Exclusion and Modification of Warranty under the U.C.C.—How to Succeed in Business Without Being Liable for Not Really Trying*, 46 Den. L.J. 579, 606 & n.161 (1969) ("Since implied warranties are generally viewed as arising by operation of law, rather than by conduct of the parties, the parol evidence rule is irrelevant to implied warranties."); Note, *Warranties, Disclaimers and the Parol Evidence Rule*, 53 Colum. L. Rev. 858, 864 & n.47 (1953) (warranties imposed by law are outside operation of parol evidence rule) [hereinafter cited as *Parol Warranties*]. The UCC parol evidence rule applies to "terms," defined in UCC § 1-201(42), and "agreements," defined in UCC § 1-201(3). See U.C.C. § 2-202 (1978). Neither includes obligations imposed by law. Compare these with the definition of "contract," U.C.C. § 1-201(11). The UCC rules are discussed more fully in connection with implied warranties. See *infra* notes 184-85, 192-215 and accompanying text.

For a case that gives undue dignity to a parol evidence argument against implication of a term, see *William Berland Realty Co. v. Hahne & Co.*, 26 N.J. Super. 477, 485-87, 98 A.2d 124, 128-29 (1953), *modified per curiam on other grounds*, 29 N.J. Super. 316, 102 A.2d 686 (1954). The court countered the parol evidence objection by characterizing the implication as one of fact derived from the writing itself, and stated that although the parol evidence rule "prohibits the modification of a written agreement" by oral evidence, an implied covenant may be recognized as an "articulation of a provision implicit in the agreement and as much a part thereof as if it had been expressly stated." *Id.* at 485, 98 A.2d at 128.

157. See *Fashion Fabrics, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 28 (Iowa 1978) (covenant will not be implied where contract is fully integrated). This practice is

ent completeness and detail,¹⁵⁹ its execution after extensive negotiations conducted with aid of counsel,¹⁶⁰ and the presence of a merger clause,¹⁶¹ all have been used as reasons for refusing to imply an obligation. But on what basis?

A. *Silence of Writing as Inference of Intent to Exclude the Implication*

Courts commonly apply a rule stating that a court will not imply a term that is dealt with in the writing or on which the written agreement is "intentionally silent."¹⁶² Of course, if the writing conflicts with a term the court would imply, the writing itself evidences intent to exclude the

highlighted by *Gerard v. Almouli*, 746 F.2d 936 (2d Cir. 1984) which involved both the argument that the court should imply an obligation to use "best efforts" and the offer of parol evidence to prove that the parties had actually agreed to such an obligation. *See id.* at 939. On the implied obligation, the court noted that the implication will not be made where parties "otherwise agreed." *See id.* Because the written contract set out specific obligations, the court concluded that the parties had "otherwise agreed" and therefore it would be "improper to read into the contract a contradictory sales requirement." *Id.* The court went on to hold that the "parol evidence argument falls by virtue of the same finding." *Id.* The dissent concluded that the written contract was silent as to the "best efforts" obligation, and therefore the court should have admitted parol evidence to determine whether the obligation should be imposed. *See id.* at 941 (Van Graafeiland, J., dissenting).

158. *See Conservative Fed. Sav. & Loan Ass'n v. Warnecke*, 324 S.W.2d 471, 478 (Mo. Ct. App. 1959) ("[W]hen parties reduce their agreements to writing it is presumed that the instrument contains their entire contract, and the court will not read into it additional provisions unless this be necessary to effectuate the intention of the parties as disclosed by the contract as a whole."). When the parties' agreement is oral or evidenced by informal writings courts feel free to consult all evidence of the circumstances surrounding the transaction to determine the parties' obligations. *See* 3 A. Corbin, *supra* note 7, § 522, at 2-3; E. Farnsworth, *supra* note 25, § 7.10, at 492-93.

159. *See Goff v. Jacobs*, 164 Miss. 817, 825, 145 So. 728, 729 (1933) (Courts are "reluctant" to imply a term "particularly . . . where, as here, the parties have at much pains and in detail undertaken to reduce their agreement to such specific written terms as to evince their purpose to expressly cover every phase of their understanding.").

160. *See HML Corp. v. General Foods Corp.*, 365 F.2d 77, 81 (3d Cir. 1966) ("[W]here the bargain is the result of elaborate negotiations in which the parties are aided by counsel . . . it is easier to assume that a failure to make provision in the agreement resulted not from ignorance of the problem, but from an agreement not to require it.").

161. *See Vacuum Concrete Corp. of Am. v. American Mach. & Foundry Co.*, 321 F. Supp. 771, 774 (S.D.N.Y. 1971) ("[T]he merger or integration clause . . . negates the thought that they intended to impose . . . a duty upon AMF" not contained in the contract.); *Detroit Trust Co. v. Engel*, 192 Mich. 62, 64, 158 N.W. 123, 124 (1916) (merger clause excluded implied warranty). *But see Havel v. Kelsey-Hayes Co.*, 83 A.D.2d 380, 384, 445 N.Y.S.2d 333, 336 (1981) (court properly held that the merger clause did not prevent implication of a promise to exercise reasonable diligence, but went on to make the overbroad statement that the purpose of the merger clause is "to preclude consideration of matters extrinsic to the agreement"). A merger clause does not bar consideration of extrinsic evidence for all purposes. *See infra* notes 216-29 and accompanying text. For consideration of the issue in the context of the implied warranty of fitness for a particular purpose, *see infra* notes 216-30 and accompanying text.

162. *See, e.g., So Good Potato Chip Co. v. Frito-Lay, Inc.*, 462 F.2d 239, 241 (8th Cir. 1972); *Foley v. Eules*, 214 Cal. 506, 511, 6 P.2d 956, 958 (1931) (*per curiam*); *Glass v. Mancuso*, 444 S.W.2d 467, 478 (Mo. 1969).

term.¹⁶³ But assume that the writing is silent on the obligation in question. How does a court decide that a written agreement is “*intentionally* silent?” If the existence of an apparently complete written contract raises an inference of exclusion, then it is as though the court is applying the principles underlying the parol evidence rule to the implication of a term.

A court might suspect that a party is urging the court to imply a term that the party was unable to obtain through negotiation.¹⁶⁴ The parties might have discussed the term during negotiations and either never agreed on it or agreed tentatively but later excluded the term in their final agreement.¹⁶⁵ If such discussions actually took place, they may or may not be admissible.¹⁶⁶ But if no such evidence is introduced and admitted, there is no reason to infer exclusion from the writing’s silence. It is obviously unrealistic to assume that the parties had all possible obligations in mind when the writing was executed.¹⁶⁷ At most, silence evidences absence of intent on the issue.

Absence of intent is relevant to an implication of fact but not to an implication of law. Because an implication of fact is based on an inference of intention, the silence of an apparently complete writing could conclusively indicate absence of the requisite intent. But the court’s ability to impose the same obligation as an implication of law remains unaffected. The parties’ silence indicates absence of intent, not intent to exclude the term.

163. See *So Good Potato Chip Co. v. Frito-Lay, Inc.*, 462 F.2d 239, 241 (8th Cir. 1972) (negative covenant by Frito-Lay not to sell competing products in the franchise territory not implied where a “paragraph . . . of the . . . franchise agreement expressly deals with the sale of products by Frito-Lay in the franchised territory.”); see also Goetz & Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 Cal. L. Rev. 261, 312 (1985) (problem of distinguishing between “supplementary expressions and trumps”).

164. In *Local 461, Int’l Union of Elec., Radio & Mach. Workers v. Singer Co.*, 540 F. Supp. 442, 447-49 (D.N.J. 1982), plaintiff claimed a provision in the contract implied a guarantee that Singer would keep its Elizabeth, New Jersey plant open. The court stated, “[i]f the union had been able to wrest a guarantee of continued employment from the company, words embodying that promise would have appeared explicitly in the agreement.” *Id.* at 448. While not finding such a guarantee, the court concluded that the provision in question obligated Singer to use best efforts to keep the plant efficient and that Singer had breached that obligation. *Id.* at 449. For an example of bold judicial gap filling, see *J.C. Millett Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. 1954), in which plaintiff made repeated unsuccessful efforts to obtain a fixed term or termination provisions in a liquor distributorship agreement. See *id.* at 488. Defendant refused to agree to such provisions. See *id.* The court, stating that defendant’s refusal to give a fixed term or termination provisions nonetheless contemplated a continuing relationship, see *id.* at 491, held that the duration of the contract was a reasonable time (one year) and terminable only on reasonable notice (three months). See *id.* at 493.

165. See *Vacuum Concrete Corp. of Am. v. American Mach. & Foundry Co.*, 321 F. Supp. 771, 773 (S.D.N.Y. 1971); Farnsworth, *supra* note 6, at 873.

166. See *infra* notes 237-49 and accompanying text.

167. Farnsworth, *supra* note 6, at 869. See *supra* note 5.

B. *Effect of Recognition that Implication is Based on Rule of Law, Rather than Inference of Intent*

When the term to be supplied is clearly recognized as a rule of law applying to the transaction, no inference of exclusion by silence is made.¹⁶⁸ For example, a contract for the sale of goods which is silent on the subject of warranties does not raise an inference that implied warranties are excluded.¹⁶⁹ A contract for the sale of the assets of a business including goodwill imposes on the seller an obligation to refrain from direct solicitation of the seller's former customers because that conduct would destroy the value of the goodwill, but the contract's silence on direct solicitation raises no inference that the implied covenant is excluded.¹⁷⁰ When the implied term falls clearly within the duty of good faith and fair dealing which applies to every contract,¹⁷¹ silence evidences no intentional exclusion.¹⁷² Rather, an agreement excluding an obligation imposed by law must be clear and unambiguous.¹⁷³ Thus, the extent to which the court will assume exclusion by silence will vary inversely with the court's willingness to view the implication as a settled rule of law which applies to the parties' agreement.

The inference of exclusion by the silence of an apparently complete writing is rarely the primary basis for the decision not to imply the term. Rather, the primary basis is that the legal criteria necessary for implication of a term did not exist.¹⁷⁴ Furthermore, when the implication of a

168. The gap filling provisions of Article 2 of the UCC, which apply absent agreement to the contrary, clearly illustrate this approach. See U.C.C. § 2-303 to -311 (1978). Article 2 mandates the obligation of best efforts in an exclusive dealing contract unless the parties agree otherwise. See *id.* § 2-306(2). Thus, silence would not constitute an agreement to the contrary.

169. See *infra* notes 184-85 and accompanying text.

170. See *Bergum v. Weber*, 136 Cal. App. 2d 389, 393, 288 P.2d 623, 625-26 (1955).

171. See *supra* note 2 and accompanying text.

172. See *Bergum v. Weber*, 136 Cal. App. 2d 389, 393-94, 288 P.2d 623, 626 (1955) ("If without the implied obligation the fruits of the contract would be denied to one of the parties, the intent that such an obligation should not exist must clearly appear from the express terms of the contract.").

173. *Bonner v. Westbound Records, Inc.*, 76 Ill. App. 3d 736, 748, 394 N.E.2d 1303, 1311 (1979) ("The doctrine announced in *Wood v. Lucy* involving an implied promise of good faith performance has become such an integral part of contract law that contractual terms should not be construed to negate it where they are ambiguous or subject to a contrary interpretation."); see also *Stone v. Caroselli*, 653 P.2d 754, 756-57 (Colo. Ct. App. 1982) (distributor's duty under UCC § 2-306(2) to use best efforts in exclusive dealing contract to promote the sale of the product not negated by a contractual provision giving distributor the discretion to designate number and location of sales outlets); *Furrer v. International Health Assurance Co.*, 256 Or. 429, 438-40, 474 P.2d 759, 763-65 (1970) (promise to use best efforts implied although contractual provision stated "plaintiff 'agrees to spend such time as he personally sees fit' in developing agency agreements and personal sales").

174. In *Conservative Fed. Sav. & Loan Ass'n v. Warnecke*, 324 S.W.2d 471 (Mo. Ct. App. 1959), lessee alleged that lessor had an implied duty to notify lessee of an increase in the average rent before the lease's escalator clause based on that figure became operative. See *id.* at 477. The court reversed the trial court's holding that such a covenant should be implied: "The escalator clause is clear and definite in its terms. It omits any reference to

term is necessary for the very existence of a valid contract, the completeness and formality of the writing which are said to militate against the implication of a term have the opposite effect. They militate for the implication of a term because the court can infer that the parties intended a contract, not a nullity.¹⁷⁵

In summary, the adoption of a writing should have no effect on the court's ability or willingness to make an implication of law despite sporadic statements in the decisions to the contrary. An implication of law is made unless the parties have expressed an intent to exclude it. Whether or not such a contrary agreement must appear in the writing itself is discussed in Parts I and IV but it is clear, at least, that the silence of the writing is not by itself such an expression.

III. DOES THE PAROL EVIDENCE RULE EXCLUDE EXTRINSIC EVIDENCE NECESSARY TO ESTABLISH AN OBLIGATION IMPOSED BY LAW?

Under the great weight of authority, the parol evidence rule does not exclude evidence extrinsic to the writing to establish an obligation imposed by law.¹⁷⁶ The parol evidence rule is not meant to preclude all inquiry into the circumstances surrounding a transaction.¹⁷⁷ At most,

notice to the lessee of any increase in the average rental. From reading the entire clause it is our judgment that such omission was intentional." *Id.* at 480.

But the same court would have implied an obligation under the same escalator clause to notify of a decrease in average rent, upon request of the lessee, because that event triggered the lessee's right to terminate the lease. *See id.* at 479-80. The court stated, "It would seem that in a case of that kind such an implied obligation would be necessary in order to fully protect the rights of the lessee under the lease." *Id.* at 480.

175. *See* *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642, 643 (2d Cir. 1945) ("No one can read the document as a whole without concluding that the parties intended a contract . . ."); *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 90-91, 118 N.E. 214, 214 (1917) ("A promise may be lacking, and yet the whole writing may be 'instinct with an obligation' . . ."); *Mezzanotte v. Freeland*, 20 N.C. App. 11, 17, 200 S.E.2d 410, 414 (1973) (contract not declared void for illusoriness because parties intended to be bound).

176. *See* 3 A. Corbin, *supra* note 7, § 590, at 550; E. Farnsworth, *supra* note 25, § 7.16, at 525; 4 S. Williston, *supra* note 9, § 643, at 1110.

177. For example, the parol evidence rule does not apply to interpretation of a writing. *See* 3 A. Corbin, *supra* note 7, § 579, at 412-13; First Restatement, *supra* note 11, § 237 comment a; Second Restatement, *supra* note 2, § 213 comment a; 4 S. Williston, *supra* note 9, § 631, at 955. Under the so-called "plain meaning" rule of interpretation, however, many courts still require a finding of ambiguity on the face of the document as a prerequisite to introducing extrinsic evidence for this purpose. *See, e.g.,* *Grumman Allied Indus. v. Rohr Indus.*, 748 F.2d 729, 734 (2d Cir. 1984); *Zim v. Western Publishing Co.*, 573 F.2d 1318, 1322-23 (5th Cir. 1978); *Poggi v. Tool Research and Eng. Corp.*, 75 Wash. 2d 356, 364, 451 P.2d 296, 301 (1969). The parol evidence rule does not exclude extrinsic evidence used to attack the validity of the agreement due to, for example, fraud, duress, mistake, illegality or lack of consideration. *See* 3 A. Corbin, *supra* note 7, § 580, at 431, 436-38; First Restatement, *supra* note 11, § 238(b); Second Restatement, *supra* note 2, § 214(d); 4 S. Williston, *supra* note 9, § 634, at 1017-20; *see also* Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 Calif. L. Rev. 877, 894, 896-97 (1961) (criticizing California rule limiting parol evidence to prove promissory fraud). Nor does it apply to

the parol evidence rule can have the effect of forcing parties to put all their agreements relating to a particular transaction into writing at the risk of being unable to prove those that are omitted from the writing.¹⁷⁸ The rule does not cut off a court's ability to consider circumstances surrounding a transaction which are relevant to deciding whether to impose an obligation.¹⁷⁹

Sometimes extrinsic evidence is necessary to establish an obligation imposed by law. In a percentage lease, for example, the lessee may promise to pay the lessor a fixed sum plus a percentage of the profits.¹⁸⁰ In such cases, most courts have implied a promise on the part of the lessee to use best efforts to produce profits if the fixed sum is nominal, but not if it is substantial.¹⁸¹ Some courts will imply a promise even where the fixed sum is more than nominal, provided it is significantly below the

proof of an oral condition precedent to the effectiveness of a written agreement. *See Pym v. Campbell*, 6 Ellis & Bl. 370, 374, 119 Eng. Rep. 903, 905 (Q.B. 1856); 3 A. Corbin, *supra* note 7, § 589, at 530-32; First Restatement, *supra* note 11, § 241; Second Restatement, *supra* note 2, § 217; 4 S. Williston, *supra* note 9, § 634, at 1021-26. *But see* Wallach, *supra* note 41, at 654 ("This exception to the parol evidence rule is difficult to justify."). It does not prevent reformation of the instrument. *See* First Restatement, *supra* note 11, § 238(c); Second Restatement, *supra* note 2, § 214(e); Palmer, *supra* note 14, at 833. The "common law exceptions" to the parol evidence rule are available under the Uniform Commercial Code. *See* J. White & R. Summers, *supra* note 78, § 2-11, at 88-89; Broude, *supra* note 14, at 890-902.

178. For a comparison of the parol evidence rule and the statute of frauds, see 3 A. Corbin, *supra* note 7, § 575, at 380-82.

179. If the implication is one of fact, but not from the writing alone, the parol evidence rule may bar evidence to prove it. *See supra* notes 24 and 148. Thus the parol evidence rule could bar evidence of words or conduct to add terms to a fully integrated agreement. The need to decide whether extrinsic evidence is being used to prove an implied in fact or implied in law term is avoided by courts that take an expansive interpretation approach. Evidence of the circumstances of the transaction, including statements made, are then considered in interpreting the agreement as a whole. *See, e.g.,* *Onderdonk v. Presbyterian Homes*, 85 N.J. 171, 182, 187, 425 A.2d 1057, 1062-63, 1065-66 (1981) (implied agreement that defendant would not use money paid by nursing home residents to improve defendant's other nursing homes and implied incidental obligation to provide plaintiffs with "meaningful" financial statements); *see also* *Quader-Kino A.G. v. Nebenzal*, 35 Cal. 2d 287, 289, 293-94, 217 P.2d 650, 651, 655 (1950). *See infra* note 239.

For a case that admitted proof of the term under both theories, interpretation and partial integration, see *Paccon, Inc. v. United States*, 399 F.2d 162 (Ct. Cl. 1968). In that case, proof of an oral promise was deemed admissible to aid in interpreting the contract and also as an additional term of the agreement because it was "the type the defendant would naturally make . . . without including it in the formal written agreement." *Id.* at 171 n.11.

180. *See Masciotra v. Harlow*, 105 Cal. App. 2d 376, 377, 233 P.2d 586, 588 (1951); *Garden Suburbs Golf & Country Club, Inc. v. Pruitt*, 156 Fla. 825, 827, 24 So. 2d 898, 899 (1946); *Dickey v. Philadelphia Minit-Man Corp.*, 377 Pa. 549, 551, 105 A.2d 580, 580 (1954).

181. *See Cousins Inv. Co. v. Hastings Clothing Co.*, 45 Cal. App. 2d 141, 149, 113 P.2d 878, 882 (1941); *Sinclair Ref. Co. v. Giddens*, 54 Ga. App. 69, 69, 187 S.E. 201, 202 (1936); *Taylor v. Universal Tire, Inc.*, 672 S.W.2d 775, 779 (Tenn. Ct. App. 1984); *E. Farnsworth, supra* note 25, § 7.16, at 525 n.27 (1982); *see also* *Long Island R.R. v. Northville Indus.*, 41 N.Y.2d 455, 461-62, 362 N.E.2d 558, 562, 393 N.Y.S.2d 925, 929-30 (1977) (licensee's obligation limited to minimum annual payments under license because no implied promise that it would build oil pipeline that would increase revenue).

fair market value of the property.¹⁸² The parol evidence rule does not bar extrinsic evidence introduced to show that the fixed rental is merely nominal or at least significantly below the fair market value of the property at the time of the agreement.¹⁸³

A. *Example of Implied Warranty of Fitness for a Particular Purpose*

A number of warranties arise by operation of law in a sale of goods transaction,¹⁸⁴ most of which require little or no introduction of extrinsic evidence.¹⁸⁵ The implied warranty of fitness for a particular purpose is a notable exception. It arises when the seller has reason to know of the buyer's particular purpose and that the buyer is relying on the seller's skill or judgment.¹⁸⁶ The written order (or contract) may show the buyer's particular purpose,¹⁸⁷ but frequently it does not.¹⁸⁸

Does the parol evidence rule bar evidence of negotiations between parties to prove the facts establishing an implied warranty of fitness?¹⁸⁹ At common law the prevailing view was that it did not because the parol

182. See, e.g., *Masciotra v. Harlow*, 105 Cal. App. 2d 376, 379-80, 233 P.2d 586, 589 (1951) (minimum rent must be "fair and adequate"); *Stop & Shop, Inc. v. Ganem*, 347 Mass. 697, 702-04, 200 N.E.2d 248, 251-53 (1964) (minimum rent found substantial).

183. See E. Farnsworth, *supra* note 25, § 7.17, at 531 n.24.

184. Mechem, *Implied and Oral Warranties and the Parol Evidence Rule*, 12 Minn. L. Rev. 209, 218 (1928); Moye, *supra* note 156, at 596; Note, *Warranty Disclaimers and Limitation of Remedy for Breach of Warranty Under the Uniform Commercial Code*, 43 B.U.L. Rev. 396, 400 (1963) [hereinafter cited as *Warranty Disclaimers*]. Aside from the express warranties of UCC § 2-313, Article 2 of the U.C.C. recognizes five warranties: the implied warranty of merchantability, UCC § 2-314(1) (1978), the implied warranty of fitness for a particular purpose, *id.* § 2-315, implied warranties arising from a course of dealing or usage of trade, *id.* § 2-314(3), the warranty of title, *id.* § 2-312(1), and the warranty against infringement, *id.* § 2-312(3). Of these, only the implied warranty of fitness for a particular purpose and any implied warranties added by course of dealing or usage of trade require much significant inquiry into matters extrinsic to the writing. For a recent extensive discussion of UCC Article 2 warranties, see Special Project, *Article Two Warranties in Commercial Transactions*, 64 Cornell L. Rev. 30 (1978). On the importance of clearly distinguishing the implied warranties of merchantability (fitness for ordinary purpose) and fitness for a particular purpose, see Covington & Medved, *The Implied Warranty of Fitness for a Particular Purpose: Some Persistent Problems*, 9 Ga. L. Rev. 149, 149-51 (1974).

185. The warranty of title arises from the mere fact of sale. U.C.C. § 2-312(1) (1978). The implied warranty of merchantability arises when the seller is "a merchant with respect to goods of that kind." *Id.* § 2-314(1). The warranty against infringement arises when the seller is "a merchant regularly dealing in goods of the kind." *Id.* § 2-312(3).

186. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Id. § 2-315.

187. See *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962).

188. See Strahorn, *supra* note 59, at 733-35.

189. In these cases, the extrinsic evidence is more closely related to the negotiations than are facts of market value in the percentage lease cases. The credibility of the parties may be at issue when testifying about what the buyer told the seller about his particular purpose or how the seller responded. But the parol evidence rule cannot police the credi-

evidence rule does not apply to obligations arising by operation of law.¹⁹⁰ Commentators unanimously agreed.¹⁹¹ Does the UCC parol evidence rule apply to the facts necessary to prove an implied warranty of fitness? The answer under the Code, as it was at common law, should be no.¹⁹² But, because two important commentators have recently, without explanation, said it does,¹⁹³ this Article will enumerate some of the reasons

bility of all oral evidence wherever a written contract exists. See Sweet, *supra* note 7, at 1052.

190. See, e.g., *United States Credit Bureau, Inc. v. Powell*, 121 Cal. App. 2d Supp. 870, 871-72, 264 P.2d 229, 230-31 (1953) (reversing trial court's refusal to allow parol evidence to prove breach of implied warranties); *McDonald v. Sanders*, 103 Fla. 93, 98-100, 137 So. 122, 125 (1931) (extrinsic evidence to prove implied warranties not precluded by parol evidence rule); *John A. Roebeling's Sons Co. v. Southern Power Co.*, 142 Ga. 464, 469, 83 S.E. 138, 140-41 (1914) (same); *Nettles v. Imperial Distribs., Inc.*, 152 W. Va. 9, 15, 159 S.E.2d 206, 210 (1968) (same). For listings of further cases, see *Buchanan v. Dugan*, 82 A.2d 911, 914 & nn.4-6 (D.C. 1951); Strahorn, *supra* note 59, at 735 n.28; *Parol Warranties*, *supra* note 156, at 864 n.47. The implied warranty of fitness for a particular use is a "warranty which attaches itself to the contract of sale, independent of any express representation by the manufacturer of the suitability of the machinery for such use." *International Harvester Co. of Am. v. Bean*, 159 Ky. 842, 846, 169 S.W. 549, 550 (1914). But see *Bowser & Co. v. Independent Dye House, Inc.*, 276 Mass. 289, 295-96, 177 N.E. 268, 270 (1931) (parol evidence rule precludes extrinsic evidence to prove implied warranty of fitness). For a discussion of whether a merger clause operates as a "waiver" (disclaimer) of the implied warranty, see *infra* notes 216-29 and accompanying text.

191. See, e.g., 3 A. Corbin, *supra* note 7, § 585, at 488, § 593, at 563; E. Farnsworth, *supra* note 25, § 7.16, at 525 n.27; 4 S. Williston, *supra* note 9, § 643, at 1084-85; Mechem, *supra* note 184, at 218-20; *Merger Clause*, *supra* note 91, at 365.

Professor Strahorn gives a broader reach to the parol evidence rule than Williston, who limits the applicability of the rule to "agreements," see 4 S. Williston, *supra* note 9, § 643, at 1084, because Strahorn applies it to "facts dehors a writing," see Strahorn, *The Unity of the Parol Evidence Rule*, 14 Minn. L. Rev. 20, 20 (1929). In the context of warranties, Strahorn applies the rule to "jurally unfavorable statements" (assuming absence of fraud) because these are natural to include in the writing. See Strahorn, *supra* note 59, at 747-51. This characterization covers a promissory ("prophetic") express warranty ("This car will do well on rough roads."), and an express warranty by affirmation of fact (assertive express warranty) ("This car is built to do well on rough roads."). See *id.* at 729-30. It does not cover statements and facts giving rise to an implied warranty of fitness for a particular purpose, (Buyer: "I need a car for rough roads;" Seller: "Take this model.") because it is not natural to include these in the writing. See *id.* at 731, 733-36. Thus, Strahorn would not make the parol evidence rule's operation turn on whether the warranty was promissory or implied in law (as Williston does), but rather on whether it would be natural to include the operative facts in the writing. See *id.* at 732. His thesis is that it is natural to omit operative facts giving rise to implied warranties from the writing. See *id.* at 746-47, 750-51. The Second Restatement also takes the position that implied warranties are naturally omitted from the writing. See Second Restatement, *supra* note 2, § 216(2)(b) comment d & ill. 9. See *infra* note 193.

192. See *supra* notes 190-91 and accompanying text.

193. See E. Murphy & R. Speidel, *Studies in Contract Law* 746-47 (3d ed. 1984); see also 9 J. Wigmore, *supra* note 9, § 2434, at 115 n.3 (indicating that evidence giving rise to implied warranty of fitness can be excluded by parol evidence rule).

Some confusion may be caused by the Second Restatement's use of implied warranties in § 216 illustration 9 as examples of comment d, "Terms omitted naturally":

A and B sign a written agreement, complete on its face, for the sale of a specific machine by A to B. The writing describes the machine and warrants that it is new, but contains no other terms relevant to warranty. Warranties of title, conformity to the description, merchantability, or fitness for a particular

why the UCC parol evidence rule does not apply to proof of an implied warranty of fitness.

The Code's parol evidence rule prohibits contradiction of the final writing by "any prior agreement" or by "a contemporaneous oral agreement."¹⁹⁴ If the writing is "intended also as a complete and exclusive statement of the terms of the agreement," the UCC bars evidence of even "consistent additional terms."¹⁹⁵ Thus, the UCC parol evidence rule applies only if the extrinsic evidence is introduced to prove an "agreement" or "term." Therefore, whether extrinsic evidence may be introduced to prove an implied warranty of fitness depends on whether the implied warranty is either an "agreement" or "term." Both of these words are defined in the Code. "Term" is defined as "that portion of an agreement which relates to a particular matter."¹⁹⁶ Thus the definition of "term" directs us to the definition of "agreement." "Agreement" is defined as "the bargain of the parties in fact as found in their language or by implication from other circumstances."¹⁹⁷ At least for purposes of Article 2, "agreement" includes a present sale.¹⁹⁸ Does it include the warranties imposed by law on the sale? The Code carefully distinguishes between the concepts of "agreement" and "contract." "Contract" is defined as "the total legal obligation which results from the parties' agreement as affected by this Act and other applicable rules of law."¹⁹⁹ The definitional sections of "contract" and "agreement" make cross-references to each other with the direction to "compare," thus pointing out to the reader that although the word "contract" includes obligations imposed by law, the word "agreement" does not.²⁰⁰

Because the implied warranty of fitness doubtlessly arises by operation of law and not by virtue of the parties' assent,²⁰¹ the two commentators

purpose, arising under Uniform Commercial Code §§ 2-312 through 2-315, are not excluded. Whether an additional oral warranty of quality is superseded depends on whether the agreement is completely integrated.

Second Restatement, *supra* note 2, § 216(2)(b) ill. 9. However, a term that "might naturally be omitted" is admissible even if the parties assented to the writing as the complete and exclusive statement of their agreement. *Id.* § 216(2)(b) comment a. Therefore, the Second Restatement view does not contemplate potential exclusion of the implied warranty of fitness by the UCC's parol evidence rule, UCC § 2-202(b).

194. U.C.C. § 2-202 (1978).

195. *Id.* § 2-202(b).

196. *Id.* § 1-201(42).

197. *Id.* § 1-201(3). The word "bargain" is not defined in the Code. Mellinkoff, *The Language of the Uniform Commercial Code*, 77 Yale L.J. 185, 189 (1967). The Second Restatement defines "bargain" as "an agreement to exchange promises or to exchange a promise for a performance or to exchange performances." See Second Restatement, *supra* note 2, § 3.

198. See U.C.C. § 2-106(1) (1978).

199. *Id.* § 1-201(11). Section 2-106(1) defines "contract for sale" as both a present sale of goods and a contract to sell goods in the future. *Id.* § 2-106(1).

200. See *id.* §§ 1-201(3), (11). The Code, however, is not always consistent in maintaining this distinction. See Mellinkoff, *supra* note 197, at 189.

201. See *John A. Roebbling's Sons Co. v. Southern Power Co.*, 142 Ga. 464, 469, 83 S.E. 138, 140 (1914) (implied warranty of fitness "is an implication which the law itself

who characterized it as a "term of the agreement"²⁰² seem to have lost sight of this important limit on the concept of "agreement." The facts necessary to prove the implied warranty of fitness are not subject to the parol evidence rule because they are not introduced to prove a "term of the agreement" but to prove an obligation imposed by law.²⁰³

The warranty provisions of the Code add further support to this analysis. Section 2-315 states that an implied warranty of fitness for a particular purpose exists by virtue of the circumstances of the sale unless excluded or modified under section 2-316.²⁰⁴ Thus, the only exclusionary mechanism mentioned for the implied warranty is section 2-316. Section 2-316, in turn, distinguishes between express and implied warranties.²⁰⁵ The subsection dealing with express warranties²⁰⁶ makes a cross-reference to the UCC parol evidence rule, section 2-202, yet none of the subsections relating to disclaimer of implied warranties contain that cross-reference.²⁰⁷ This suggests that, although express warranties are subject to the parol evidence rule, the implied warranty of fitness is not.²⁰⁸ In addition, although the official comments to the warranty pro-

imposes"); *International Harvester Co. of Am. v. Bean*, 159 Ky. 842, 846, 169 S.W. 549, 550 (1914) (implied warranty of fitness "attaches" to contract of sale); see also *Farnsworth*, *supra* note 6, at 862-68 (tracing development of implied terms from early cases that based such implications on intention of the parties to later judicial recognition that such terms are duties imposed by law).

202. See *E. Murphy & R. Speidel*, *supra* note 193, at 746-47 (implied warranties are "terms of the agreement." . . . [The] implied warranty [of merchantability] emerges from the very roots of the bargain . . .").

203. See 1 New York State Law Revision Commission, Study of the Uniform Commercial Code 412 n.104 (1955) [hereinafter cited as *New York State Law Revision Commission*]; *J. White and R. Summers*, *supra* note 177, § 2-12, at 90. Consistent with the analysis that an implied warranty of fitness is part of the "contract" but not a "term" of the "agreement" as those terms are defined in the Code, see *supra* notes 196-200 and accompanying text, under UCC § 2-314, a warranty of merchantability is "implied in a contract [not agreement] for . . . sale," see U.C.C. § 2-314 (1978), and under UCC § 2-312, a warranty of title against infringement "is in a contract [not agreement] for sale," *id.* § 2-312.

204. See U.C.C. § 2-315 official comment 1 (1978). Whether the implied warranty of fitness exists in any particular case is a question of fact under the circumstances. This is not the same as saying that the implied warranty of fitness is part of the parties' bargain in fact. *But see E. Murphy & R. Speidel*, *supra* note 193, at 746-47 ("[An] implied warranty of merchantability emerges from the very roots of the bargain.").

205. See U.C.C. § 2-316 (1978).

206. See *id.* § 2-316(1).

207. See *id.* § 2-316(2), (3).

208. U.C.C. § 2-316(1)'s cross-reference to U.C.C. § 2-202 is important because the section states a rule for express warranties which is in conflict with § 2-202, and if no cross-reference were made, § 2-316(1) could have been construed as eliminating the parol evidence rule in the context of express warranties. It could be argued, however, that even if the parol evidence rule of § 2-202 were intended to apply to implied warranties, it would have been unnecessary to make a cross-reference to § 2-202 in § 2-316(2) because § 2-316(2) states an additional rule of exclusion which does not conflict with the parol evidence rule of exclusion in § 2-202. It is important to remember, however, that § 2-315, the Code section establishing the implied warranty of fitness, provides only one method of exclusion: the disclaimer provisions of § 2-316. See *supra* note 204 and accompanying text.

visions refer to the parol evidence rule, no such references are made with respect to proof of circumstances necessary to establish an implied warranty.²⁰⁹ Although the Code's warranty sections and official comments do not expressly preclude applying the parol evidence rule to the facts necessary to give rise to the implied warranty of fitness for a particular purpose, they imply that the rule does not apply.

The case law under the Code agrees.²¹⁰ Cases under the Code consider the parol evidence rule in connection with allegations of express warranties²¹¹ but do not apply the parol evidence rule to implied warranties such as those of merchantability or fitness for a particular purpose.²¹²

Textual analysis of the UCC parol evidence rule, negative inferences from the warranty provisions and the comments thereto, and the case law construing the Code support the suggested analysis. Nevertheless, it might be argued that the UCC parol evidence rule would apply to the implied warranty of fitness if the Code were intended to expand the coverage of the parol evidence rule. The opposite is true.²¹³ Although a few cases state that the UCC parol evidence rule does not change the common law rule,²¹⁴ most cases and commentators view the Code's formula-

209. See generally U.C.C. § 2-312 to -316 official comments (1978).

210. See, e.g., Appeals of Reeves Soundcraft Corp., 2 U.C.C. Rep. Serv. (Callaghan) 210, 219 (ASBCA 1964); Moye, *supra* note 156, at 606; *Warranty Disclaimers*, *supra* note 184, at 400. The same conclusion was reached under the Uniform Sales Act. See, e.g., Buchanan v. Dugan, 82 A.2d 911, 913 (D.C. 1951); Bekkevold v. Potts, 173 Minn. 87, 90, 216 N.W. 790, 791 (1927).

211. See, e.g., Computerized Radiological Servs. v. Syntex Corp., 595 F. Supp. 1495, 1505-07 (E.D.N.Y. 1984) (express warranty admitted as consistent additional term where written contract was a partial integration); Jordan v. Doonan Truck & Equip., Inc., 220 Kan. 431, 435, 552 P.2d 881, 884 (1976) (parol evidence rule bars evidence of alleged express warranties where written contract stated as is, where is, no warranty).

212. Appeals of Reeves Soundcraft Corp., 2 U.C.C. Rep. Serv. (Callaghan) 210, 219 (ASBCA 1964); Moye, *supra* note 156, at 606; *Warranty Disclaimers*, *supra* note 184, at 400; see also Computerized Radiological Servs. v. Syntex Corp., 595 F. Supp. 1495, 1508-09 (E.D.N.Y. 1984) (only disclaimer provisions, not parol evidence rule, considered on issue of existence of implied warranty of fitness for a particular purpose).

In Thorman v. Polytemp, Inc., 2 U.C.C. Rep. Serv. (Callaghan) 772 (N.Y. County Ct. 1965), the written sales agreement included both a merger clause and a valid disclaimer. See *id.* at 774. The court held that extrinsic evidence to prove an implied warranty of fitness was barred by the Code's parol evidence rule, § 2-202. See *id.* Because the implied warranty is not a "term" of the "agreement," § 2-202 is inapplicable to it. See *supra* notes 194-200 and accompanying text. The court seems to have applied the broad evidentiary common law parol evidence rule that any extrinsic evidence is inadmissible to contradict a provision of a written contract, in this case, the disclaimer provision. See 4 S. Williston, *supra* note 9, § 631, at 948-49. It has been forcefully argued in the context of trade usage and course of dealing that applying the broad evidentiary common law parol evidence rule in a UCC case to exclude any extrinsic evidence which apparently contradicts a final writing causes confusion and even a subversion of UCC theory. See Kirst, *supra* note 148, at 832-36.

213. Compare 5 S. Williston, *supra* note 9, § 654, at 60 (parol evidence rule principles applicable to trade usage used to supplement written contract) with Kirst, *supra* note 148, at 35 ("[E]vidence of usage of trade . . . is not excludable parol evidence under section 2-202 . . .")

214. See, e.g., Green Chevrolet Co. v. Kemp, 241 Ark. 62, 64, 406 S.W.2d 142, 143

tion of the rule as less restrictive than the common law rule.²¹⁵ Certainly there is no authority for the proposition that the Code rule is intended to exclude more evidence than was excluded under the prior law.

B. *Effect of Merger Clause*

Does a merger clause exclude an implied warranty or extrinsic evidence necessary to establish implied warranties? At common law, the cases were in conflict, but the majority view was that it did not.²¹⁶ The reason for the apparently conflicting decisions was that resolution of the issue depended on the interpretation of the merger clause.²¹⁷ If the merger clause was interpreted as a mere paraphrase of the assumption made by the traditional parol evidence rule, it did not exclude implied warranties.²¹⁸ If the merger clause was interpreted as an expression of intent to exclude any unwritten obligation (including one imposed by

(1966) (Arkansas parol evidence rule not changed by UCC § 2-202); Glenn Dick Equip. Co. v. Galey Constr., Inc., 97 Idaho 216, 223, 541 P.2d 1184, 1191 (1975) (UCC § 2-202 incorporates common law parol evidence rule); Jordan v. Doonan Truck & Equip., Inc., 220 Kan. 431, 435, 552 P.2d 881, 884 (1976) ("From the Comments accompanying [UCC §] 2-202 and case law concerning that section, it is clear the Code is not meant to change the local parol evidence rule.").

215. See, e.g., S.M. Wilson & Co. v. Smith Int'l, Inc., 587 F.2d 1363, 1370 (9th Cir. 1978); Michael Schiavone & Sons, Inc. v. Securalloy Co., 312 F. Supp. 801, 804 (D. Conn. 1970); Zwierzycki v. Owens, 499 P.2d 996, 997 (Wyo. 1972); 1 New York State Law Revision Commission, *supra* note 203, at 598; Broude, *supra* note 14, at 906-07, 911-12, 918; Weintraub, *Disclaimers of Warranties and Limitations of Damages for Breach of Warranty under the UCC*, 53 Tex. L. Rev. 60, 74-75 (1974).

216. See, e.g., United States Gypsum Co. v. Schiavo Bros., 668 F.2d 172, 175 (3d Cir. 1981) (implied covenant in lease to return premises in same condition as received not negated by merger clause), *cert. denied*, 456 U.S. 961 (1982); Sperry Rand Corp. v. Industrial Supply Corp., 337 F.2d 363, 371 (5th Cir. 1964) (merger clause does not bar recovery on implied warranty of fitness for use); Bekkevold v. Potts, 173 Minn. 87, 89-90, 216 N.W. 790, 791 (1927) (merger clause may be so worded so that implied warranties are not excluded); 3 A. Corbin, *supra* note 7, § 578, at 411-12 (merger clause does not necessarily preclude existence of implied warranties); 4 S. Williston, *supra* note 9, § 643, at 1079 & n.6 (same); *Merger Clause*, *supra* note 91, at 365-66 (only merger clauses which expressly exclude implied warranties should have that effect); Moye, *supra* note 156, at 606 (merger clause does not necessarily preclude existence of implied warranties); see also Buchanan v. Dugan, 82 A.2d 911, 913-14 (D.C. 1951) (merger clause did not bar evidence of implied warranty on hearing aid); Hughes v. National Equip. Corp., 216 Iowa 1000, 1004-05, 250 N.W. 154, 156-57 (1933) (evidence of implied warranty on machines sold not barred by merger clause); Ideal Heating Co. v. Kramer, 127 Iowa 137, 143, 102 N.W. 840, 842 (1905) (merger clause "does not exclude an implied warranty where one would otherwise be found"). *But see* Detroit Trust Co. v. Engel, 192 Mich. 62, 64, 158 N.W. 123, 124 (1916) (merger clause in contract excluded implied warranty); F.A. North Co. v. Beebe, 11 N.J. Misc. 759, 760, 168 A. 632, 633 (1933) (same); Rockwood & Co. v. Parrot & Co., 142 Or. 261, 269-72, 19 P.2d 423, 426-27 (1933) (same); 4 S. Williston, *supra* note 9, § 643, at 1078-79 (some cases hold that merger clause excludes implied warranties); *Parol Warranties*, *supra* note 156, at 867 (statement in a final writing that the writing contains the entire agreement is an express disclaimer of implied warranties).

217. See 3 A. Corbin, *supra* note 7, § 578, at 412 ("Here, as elsewhere, the process of interpretation leads to results that seem to be inconsistent and conflicting so far as can be determined from the court opinions.").

218. See Sperry Rand Corp. v. Industrial Supply Corp., 337 F.2d 363, 371 (5th Cir.

law), the merger clause was a disclaimer.²¹⁹ The outcome of the cases often depended on the language of the particular merger clause.²²⁰ On the whole, there was a tendency to interpret them narrowly against exclusion,²²¹ but particularly when the writing contained an express warranty in addition to the merger clause, the merger clause was sometimes given the effect of a disclaimer.²²²

In sum, the common law cases concerning merger clauses grappled with the question of whether the merger clause acted as a disclaimer of the implied warranties, not with whether a merger clause excludes reference to the parties' negotiations establishing an implied warranty.

Because the Code parol evidence rule is inapplicable to obligations imposed by law,²²³ proof of the implied warranty of fitness is admissible even though the merger clause signifies that the parties intended their

1964); *Ideal Heating Co. v. Kramer*, 127 Iowa 137, 143, 102 N.W. 840, 842 (1905); 5 S. Williston, *supra* note 9, § 811, at 887.

In *Sperry Rand*, the seller had made prior written representations of fitness for use which were excluded by an integration clause. See *Sperry Rand*, 337 F.2d at 365-66, 370. Even though an express warranty of fitness for use was barred by the parol evidence rule, the court admitted the written representations to prove an implied warranty of fitness for use. See *id.* at 371. The court stated: "[W]here the alleged verbal warranty sought to be established is only what would be implied, evidence thereof does not change the legal effect of the contract, and is therefore admissible." *Id.* (quoting *McDonald v. Sanders*, 103 Fla. 93, 99, 137 So. 122, 125 (1931)).

Where, however, a term has been discussed in early negotiations and then dropped or where a party refused to include a promise in the written contract, the courts have sometimes concluded that the term was intentionally excluded and refused to imply the same term. See *supra* notes 164-65, *infra* note 239 and accompanying text.

219. See *Bagley v. General Fire Extinguisher Co.*, 150 F. 284, 286-87 (2d Cir. 1906), *appeal dismissed*, 212 U.S. 477 (1909); *Parol Warranties*, *supra* note 156, at 867.

220. Compare *Bekkevold v. Potts*, 173 Minn. 87, 90, 216 N.W. 790, 791 (1927) (Merger clause stated: "No warranties have been made . . . by the seller to the buyer unless written hereon." None were written. The court held that because only express warranties are "made" by seller, the parties did not intend to exclude implied warranties.) with *Bagley v. General Fire Extinguisher Co.*, 150 F. 284, 285, 287 (2d Cir. 1906) (Merger clause stated: "It is explicitly understood and agreed that no obligations other than herein set forth . . . shall be binding upon either party." The court held this language to mean that "no warranties should be attached to the contract except those that were 'set forth' in terms."), *appeal dismissed*, 212 U.S. 477 (1909).

221. See *Parol Warranties*, *supra* note 156, at 867-68, 870; see also *United States Credit Bureau v. Powell*, 121 Cal. App. 2d Supp. 870, 871-72, 264 P.2d 229, 230-31 (1953) ("Obviously, the statement in the written contract that it contains the entire agreement of the parties cannot furnish . . . an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use.'") (quoting *Kuitems v. Covell*, 104 Cal. App. 2d 482, 485, 231 P.2d 552, 554 (1951)); *J.B. Colt Co. v. Bridges*, 162 Ga. 154, 158, 132 S.E. 889, 891 (1926) ("The assertion of the implied warranty of [fitness for particular purpose] does not in any way conflict with the stipulations of the written contract of sale that the instrument contains all the agreements of the parties."); *Bekkevold v. Potts*, 173 Minn. 87, 90, 216 N.W. 790, 791 (1927) ("We must conclude that the parties did not intend to exclude the implied warranty which could easily have been done in unmistakable terms had they so chosen.").

222. See *supra* note 219 and accompanying text.

223. See *supra* notes 192-215 and accompanying text.

writing to be a "complete and exclusive statement . . . of the agreement."²²⁴ If the merger clause is to affect implied warranties under the Code it is strictly as a disclaimer that meets the requirements of UCC section 2-316(2). Although a warranty of fitness for a particular purpose can be disclaimed under that section with general language,²²⁵ a simple statement that the writing contains the entire agreement of the parties should not qualify because it does not manifest an intention to exclude implied warranties.²²⁶ An additional protection under that section, the requirement of conspicuousness,²²⁷ will prevent even a merger clause that explicitly refers to implied warranties from acting as a "secret disclaimer."²²⁸ If a simple merger clause could exclude an implied warranty of fitness for a particular purpose, the Code's policy of protecting buyers by a conspicuous disclaimer would be subverted. That policy requires both conspicuousness and language of disclaimer, not of merger.²²⁹

In conclusion, the parol evidence rule does not exclude extrinsic evidence to establish an obligation imposed by law. The issue has been raised frequently in connection with the implied warranty of fitness for a particular purpose.²³⁰ Despite the assertions of some recent commentary, this warranty should not be considered a "term" of the "agreement" under the Code. Thus, neither the parol evidence rule nor a simple merger clause excludes implied warranties or the extrinsic evidence necessary to establish them.

224. U.C.C. § 2-202(b) (1978); see *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888, 891 (E.D. Pa. 1962), *rev'd in part on other grounds*, 320 F.2d 130 (3d Cir. 1963); J. White & R. Summers, *supra* note 177, § 2-12, at 90; see also *Buchanan v. Dugan*, 82 A.2d 911, 913-14 (D.C. 1951) (reaching this conclusion under the Uniform Sales Act). *But see* Moye, *supra* note 156, at 607 ("The fact that the buyer has signed an agreement which states that it represents the entire contract between the parties tends to show that he is willing to waive all of the prior negotiations" including the circumstances necessary to establish the implied warranty.)

The Second Restatement states that "if agreed to [a merger clause] is likely to conclude the issue whether the agreement is completely integrated. Consistent additional terms may then be excluded even though their omission would have been natural in the absence of such a clause." Second Restatement, *supra* note 2, § 216 comment e. This statement is made just after illustration 9 to § 216 in which a number of implied warranties are characterized as "[t]erms omitted naturally." *Id.* ill. 9. The Second Restatement's suggestion that implied warranties might be natural to include in the writing in view of a merger clause is untenable and, presumably, unintentional.

225. See U.C.C. § 2-316(2) (1978). In the 1952 draft of the Code, an implied warranty of fitness for a particular purpose could be disclaimed only by specific language. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. Rev. 281, 316 (1961).

226. See *supra* note 216 and accompanying text.

227. See U.C.C. § 2-316(2) (1978).

228. See Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 Cornell L.Q. 1, 7, 9 (1962).

229. See U.C.C. § 2-316(2) (1978). *But see* E. Murphy & R. Speidel, *supra* note 193, at 747 (suggesting that conspicuous "manifestation of intention to integrate the writing" would exclude implied warranties).

230. See *supra* note 210 and accompanying text.

IV. MAY PAROL EVIDENCE BE INTRODUCED TO HELP DEFINE THE MEANING OF AN IMPLIED TERM?

It is frequently held that, even if the parol evidence rule excludes extrinsic evidence of the parties' agreement submitted to prove the agreement,²³¹ the same evidence is admissible to help define the meaning of the term the law implies to fill the gaps in the parties' written agreement.²³² Thus, courts have frequently admitted evidence of the parties' actual agreement to help define the meaning of "reasonable time,"²³³ and occasionally of "best efforts."²³⁴ One commentator has pointed to these decisions as anomalous.²³⁵ The author respectfully disagrees. Although parol evidence is considered by the jury, the jury uses it to determine the scope of an already established legal obligation as applied to the particular facts of the case. It is one thing to admit evidence of the conversations of the parties to prove that the repairer had a duty to complete repairs within three months, and another to admit the same evidence to determine what amounts to a reasonable time under the circumstances.²³⁶

231. This could occur if the agreement is fully integrated or if the court deems the implied term to be part of the integration. See *supra* notes 26-39 and accompanying text.

232. See, e.g., *American Historical Soc'y v. Vestal*, 189 Ark. 651, 652-53, 74 S.W.2d 964, 965 (1934); *Epstein v. Paganne, Ltd.*, 44 A.D.2d 520, 520, 353 N.Y.S.2d 190, 192 (1974) (*per curiam*); see also 3 A. Corbin, *supra* note 7, § 593, at 557-59; Second Restatement, *supra* note 2, § 204 comment e, § 213 ill. 3; 4 S. Williston, *supra* note 9, § 640, at 1051-53.

233. See *American Historical Soc'y v. Vestal*, 189 Ark. 651, 652, 74 S.W.2d 964, 965 (1934); *Gluckman v. Holzman*, 29 Del. Ch. 458, 466, 51 A.2d 487, 491 (1947); *Weiner v. Rex Pontiac Corp.*, 8 U.C.C. Rep. Serv. (Callaghan) 191, 191 (N.Y. Sup. Ct. 1970).

234. See *Epstein v. Paganne, Ltd.*, 44 A.D.2d 520, 520, 353 N.Y.S.2d 190, 191 (1974) (*per curiam*) (trial court should have heard evidence of parties' understanding to determine meaning of "best efforts"); see also *Paccon, Inc. v. United States*, 399 F.2d 162, 170-71 & n.11 (Ct. Cl. 1968) (consideration of pre-contract discussions does not violate the parol evidence rule because they do not contradict anything in the contract but merely "spell out and trigger. . . the latent obligation . . . of the Government to take reasonable steps to coordinate the work"). Cf. *Kubik v. J. & R. Foods, Inc.*, 282 Or. 179, 183-84, 186 n.5, 577 P.2d 518, 520, 521 n.5 (1978) (suggesting parol evidence would have been admissible on issue of whether the good faith was that of a buyer in an exclusive dealing contract, UCC § 2-306(2) (implied good faith obligation to promote the product), or that of requirements buyer, UCC § 2-306(1) (good faith in determining requirements)). *But see Local 461 of the Int'l Union of Elec., Radio and Mach. Workers v. Singer Co.*, 540 F. Supp. 442, 446-47 (D.N.J. 1982) (parol evidence inadmissible to show that one party was obligated to continue in business where the contract was unambiguous and fully integrated); *United States v. Wallace & Wallace Fuel Oil Co.*, 540 F. Supp. 419, 427 (S.D.N.Y. 1982) (express best efforts clause not "inherently ambiguous").

235. See *Sweet*, *supra* note 7, at 1039.

236. See Second Restatement, *supra* note 2, § 204 comment e ("Where there is complete integration and interpretation of the writing discloses a failure to agree on an essential term, evidence of prior negotiations or agreements . . . may be admissible, if relevant, on the question of what is reasonable in the circumstances.").

V. MAY PAROL EVIDENCE BE INTRODUCED TO NEGATE A TERM IMPLIED BY LAW THOUGH NO SUBSTITUTE TERM IS SOUGHT TO BE PROVED?

It is clear that when a party seeks to add a term to an integrated agreement, evidence of the offered term may be excluded if the agreement is fully integrated.²³⁷ But suppose the party seeks to prove an agreement that merely negates a term the law would imply without seeking to prove a substituted term. The issue does not generally arise in time of performance or duration cases. In the former, a time for performance cannot be negated completely. Because the obligation to perform is expressed, the performance must occur within some time limit. In the latter, when duration of performance is at issue, an agreement negating duration need not ordinarily be proved because the usual implication is that the duration of the performance is terminable at will.²³⁸ In other words, no duration is implied.

The issue has sometimes arisen, however, in the case of an implied obligation of best efforts. In this context the courts have been willing to look at evidence of the negotiations that show such an obligation was excluded.²³⁹ Even though such obligations are often termed "implied by fact," they are not treated as part of the writing for parol evidence purposes.²⁴⁰

The issue also arises in the case of disclaimer of warranties.²⁴¹ Suppose a seller makes an oral disclaimer or a prior written disclaimer that is not included in the final writing. An express warranty found in the writing itself would no doubt exclude proof of the disclaimer as contradictory. Would an implied warranty be "read into" the writing to exclude

237. See *supra* note 11 and accompanying text.

238. See *Boatright v. Steinite Radio Corp.*, 46 F.2d 385, 389 (10th Cir. 1931); *Elliot v. Delta Air Lines*, 116 Ga. App. 36, 36, 156 S.E.2d 656, 656 (1967); *Parker v. Borock*, 5 N.Y.2d 156, 159, 182 N.Y.S.2d 577, 579 (1959).

239. See, e.g., *Vacuum Concrete Corp. v. American Mach. & Foundry Co.*, 321 F. Supp. 771, 774-75 (S.D.N.Y. 1971) (best efforts assured during negotiations but omitted from written contract); *Eastern Elec., Inc. v. Seeburg Corp.*, 310 F. Supp. 1126, 1145-51 (S.D.N.Y. 1969), *aff'd*, 427 F.2d 23 (2d Cir. 1970) (court considered in detail prior proposals and drafts of the agreement; particularly telling was an early proposal which included an express "best efforts" clause which was later dropped and replaced by other provisions); see also *Quader-Kino A.G. v. Nebenzal*, 35 Cal. 2d 287, 288, 294-95, 217 P.2d 650, 651, 655 (1950) (interpretation of two written contracts "with the aid of parol evidence", revealed that plaintiff's right to exhibit motion picture had expired and therefore defendant was under no implied obligation "not to interfere with plaintiff's acquisition of an extension of [those] rights [nor] to use [defendant's] own independently acquired . . . license to prevent plaintiff from exploiting [motion picture]"); *Garden Park Homes Corp. v. Martin Marietta Corp.*, 507 S.W.2d 368 (Mo. 1974) (*per curiam*) (oral agreement for fixed minimum royalty supplementing mineral lease introduced though it negated implied covenant to use reasonable diligence to extract sand).

240. If they were, the oral agreements would be excluded as contradictory because implications of fact are generally considered part of the integration. See *supra* note 112-13, 131-32 and accompanying text.

241. See *infra* note 242.

proof of the disclaimer as contradictory? Cases decided under the traditional "four corners" view took this approach.²⁴² One commentator has proposed asking whether the particular purpose of the buyer is stated in the writing.²⁴³ He argues that if it is, the seller would naturally include the disclaimer in the writing in order to protect himself. His failure to do so causes proof of the oral disclaimer to be excluded by the parol evidence rule. Under this approach the result would presumably change if extrinsic evidence had to be considered to determine that the seller had reason to know of the buyer's particular purpose. Corbin argues that because the implied warranty is imposed by law, proof of an agreement disclaiming it is admissible in every case.²⁴⁴

Under the UCC, admissibility of the disclaimer as a term of the agreement presumably depends on whether there is a total or partial integration. An official comment indicates that UCC section 2-202 may bar proof of an oral disclaimer.²⁴⁵ The negative implication, therefore, is that unless the parties intend a total integration, proof of the oral disclaimer may be admitted as a consistent additional term. It might be argued, of course, that proof of the disclaimer is inadmissible because the parties would certainly have included the disclaimer in the writing.²⁴⁶ One case that considered the admissibility of evidence of a parol disclaimer held such evidence inadmissible when the written agreement contained a merger clause.²⁴⁷ Another avoided the question by holding that proof of the disclaimer was admissible as a course of performance.²⁴⁸ Because course of performance is subsequent to the integration it can never be excluded by the parol evidence rule.²⁴⁹

Suppose evidence of the oral disclaimer is admitted to prove a consistent additional term but the oral disclaimer is ineffective because it is not made by a conspicuous writing as required by UCC section 2-316(2).²⁵⁰

242. See, e.g., *Calpetro Producers Syndicate v. Charles M. Woods Co.*, 206 Cal. 246, 252-53, 274 P. 65, 67-68 (1929) (warranty of title read in to exclude evidence of oral disclaimer as contradictory); *La France v. Kashishian*, 204 Cal. 643, 645, 269 P. 655, 656 (1928) (implied warranty of title of lessor of real property read in to exclude evidence that lessee knew of defect in title and that the defect was taken into account in setting the terms of the lease).

243. See Strahorn, *supra* note 59, at 729 & n.15.

244. 3 A. Corbin, *supra* note 7, § 585, at 488, § 593, at 559.

245. See U.C.C. § 2-316 official comment 5 (1978).

246. See *supra* notes 82-83 and accompanying text.

247. See *Woodward v. Naylor Motor Sales*, 14 U.C.C. Rep. Serv. (Callaghan) 1269, 1273 (Mich. Dist. Ct. 1974).

248. See *Robinson v. Branch Moving & Storage Co.*, 28 N.C. App. 244, 250, 221 S.E.2d 81, 85 (1976). The evidence introduced was not properly characterized as course of performance, see U.C.C. § 2-208(1) (1978), because it apparently consisted of statements made prior to or contemporaneously with the written sales contract. See *Robinson*, 28 N.C. App. at 249, 221 S.E.2d at 84.

249. See *supra* note 11 and accompanying text. The course of performance would be admissible as a modification. See *Atlas Concrete Pipe, Inc. v. Roger J. Au & Son, Inc.*, 467 F. Supp. 830, 836 (E.D. Mich. 1979), *rev'd on other grounds sub nom.* In re Atlas Concrete Pipe, Inc., 668 F.2d 905 (6th Cir. 1982); U.C.C. § 2-208(3) (1978).

250. A disclaimer of the implied warranty of fitness under UCC § 2-316(2) must be

An official comment indicates that "whether or not language of disclaimer satisfies [UCC section 2-316(2)] such language may be relevant . . . to the question of whether the warranty was ever in fact created."²⁵¹

Suppose instead, that the parol evidence rule does bar proof of the oral disclaimer to supplement the written terms of the sales contract. May proof of the disclaimer be introduced on the issue of whether the implied warranty arose? The Code is unclear. An official comment states that it is admissible for that purpose unless prevented by "the provisions of this Article on parol and extrinsic evidence."²⁵² The answer should be yes, for if it were not, the buyer would have it both ways. As has already been seen, the parol evidence rule does not prevent the buyer from introducing extrinsic evidence to prove the operative facts that give rise to the implied warranty.²⁵³ It would be anomalous, as well as unfair, if the buyer could introduce evidence of conversations to prove the warranty but the seller could not introduce evidence of an oral disclaimer to disprove the warranty. Although inadmissible as proof of a term of the agreement, evidence of the oral disclaimer would be relevant to show the seller had no reason to know of the buyer's reliance or that the buyer did not actually rely on the seller.²⁵⁴

Therefore, even if under the parol evidence rule the disclaimer is inoperative as a term, and even if it is invalid as a disclaimer due to failure to comply with the requisite formalities under the Code, evidence of it should nevertheless be admissible to show that the circumstances of the sale do not justify imposing an implied warranty.

CONCLUSION

This Article sheds some light on an area of the parol evidence rule seldom addressed by commentators—the relation between the parol evidence rule and implication of terms. If one conclusion can be reached, it is that the terms on which the writing is silent, but which are implied by law or implied in fact, should not be treated as though they were written, thereby excluding, under the parol evidence rule, proof of the actual agreement of the parties.

Finally, the parol evidence rule does not exclude reference to the negotiations of the parties for all purposes. It is irrelevant to the issue of whether the court should consider evidence, including negotiations, in

made by a conspicuous writing. See U.C.C. § 2-316(2) (1978). A disclaimer under UCC § 2-316(3) such as "as is" or "with all faults" does not require a writing. See *id.* § 2-316(3).

251. See U.C.C. § 2-316 official comment 5 (1978). ("[O]ral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had 'reason to know' under the section on implied warranty of fitness for a particular purpose.")

252. U.C.C. § 2-316 official comment 5 (1978).

253. See *supra* notes 189-215 and accompanying text.

254. See *supra* note 251.

determining whether to imply a term or otherwise impose a legal obligation on the parties' agreement.