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SECTION 2-202: A DIFFERENT APPROACH TO CONSISTENCY

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INTRODUCTION

Section 2-202 of the Uniform Commercial Code provides the guidelines for admissibility of extrinsic evidence introduced to interpret written agreements.[1] With certain exceptions,[2] extrinsic evidence is not admissible unless consistent with the written terms of the particular agreement. The uncertain meaning and application of the term "consistent" in section 2-202 has proven to be a major impediment to a predictable treatment of admissibility questions under the Code.[3] A Maryland intermediate court, however, has recently suggested a different but functional approach to resolve the issue of consistency under section 2-202.

In *Snyder v. Herbert Greenbaum Associates, Inc.*,[4] the Maryland Court of Special Appeals[5] held certain extrinsic evidence to be inadmissible under section 2-202. The Maryland court ruled that the proffered evidence, while not contradictory, was *inharmonious,* and thus inconsistent with the final written expres-

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1. In Childers & Venters, Inc. v. Sowards, 460 S.W.2d 343, 345 (Ky. 1970), the Court of Appeals of Kentucky observed that:

> [T]he fundamental purpose of the Uniform Commercial Code is to facilitate credit transactions by making commercial documents enforceable according to their stated terms and, therefore, reliable. That purpose cannot be effected if the written word can be modified or avoided by reason of whatever else is thereafter claimed to have been said and done at or before the time of its execution. This also is a fundamental basis of the parol evidence rule.

See UNIFORM COMMERCIAL CODE § 1-102 (1972 version) [hereinafter cited as U.C.C.]; U.C.C. Introductory Comment. For an excellent discussion of the problems courts have had with interpreting agreements for purposes of the parol evidence rule, see CORBIN, *The Interpretation of Words and The Parol Evidence Rule*, 50 CORNELL L.Q. 161, 170-86 (1965); Note, *The Parol Evidence Rule: Is It Necessary?* 44 N.Y.U.L. REV. 972 (1969).

2. *See* note 47 and accompanying text *infra*.

3. *See* notes 38-77 and accompanying text *infra*.

4. 38 Md. App. 144, 380 A.2d 618 (1977).

5. The Maryland Court of Special Appeals is an intermediate court. The procedure for filing a writ of certiorari is governed by MD. R.P. 812.

sion of the parties. In reaching this decision, the *Snyder* court established a meaningful guideline for analyzing the consistency issue by extending the judicial inquiry beyond the written terms of the agreement to the underlying obligations of the parties implied therefrom.

The *Snyder* approach is significant because it offers a new way of examining the question of consistent terms than that previously employed by courts confronting this issue. Furthermore, the approach in *Snyder* offers a realistic framework for courts to measure the consistency of proffered extrinsic evidence against the parties contractual intent, whether specifically or impliedly expressed in the writing. Accordingly, the *Snyder* test should ultimately prove to be an important precedent in the future application of section 2-202.

SECTION 2-202: A BLUEPRINT TO ADMISSIBILITY

While oral and written agreements are generally enforceable,[6] the preservation of the integrity of a written agreement may be necessary to protect the reasonable expectations of parties relying upon the writing as their final expression of terms.[7]

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6. U.C.C. § 2-201 provides that unless an exception to the Statute of Frauds is applicable, a contract for the sale of goods at a price of $500 or more must be in writing to be enforceable.

Two commentators have succinctly stated the different requirements of U.C.C. § 2-201 (Statute of Frauds) and U.C.C. § 2-202 (Parol Evidence Rule):

> Some of the basic differences between a statute of frauds requirement and a parol evidence rule should be noted. The former requires a certain kind of agreement to be partly in writing to be legally enforceable, but the latter imposes no such requirement. The latter in effect, gives special preference to a writing in determining the terms of the agreement where both written and oral evidence are proffered, but the former does not have this effect except in regard to any quantity term in the writing. Finally, the parties may satisfy the former requirement without ever having made a contract, but the latter presupposes a contract and is concerned only with what its terms are.

J. WHITE AND R. SUMMERS, THE LAW UNDER THE UNIFORM COMMERICAL CODE § 2-9, at 65 n.98 (1972) [hereinafter cited as WHITE & SUMMERS].

7. U.C.C. § 1-102 states that one of the primary purposes of the Code is "to simplify, clarify and modernize the law governing commercial transactions . . . ." Due to the lack of uniformity of prior law, Article 2 was drafted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute to replace the uncertainity of the past with a sense of predictability for the future. *See* Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C. IND. & COMM. L.R. 59 (1960). *See also* Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 293:

> While early American judges were well guided by centuries of uniform English decisions on property law, such was not the case in commercial law. Thus, unguided frontier judges came up with diverse opinions, often disasterous to the commercial community. As such, the need for a codification of the commercial law was well known to the drafters of the Code.

In transactions[8] involving goods,[9] Article 2, section 2-202 of the

But see Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 335-36 (1952):

> It is not a Code at all but a collection of isolated and impractical statutes, which will, if enacted, cause great confusion in the commercial world . . . . The Code as a whole is not a credit to its sponsors and if enacted will destroy uniformity and cause unnecessary confusion in the law.

However, Professor Corbin states:

> The law does not attempt the realization of every expectation that has been indured by a promise; the expectation must be a reasonable one. Under no system of law that has ever existed are all promises enforceable. The expectation must be one that most people would have; and the promise must be one that most people would perform. This necessarily leads to a complexity in the law, to the construction of the various rules determining the circumstances under which a promise is said to be enforceable and those under which its performance will be excused.

1 A. CORBIN, CONTRACTS § 1 at 2 (1963 ed.). *See* 3 R. POUND, JURISPRUDENCE § 88 at 162 (1959 ed.) ("If it is a task of the legal order to secure reasonable individual expectations so far as they may be harmonized with the least friction and waste, in an economic order those arising from promises have a chief place").

8. In construing the scope of the Code, courts have diverged in the application of Code policies to technical sales on the one hand, and more broadly to transactions which are analogous to sales on the other. The former view finds support in U.C.C. § 2-101, which expressly entitles Article 2 as "Sales," along with numerous sections of Article 2 which specifically refer to terms of sale, most notably, the warranty sections 2-312 through 2-316, which expressly refer to "buyer," "seller," and "sale."

In furtherance of the liberal view, courts have employed two different rationales. Some courts interpret the scope of Article 2 through U.C.C. § 2-102. This section extends the parameters of Article 2 to all transactions involving goods. Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 354 N.Y.S.2d 778 (1974) (Code draftsmen did not intend to confine warranties to sales contracts. Although the transaction was solely a lease and therefore not a sale, it was a transaction in goods giving use to the warranties implied under the provisions of the Code.) *Accord*, Fairfield Lease Corp. v. George Umbrella Co., Inc., 8 U.C.C. Rep. Ser. 184 (D. Me. 1970); *In re* Vaillancourt, 7 U.C.C. Rep. Serv. 748 (D. Me. 1970). Other courts have considered transactions involving goods analogous to sales and thus subject to Article 2. Glenn Dick Equip. Co. v. Galey Constr., Inc., 97 Idaho 216, 541 P.2d 1184 (1975) (Warranty provisions of U.C.C. may be extended by analogy to lease transactions because warranties will generally only be created in a transaction where lessor's role is analogous to that of seller rather than that of financing agent.) Stang v. Hertz Corp., 83 N.M. 217, 490 P.2d 476 (1971). (In considering the issue of the applicability of a breach of warranty action to a rental car transaction, the court stated: "We assume there is no distinction between seller, as used in the U.C.C. statute, and the defendant's status as lessor."); MacDonald v. Mobley, 555 S.W.2d 916 (1977) (applying U.C.C. implied warranty provisions to real estate sales involving new houses); *See* Conran v. Yager, 263 S.C. 417, 421, 211 S.E.2d 228, 230 (1975) ("While Article 2, of Uniform Commercial Code is inapplicable to real estate sales . . . ," court applied U.C.C. § 2-202 parol evidence rule and U.C.C. § 2-316(3)(a) exclusion of warranties sections to sale of home by analogy).

Although investment securities are excluded by U.C.C. § 2-105 from provisions of Article 2 of U.C.C., a court by analogy may apply provisions of U.C.C. § 2-202 to allow extrinsic evidence of the written agreement. Stern & Co. v. State Loan & Fin. Corp., 238 F. Supp. 901 (D. Del. 1965). *But see* Chase

Uniform Commercial Code provides:

Manhattan Bank v. First Marion Bank, 437 F.2d 1040 (5th Cir. 1971). (U.C.C. § 2-202 is inapplicable to standby and subordination agreements on ground they are not contracts for sale of goods). *See also* discussion of *Hunt Foods*, notes 38-52 and accompanying text *infra*. *See* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957) (concluding that a non-sales contract (bailment) is sufficiently similar to a sale to justify extension of implied warranties to non-sales cases). *See also* Murray, *Under the Spreading Analogy of Article 2 of The Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971); Annot. 48 A.L.R. 3d 668 (1973). Note, *The Extension of Warranty Protection to Lease Transactions*, 10 B.C. IND. & COMM. L. REV. 127 (1968). *See generally* ANDERSON, 1 UNIFORM COMMERCIAL CODE 206-210 (2d ed. 1970).

9. The Code defines goods as things which must be movable at the time those things are identified to the contract. U.C.C. § 2-105(1). Thus, tangible, portable property qualifies as falling within the intended parameters of Article 2. Hirst v. Elgin Metal Casket Co., 438 F. Supp. 906 (D. Mont. 1977) (Casket is a good within the meaning of § 2-105(1), and any warranties extending thereto would be subject to enforcement under Code); *Accord*, Fuqua Homes, Inc. v. Evanston Bldg. & Loan Co., 52 Ohio App. 2d 399, 370 N.E.2d 780 (1977). (Mobile and modular homes and trailers fall within the definition of goods in U.C.C. § 2-105 because they are things which are movable at the time of identification to the contract of sale); Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976) (Construction of an one-million gallon water tank was a good within the meaning of U.C.C. § 2-105(1)); Puamier v. Barge BT 1793, Etc., 395 F. Supp. 1019 (E.D. Va. 1974) (A vessel is a good within meaning of Code). Helvey v. Wabash County REMC, 151 Ind. App. 176, 278 N.E.2d 608 (1972) (Either electricity, gas or water furnished by a public utility would be a good within purview of U.C.C. § 2-105).

But where the agreement is essentially a rendition of services, and the materials or goods are only incidental to the essential purpose of the agreement, the agreement is not one for the sale of goods under the U.C.C. Gulash v. Stylarama, Inc., 33 Conn. Supp. 108, 364 A.2d 1221 (1975) (Agreement to construct swimming pool is not a sale of goods under U.C.C. § 2-105(1)); *Accord*, Schenectady Steel Co., Inc. v. Bruno Trimpoli Gen. Constr. Co., Inc., 43 App. Div. 2d 234, 350 N.Y.S.2d 920, *aff'd*, 34 N.Y.2d 939, 359 N.Y.S.2d 560, 316 N.E.2d 87 (1974) (Agreement to furnish and erect structural steel for construction of bridge was essentially one for service, and transfer of title to personal property is only incidental feature of transaction and thus, not within the ambit of the Code); Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (1963) (Agreement for beauty treatments is not sale of goods but rendition of services and therefore not subject to purview of Code).

The test enunciated in Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) may prove helpful to courts in considering the question of whether Article 2 of the U.C.C. applies to mixed "goods" and "services" agreements: "The test for inclusion or exclusion is . . . whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved." This test has been applied by several courts. *See* Ranger Const. Co. v. Dixie Floor Co., Inc. 433 F. Supp. 442 (D.S.C. 1977); Burton v. Artery Co., Inc., 279 Md. 94, 367 A.2d 935 (1977); Meyers v. Henderson Const. Co., 147 N.J. Supp. 77, 370 A.2d 547 (1977). *But see* R. NORDSTROM, HANDBOOK OF THE LAW OF SALES 46-47 (1970) suggesting that in keeping with the spirit and purpose of the Code, the § 2-105(1) definition should not be used to deny Code application simply because an added service is required to inject or apply the product. *See generally* Miller, *A "Sale of Goods" as a Prerequisite for Warranty Protection*, 24 BUS. LAW. 847 (1969); Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971).

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
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> (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
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> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The question of admissibility of evidence does not arise unless and until a court determines a writing to be a final expression of agreement of the parties.[10] If a final written expression is found, it "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement."[11] However, the final written expression of the parties "may be explained or supplemented" by certain kinds of evidence.[12]

Subsection (a), as stated above, permits the explanation or supplementation of a writing by evidence of course of dealing,[13] usage of trade,[14] or course of performance[15] that may be intro-

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10. U.C.C. § 2-202. *See, e.g.*, Lakeside Bridge & Steel Co. v. Mountain State Const. Co., Inc., 400 F. Supp. 273 (E.D. Wis. 1975); *accord*, FMC Corp. v. Seal Tape Ltd., Inc., 90 Misc. 2d 1043, 396 N.Y.S.2d 993 (1977); Jazel Corp. v. Sentinel Enterprises, Inc., 20 U.C.C. Rep. Ser. 837 (N.Y. Sup. Ct. 1976); Merwin v. Ziebarth, 252 N.W.2d 193 (N.D. 1977); Drier v. Perfection, Inc., 259 N.W.2d 496 (S.D. 1977). Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 336 (1967).

11. U.C.C. § 2-202; North Penn. Oil & Tire Co. v. Phillips Petroleum Co., 358 F. Supp. 908 (E.D. Pa. 1973); *accord*, Ralston Purina Co. v. Rooker, 346 So. 2d 901 (Miss. 1977), Lectro Management, Inc. v. Freeman, Everett & Co., Inc., 135 Vt. 213, 373 A.2d 544 (1977).

12. U.C.C. § 2-202; Official Comments 2 and 3. While the Official Comments, drafted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute are persuasive authority as to the meaning and the legislative intent of particular Code provisions, they have not been enacted into law. Burchett v. Allied Concord Financial Corp., 74 N.M. 575, 578, 396 P.2d 186, 188 (1964); Wilkerson Motor Co., Inc. v. Johnson, 23 U.C.C. Rep. Serv. 842 (Okla. 1978). *See generally* Skilton, *Some Comments On the Comments To The Uniform Commercial Code*, 1966 WIS. L. REV. 597.

13. U.C.C. § 1-205(1) defines course of dealing as "a sequence of previous conduct between parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *See, e.g.*, Peoples Bank & Trust v. Reiff, 256 N.W.2d 336 (N.D. 1977); Campbell v. Hosteller Farms, Inc., 380 A.2d 463 (Pa. Super. Ct. 1977).

14. U.C.C. § 1-205(2) defines usage of trade as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. . . ." *See* United States Indus., Inc. v. Semco, Inc., 562 F.2d 1061 (8th Cir. 1977); A. & G Const. Co., Inc. v. Reid Bros. Logging Co., Inc., 547 P.2d 1207 (Alas. 1976); Warrick Beverage Corp. v. Miller Brewing Co., 352

duced to interpret the parties' intended meaning of the written terms. While section 2-202(b) expressly states that proferred evidence of additional terms must be consistent with the written terms, section 2-202(a) does not contain such an express prerequisite. In spite of Official Comment 2's mandate for a liberal admissibility standard which provides that proffered evidence "become an element of the meaning of the words used" unless the parties expressly indicate a contrary intention,[16] there is an implicit requirement of consistency between the proffered evidence and the writing under section 2-202(a).

Section 2-202(a) expressly incorporates section 1-205.[17] Section 1-205(4) states that "[t]he express terms of an agreement and an applicable course of dealing or usage of trade shall

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N.E.2d 496 (Ind. Ct. App. 1976); Modine Mfg. Co. v. North East Independent School Dist., 503 S.W.2d 833 (Tex. Civ. App. 1973).

15. U.C.C. § 2-208(1) defines course of performance as conduct within a contract for sale amounting to "repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other. . . ." Westinghouse Elec. Corp. v. CX Processing Laboratories, Inc., 523 F.2d 668 (9th Cir. 1975); Robinson v. Branch Moving & Storage Co., Inc., 28 N.C. App. 244, 221 S.E.2d 81 (1976); State of Mont. *ex rel.* Yellowstone Park Co. Realtor v. District Court, Missoula County, 160 Mont. 262, 502 P.2d 23 (1972). *But see* Jazel Corp. v. Sentinel Enterprises, Inc., 20 U.C.C. Rep. Ser. 837 (N.Y. Sup. Ct. 1976).

U.C.C. § 2-208(2) further explains the hierarchy among the written terms, trade usage, course of dealing, and course of performance:

> The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; [Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971); Division of the Triple T Serv., Inc. v. Mobil Oil Corp., 60 Misc. 2d 720, 304 N.Y.S.2d 191 (1969)] but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

Furthermore, it is interesting to note that evidence of course of performance, to the extent it is proffered to prove a modification, rescission, or waiver, may be admissible even when inconsistent with the written terms of the agreement. *See* U.C.C. §§ 2-208(3) and 2-209(1).

16. U.C.C. § 2-202, Official Comment 2 supports a liberal rule of admissibility under Subsection (a):

> Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usage of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

17. Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971), *see* text accompanying *notes* 66-74 *infra*. *Contra*, Southern Concrete Serv., Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581 (N.D. Ga. 1975). *See* text accompanying *notes* 75-77 *infra*.

be construed wherever reasonable as consistent with each other . . . ." The impact of the words "wherever reasonable" on the requirement of consistency as expressed in section 1-205(4) is minimal. Requiring consistency is clearly reasonable unless the proffered evidence is so insignificant as to have no effect on the general intent reflected in the writing.[18] Consequently, there appears to be an implied requirement of consistency for section 2-202(a), similar to that expressly stated in section 2-202(b).

Subsection (b) allows the explanation or supplementation of the writing by evidence of additional terms, if two prerequisites are fulfilled. First, the court must find that the writing is not a "complete and exclusive statement" of all the written terms.[19] Official Comment 3 to section 2-202 suggests a variation of the common law test[20] for determining whether or not a

18. U.C.C. § 2-202(b). *See generally* Comment, *"Consistent Additional Terms" Within Section 2-202(b) Of The Uniform Commercial Code*, 12 N.Y.L.F. 520 (1966).

19. U.C.C. § 2-202(b); MacGregor v. McReki, Inc., 30 Colo. App. 196, 494 P.2d 1297 (1971).

20. Under the common law there was no uniform parol evidence rule. The crucial requirement was that the parties intend the writing as the final integration of their agreement. If the court determined there was such intention of complete integration, then the writing could not be contradicted or supplemented. But the determination of whether an intention of complete integration was present resulted in the adoption of at least three dissimilar tests.

The first was the so-called "four-corners" rule. Under this approach, courts looked to the "four corners" of the document to determine whether the instrument was "complete on its face," that is, whether the instrument was a total integration, was determined from the instrument itself. Eighmie v. Taylor, 98 N.Y. 288, 296 (1885); *accord*, Washabaugh v. Hall, 4 S.D. 168, 56 N.W. 82 (1893); Economou v. Vermont Elec. Coop., Inc., 131 Vt. 636, 313 A.2d 1 (1973).

The second approach, espoused by Professor Williston, asserts that the total integration depends on the intention of the parties. 4 WILLISTON, CONTRACTS § 633 (3d ed. Jaeger 1961). Accordingly, such intention is present unless the alleged additional terms were such as might naturally have been included in the written agreement or separately agreed upon by the parties. 4 WILLISTON, CONTRACTS §§ 638, 639. Vogel v. Tenneco Oil Co., 465 F.2d 563 (D.C. Cir. 1972); Robbs v. Illinois Rural Rehabilitation Corp., 313 Ill. App. 418, 40 N.E.2d 549 (1942); *accord*, Mitchell v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928); Gianni v. R. Russel & Co. Inc., 281 Pa. 320, 126 A. 791 (1924). This approach, as well as the "four corners" test is rejected under the U.C.C. where a total integration is not established unless the alleged additional terms "would certainly have been included in the document in the view of the court." U.C.C. § 2-202, Comment 3; Ciunci v. Wella Corp., 26 App. Div. 2d 109, 271 N.Y.S.2d 317 (1966). *See* CALAMARI & PERILLO, CONTRACTS § 3-7, at 114-15 (2d ed. 1977).

Professor Corbin chose a third approach which looks to the actual expressed intent of the parties. He disagreed with the idea that a writing can be determined to be an integration by mere interpretation of the written words. If the parties do not agree as to the material terms, then the standard of reasonable expectations is utilized. Professor Corbin's objective

writing is "complete and exclusive." This Comment states that if the writing is so complete that the proffered additional terms "would certainly have been included in the document" had the parties intended them to be part of the agreement, the court should then find the writing to be "complete and exclusive,"[21] and hence, not admit the additional terms into evidence. Secondly, the proffered additional terms must be found consistent with the final written expression of the parties. Both these prerequisites were discussed by the Snyder court.

Snyder: A Consistent Harmony

According to the written agreement in *Snyder*, Greenbaum was to supply and install carpeting in certain apartments managed by Snyder. Before the carpeting was installed, Snyder cancelled, and Greenbaum sued for breach of contract. The trial court decided in favor of Greenbaum, and Snyder appealed to the Court of Special Appeals.[22]

One of the issues on appeal was whether five documents offered by Snyder, each containing a cancellation of rescission notation and purporting to be prior agreements between Snyder and Greenbaum, should have been admitted into evidence. Snyder's purpose in introducing these documents was to establish that a prior course of dealing had existed between the parties which allowed either party to unilaterally cancel or modify the agreement.[23]

The *Snyder* court first observed that since the writing did not contain a cancellation or rescission clause, the proffered evidence tending to show that each party enjoyed a right to unilaterally cancel or rescind would not contradict the written terms of the agreement.[24] This permitted the court to determine whether or not the admissibility of evidence showing an alleged course of dealing was proper. Upon an initial finding that the extrinsic evidence did not contradict the written terms, the court could have, but did not, admit the documents to explain or supplement the written terms of the agreement.

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test rejects Professor Williston's limitation on the showing of all relevant evidence of intent to the writing itself. Courts adopting Corbin's view find parol evidence always admissible with respect to the issue of integration. For a thorough discussion of the views endorsed by Professors Williston and Corbin as to the meaning and effect of the parol evidence rule see Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 Ind. L.J. 333 (1966-1967).

21. Braund, Inc. v. White, 486 P.2d 50 (Alaska 1971); Conner v. May, 444 S.W.2d 948 (Tex. Civ. App. 1969).

22. 38 Md. App. 144, 380 A.2d 618 (1977).

23. *Id.* at 149, 380 A.2d at 622.

24. *Id.*

Section 1-205(1) was cited to explain course of dealing evidence as "[a] sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."[25] The court indicated that even with the liberal policy of admissibility under section 2-202(a), course of dealing evidence would not automatically be admitted to explain or supplement the written agreement under subsection (a). Instead, the objective of admitting such evidence must be to interpret from the writing the true intent of the parties.[26] Then, in rather conclusionary language, the court determined that the proffered evidence would add to the writing rather than interpret it; consequently there was no further discussion of subsection (a).[27]

It would have been helpful if the *Snyder* court had stated its reasons for holding the proffered evidence to be additional rather than being merely interpretive under subsection (a). In factual situations where such evidence does qualify as being part of prior conduct classified as course of dealing which may be admissible under subsection(a) to "explain or supplement" a written agreement, there is difficulty in distinguishing the freedom to supplement from the inappropriateness of adding new terms.

One argument is that the statutory terms "additional" and "supplement" were intended by the drafters to be synonymous. Despite the fact that supplement normally means "to add,"[28] this definition does not appear to apply to the codified parol evidence rule, section 2-202. Otherwise, subsection (b) would be mere surplusage in that it allows for the admissibility of "additional" terms in only limited situations.[29]

Another approach is to argue that the difference between supplement and addition of terms is a matter of degree, i.e., minor additions of new terms may be permissible within the liberal confines of subsection (a), while major additions of new terms must satisfy the more restrictive prerequisites of subsection (b). While this explanation circumvents the foregoing surplusage argument concerning subsection (b) and can also be reconciled with the common understanding of the term "supple-

25. *Id.*

26. *Id. See* Murray, *The Parol Evidence Rule: A Clarification*, 4 DUQ. L. REV. 337, 338 (1965-1966).

27. *Id.* at 150-51, 380 A.2d at 622, 623.

28. "[T]he ordinary meaning of the word 'supplement' doubtless is a supplying by addition of what is wanting." Mayor of Jersey City v. Borst, 90 N.J. L. 454, 10 A. 1033 (1917). The meaning of "supplement" as expressed in U.C.C. § 2-202 is "to fill in or complete" rather than to add.

29. U.C.C. § 2-202(b).

ment," the undesirable affect would be to reduce the viability of subsection (a).[30] *Snyder*, in its disposal of the subsection (b) issue, offered a different but more effective and flexible solution to the question of admissibility.

After declaring that the five documents offered by Snyder constituted additional terms with respect to the written agreement between the parties, the court directed its inquiry to subsection (b) in order to decide whether the evidence of additional terms was permissible under that subsection. The two prerequisites for admitting additional terms under subsection (b) were stated: First, the writing cannot be a complete and exclusive statement of all the written terms;[31] second, the additional terms must be consistent with the writing.[32]

The proffered evidence did not satisfy either prerequisite to admisibility. In reference to the first prerequisite, the *Snyder* court held that the written agreement was intended to be a "complete and exclusive statement" of the written terms. The court reasoned that since Greenbaum, the installer, had to incur a considerable amount of time and expense to prepare to fulfill his obligation under the written agreement, then the existence of any right to cancel or modify the agreement "would certainly have been included in the writing." Furthermore, it was determined that the proffered evidence was not consistent with the written terms.

In focusing upon the second prerequisite of subsection (b), the *Snyder* court rejected the definition of consistency that had been enunciated in *Hunt Foods v. Doliner*[33] and reiterated in *Schiavone and Sons v. Securalloy Co.*[34] Instead, the court stated that "we believe 'inconsistency' as used in section 2-202(b) means the absence of reasonable harmony in terms of the language and respective obligations of the parties . . . ."[35]

30. 90 N.J. L. 454, 10 A. 1033 (1917). *See* text following note 78 *infra*.

31. 38 Md. App. at 151, 380 A.2d at 623.

32. *Id.*

33. 26 App. Div. 2d 41, 270 N.Y.S.2d 937 (1966).

34. 312 F. Supp. 801 (D. Conn. 1970).

35. 38 Md.App. at 152, 380 A.2d at 623. While *Snyder's* discussion of consistency is significant for its reasonable approach to the resolution of certain admissibility issues, it should be noted that such discussion may be characterized as either part of an alternative holding or dicta. One could argue that *Snyder's* consistency analysis was unnecessary to the decision since it followed the court's initial finding that the writing was a "complete and exclusive statement" of the parties' intent. However, it appears that the court did not consider its consistency discussion as being unnecessary. Specifically, after the court recognized that there were two prerequisites to admissibility under section 2-202(b), it labeled its consistency analysis as a holding and thereafter concluded that the lower court's ruling of inadmissibility was correct. In any event, the purpose of this article is not to define the parameters of obligatory precedent under Maryland law, but instead, to extract what appears to be a valuable approach to a difficult problem and hold it up for all to see.

The alleged right of unilateral cancellation by Snyder in this case could not be said to be harmonious with the written agreement that required the seller, Greenbaum, to make "extensive preparations in order to perform."[36] Thus, *Snyder*, in its analysis, was not content to relate the proffered evidence of cancellation rights solely to the written terms of the agreement, but also referred to the obligations and preparations arising from those written terms. Instead of an isolated evaluation of consistency, the court utilized an objective standard by commenting on the unreasonableness of admitting evidence to show a right to unilaterally cancel a written agreement which obligated the seller to make such substantial preparations for performance.[37]

Although the *Snyder* court, in a brief footnote, alluded to the consistency prerequisite implicitly contained in section 2-202 (a), it was content to dispose of the course of dealing issue in conclusionary form, rather than analyze the evidence with the aid of its "harmony" test. The same rationale employed in its disposal of the subsection (b) issue would have disposed of the entire course of dealing issue in subsection (a), and would have strengthened the entire opinion. Nevertheless, *Snyder* may be characterized as an important decision, albeit unrefined, because it inserts a standard of reasonableness not only with respect to the written terms of the agreement, but in the underlying obligations as well.

An Unrewarding Hunt for Consistency

Before *Snyder's* value as a precedent can be properly assessed, the decisions it rejects, *Hunt Foods* and *Schiavone*, must be discussed. In *Hunt Foods*, the New York Supreme Court admitted evidence alleging that a contemporaneous oral agreement was entered into by Hunt Foods and Doliner and declared the agreement a condition precedent to the execution of a written stock option.[38] There, an unconditional written agreement seemingly entitled Hunt Foods, the optionor, to purchase approximately $5,500,000 worth of stock owned by Doliner, the optionee. Doliner asserted that an oral understanding existed between the parties which provided that the option was only to be exercised if Doliner should speculate by solicitating a higher

36. *Id.*

37. *Id.*

38. While U.C.C. § 2-105 expressly excepts investment securities from its definition of goods and thus would appear to preclude investment securities from the scope of Article 2, Official Comment 1 to U.C.C. 2-105 encourages "application of a particular section of this Article by analogy to securities . . . ." *See* Hunt Foods v. Doliner, 26 App. Div. 2d 41, 44 n.1, 270 N.Y.S.2d 937, 939 (1966). *See also* note 8 *supra*.

offer from another source. Doliner contended that since he did not solicit other bids, the option was not exercisable by Hunt Foods.[39]

Hunt Foods moved for summary judgment, praying for specific performance of the written option agreement, arguing against admissibility of the oral condition precedent under the parol evidence rule. The court, referring to the consistency requirement of section 2-202(b), stated: "In a sense any oral provision which would prevent the ripening of the obligations of a writing is inconsistent with the writing."[40] Apparently unable to reconcile its determination of the consistency issue with the above observation, the court offered an alternate interpretation of consistency: "But that obviously is not the sense in which the word [consistent] is used . . . . To be inconsistent the term must contradict or negate a term of the writing. A term or condition which has a lesser effect is provable."[41] *Hunt Foods* essentially held admissible extrinsic evidence which is not "impossible," although "implausible," when considered in connection with the written terms of the agreement.[42]

Curiously, the court could have reached the same result by holding that the unsatisfied condition precedent prevented the formation of the written agreement. Having determined that the Code was applicable to the instant situation, the court should have utilized the common law oral condition precedent exception to the parol evidence rule that allows for the admission of evidence of an unsatisfied condition to prove that the agreement was never formed.[43] Under section 1-103, common

39. 26 App. Div. 2d at 42, 270 N.Y.S.2d at 939.

40. *Id.* at 43, 270 N.Y.S.2d at 940.

41. *Id.*, 270 N.Y.S.2d at 940.

42. *Id.*, 270 N.Y.S.2d at 940.

43. The leading case is Pym v. Campbell, 6 Ellis & Blackburn 370 (Q.B. 1856) where the court admitted parol evidence to show that an agreement to utilize a patent was not to become legally binding until the patent was approved by an engineer. One of the clearest expressions of this exception is stated in Yeager v. Jackson, 162 Okl. 207, 209, 19 P.2d 970, 972 (1933) where the court, quoting from Gamble v. Riley, 39 Okl. 363, 135 P. 390 (1913), said:

> It is elementary that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument. But the rule is almost equally well settled that parol evidence may be given to prove the existence of any separate parol agreement constituting a condition precedent to the attaching of any obligation under the written instrument; this is not to vary the terms of a written instrument, but to prove that no contract was ever made; that its obligation never commenced.

See also Atlas Petroleum v. Cocklin, 59 F.2d 571 (8th Cir. 1932) (Parol evidence was admissible to prove existence of a collateral oral agreement that the written agreement was not to take effect until the market price advanced to a price greater than or equal to the agreed price); Hicks v. Bush, 10 N.Y.2d 488, 180 N.E.2d 425 (1962) (Integrated agreement to merge two businesses was subject to an oral condition precedent that it would not take

law principles that are not specifically displaced by the Code are available to supplement particular statutory sections.[44] In view of the foregoing, the common law condition precedent exception, not displaced by section 2-202, could have been relied upon by the court. Instead, *Hunt Foods* has established an unfortunate precedent; namely, that evidence of an alleged condition precedent to a final written agreement is admissible under the "consistent additional term" exception of section 2-202 if it does not "contradict or negate" the expressed terms[45] of the writing.

A similar test has been applied by the courts in common law cases to determine whether evidence of an oral condition precedent is admissible.[46] Such evidence is usually admitted under the common law parol evidence rule, unless the proffered evidence directly conflicts with express written terms. The condition precedent and the remaining common law exceptions[47]

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effect until $672,500 in new capital had been obtained); 3 A. CORBIN, CONTRACTS § 589 (1960) and 4 S. WILLISTON, CONTRACTS § 634 (3d ed. 1961).

44. U.C.C. § 1-103 provides:

> Supplementary General Principles of Law Applicable. Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

45. U.C.C. § 1-201(42) defines "term" as "that portion of an agreement which relates to a particular matter." Thus, according to the combined language expressed in U.C.C. §§ 2-202 and 1-201(42), it may be argued that the codified parol evidence rule is subject to two possible interpretations. First, evidence of any prior or contemporaneous oral agreement which would contradict the whole instrument should be precluded. Second, any similar evidence which would contradict a particular term of writing (as opposed to the entire instrument) would be excluded by the rule. The latter interpretation was applied by *Hunt Foods*. *See* 3 BENDER'S U.C.C. SERVICE; DEUSENBERG & KING, SALES AND BULK TRANSFERS § 4.08(3) at 4-137 (1977).

46. Under the common law, evidence of a condition precedent to the formation of a written agreement (but not evidence of a condition precedent to the performance of a written agreement) was not precluded by the parol evidence rule. A party is not precluded from introducing evidence of prior or contemporaneous negotiations to show that the writing is not intended to become a duty of present performance until the occurrence of the condition. Merritt v. Walter Pocock Assoc. Brokers, Inc., 105 Ariz. 392, 465 P.2d 585 (1970); Cosper v. Hancock, 163 Colo. 263, 430 P.2d 80 (1967); Sams v. Feldman, 342 Mich. 10, 68 N.W.2d 780 (1955); Hicks v. Bush, 10 N.Y.2d 488, 225 N.Y.S.2d 34, 180 N.E.2d 425 (1962). *See* 3 A. CORBIN, CONTRACTS § 589 (rev'd ed. 1960); 4 S. WILLISTON, CONTRACTS § 634 (1961).

47. The following cases have applied common law exceptions to U.C.C. § 2-202; Glenn Dick Equip. Co. v. Galey Constr., Inc., 97 Idaho 216, 541 P.2d 1184 (1975); *accord*, Cone Mills Corp. v. A.G. Estes, Inc., 377 F. Supp. 222 (N.D. Ga. 1974); Lamb v. Bangart, 525 P.2d 606 (Utah 1974); Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433 (W. Va. S. Ct. 1976). For a comprehensive discussion of both the aforementioned and remaining common law exceptions, see Broude, *The Consumer And The Parol Evidence Rule: Section 2-202 Of The Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 331 (1962) (General rules of law remain applicable to the statutory rule of the U.C.C.; but where

available under section 2-202 via section 1-103 must be independent of both subsection (a) and the "consistent additional term" exception of subsection (b). A contrary interpretation muddles the statutory mechanism.

Rather than using the common law test to show no agreement, thereby avoiding the codified parol evidence mechanism, the *Hunt Foods* court declared the oral condition precedent "consistent" under section 2-202(b) on the ground that it did not contradict or negate the expressed terms of the written agreement.[48] In reference to the circular reasoning of *Hunt*, the *Snyder* court stated: "This interpretation of 'inconsistent' is itself inconsistent with a reading of the whole of § 2-202. Direct contradiction of express terms is forbidden in the initial paragraph of § 2-202. The *Hunt Foods* interpretation renders that passage a nullity, a result which is to be avoided."[49]

Section 2-202 precludes the introduction of any contradictory extrinsic evidence, whether it be evidence of course of dealing, usage of trade, course of performance or additional terms. If the court finds no contradiction, evidence in the aforementioned categories may be admitted as an exception to the parol evidence rule for the purpose of explaining or supplementing the writing. If a contradiction between the proffered evidence and the writing is found, section 2-202 precludes further inquiry. Consequently, admissibility of explanatory and supplementary evidence must be determined in light of the applicable subsection's prerequisites without the aid of an additional repetitive and contradictory analysis.

While the result in *Hunt Foods* could have been reached by applying the common law exception to the parol evidence rule available through section 1-103,[50] the court opted for a less persuasive rationale. The admission of evidence of an alleged oral condition to the exercise of the option agreement was inharmonious or inconsistent with the apparent unconditional nature of the writing, thereby causing a major change in what may have been the intended meaning of the written agreement between the parties.

Furthermore, although finding a consistency between the proffered evidence and the written terms, the court neglected to satisfy the other prerequisite to admissibility under subsection

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specific statutory provision is present, such should not be preempted by common law or general equitable principles); 1 A. ANDERSON, UNIFORM COMMERCIAL CODE 18 (2d ed. 1970) ("[P]reexisting law continues unless displaced by the Code").

48. 26 App. Div. 2d at 41, 270 N.Y.S.2d at 937.

49. 38 Md. App. at 152, 380 A.2d at 623.

50. *See* note 44 *supra*.

(b)—that the writing was not a "complete and exclusive statement" of all the terms.[51] The opinion cited Official Comment 3 to section 2-202 in support of the court's authority to admit parol evidence, but failed to apply the suggested test of completeness and exclusivity contained therein: "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."[52] If the court had used the "would certainly have been included" test and attempted to fit the facts of *Hunt Foods* within it, the result should have been for inadmissibility instead of admissibility. This result would have occurred because a condition precedent to an option agreement involving over 5-½ million dollars "would certainly have been included" in the written agreement. The application of this test would have compelled a finding that the writing was "complete and exclusive," thereby precluding the admission of such extrinsic evidence.

Schiavone: The Next Illogical Step

In *Michael Schiavone & Sons, Inc. v. Securalloy Co., Inc.*,[53] the Connecticut federal district court relied upon *Hunt Foods*' rational in dealing with consistent additional terms. The issue in *Schiavone* was whether the defendant would be precluded from introducing evidence that the written agreement did not represent the complete and final understanding of the parties as to defendant's obligations.

The complaint in *Schiavone* alleged that defendant agreed in writing to deliver 500 gross tons of steel solids to plaintiff, but that only 210 tons were actually delivered. Defendant sought to introduce evidence of an oral understanding that it was to supply plaintiff with as many tons as defendant could obtain with an "upper limit" of 500 tons.[54] The court denied plaintiff's mo-

51. *See* note 21 and accompanying text *supra*.

52. 26 App. Div. 2d at 43, 270 N.Y.S.2d at 940. The court quoted the language of the Official Comments.

53. 312 F. Supp. 801 (D. Conn. 1970).

54. *Id.* The quantity issue has been recently addressed by the following courts: In Alaska Independent Fishermen's Market Ass'n v. New England Fish Co., 15 Wash. App. 154, 548 P.2d 348 (1976) the Washington Court of Appeals rejected the admissibility of extrinsic evidence proffered to supply a missing quantity term:

> It is true, as we stated in Hankins v. America Pacific Sales Corp. . . '[w]hen quantity is not precisely stated, parol evidence is admissible to show what the parties intended as the exact quantity,' . . . but where the writing relied upon to form the contract of sale is totally silent as to quantity, parol evidence cannot be used to supply the missing quantity term.

Citing Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir.

tion for summary judgment on two grounds. First, an affidavit showing a trade usage which indicated that a written promise to deliver "500 tons" was a promise to deliver anywhere "up to 500 tons" presented an issue of fact. Second, relying on *Hunt Foods*, the district court admitted the evidence of a "consistent additional term," stating "[e]vidence that the quantity to be supplied by defendant was orally understood to be up to 500 tons cannot be said to be inconsistent with terms of the written agreement which specified the quantity as '500 Gross Ton.' "[55]

Admittedly, section 2-202(a) permits evidence of trade usage to explain or supplement the writing.[56] In support of a liberal administration of section 2-202(a),[57] Official Comment 2 explains: "Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing . . . . *Unless carefully negated* they have become an element of the meaning of the words used." In addition, section 1-102 supports a liberal interpretation of the entire Code.[58] One of the major underlying policies of the Code is to "permit the continued expansion of commercial practices through custom, usage and agreement of the parties."[59] Since trade usage was not negated in *Schiavone*, carefully or otherwise, from the written agreement, it would *initially* seem proper to admit the evidence because such admission would permit the trier of fact to sift fact from fiction.

1971), *see* text accompanying notes 66-74 *infra*, as persuasive authority, the California Court of Appeals in Heggslade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc. 59 Cal. App. 3d 948, 131 Cal. Rptr. 183 (1976) found evidence of trade usage and custom admissible "to explain the meaning of quantity figures." The question was whether the written quantity term of 100,000 cwt. sacks of potatoes was intended to be merely an estimate rather than a precise quantity term. *See* Loeb & Co. v. Martin, 295 Ala. 262, 327 So. 2d 711 (1976); Durbano Metals, Inc. v. A & K Railroad Materials, Inc., 574 P.2d 1159 (Utah 1978). In Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652 (Miss. 1975), a contract term to purchase 4,000 bushels of beans from seller was construed as reasonably meaning agreement to purchase "not in excess of 4,000 bushels." *But see* Ralston Purina Co. v. Rooker, 346 So. 2d 901 (Miss. 1977) (oral testimony concerning quantity of soybeans to be purchased as being "up to 4,500 bushels" held inconsistent with contract provision calling for sale of 4,500 bushels of soybeans).

55. 312 F. Supp. at 804.

56. *See* text accompanying notes 13-16 *supra*.

57. Although both Subsections (a) and (b) of U.C.C. § 2-202 appear to require proferred evidence to be consistent with the writing and the terms contained therein; *see* notes 13 and 18 *supra*, Subsection (a) is not further limited by the "complete and exclusive" restriction to admissibility expressed in Subsection (b). *See generally* Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U.L. REV. 1101 (1965).

58. U.C.C. § 1-102(1).

59. U.C.C. § 1-102(2)(b).

Nonetheless, a careful examination of the application of trade usage under the Code discloses at least one incongruent fact. Sections 1-205(4) and 2-202(a), when read together, arguably call for the same prerequisite of consistency between the proffered evidence and the writing, that is expressly stated in section 2-202(b).[60] Thus, the "up to 500 tons" interpretation in *Schiavone* is not persuasive when measured against a standard of consistency. Plainly, this interpretation of "up to 500 tons" is not consistent or harmonious with the actual figure stated in the written agreement.

After deciding that there was no "complete and exclusive" statement of the written terms that would prevent the admission of consistent additional terms, the *Schiavone* court borrowed the rationale of *Hunt Foods*, stating:

> [T]o be inconsistent the terms must contradict or negate a term of the written agreement; and a term which has a lesser effect is deemed to be a consistent term. Evidence that the quantity to be supplied by defendant was orally understood to be up to 500 tons cannot be said to be inconsistent with the terms of the written contract which specified the quantity as "500 Gross Ton."[61]

Although the court relied upon *Hunt Foods* as a precedent, the context in which the specific question arose in *Schiavone* was different. In *Hunt Foods*, the court applied the common law condition precedent guideline to satisfy the consistency prerequisite contained in subsection (b). In *Schiavone*, there was no condition precedent issue; although, the court used *Hunt Foods'* condition precedent justification for its decision.[62] According to section 2-202, if "up to 500 tons" did not contradict "500 tons," the next question should be whether the alleged oral evidence was admissible to "explain or supplement" the written terms.[63] Therefore, *Schiavone's* use of the "contradict or negate" approach was inappropriate and redundant because if there did exist a contradiction, no further inquiry was necessary under subsection (a) or (b) with respect to the admissibility of extrinsic evidence under section 2-202.

The weakness of the *Schiavone* rationale is apparent upon examining the following questions that the *Schiavone* court

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60. *See* text accompanying notes 17-18 *supra*.

61. 312 F. Supp. at 804.

62. Though *Hunt Foods* dealt with admissibility of a condition precedent to the formation of a written agreement, the following cases also cited the *Hunt Foods'* test despite the absence of a condition precedent issue in their facts. MacGregor v. McReki, Inc., 30 Colo. App. 196, 494 P.2d 1297 (1971); Whirlpool Corp. v. Regis Leasing Corp., 29 App. Div. 2d 395, 288 N.Y.S.2d 337 (1968).

63. *See* text accompanying notes 13-21 *supra*.

neither addressed nor resolved: Was there an absence of consistency between the written terms and the obligations of the parties to buy and sell a certain quantity of steel in construing "500 tons" as meaning "up to 500 tons"?[64] Does the admission of oral evidence, indicating that defendant was justified in delivering 210 tons of steel, circumvent the written terms of the agreement, thereby causing injury to the plaintiff's reasonable expectations as well as the uniformity and predictability of section 2-202(b) in future actions?[65] If the parties had agreed to less than a 500 ton delivery, would not such an agreement certainly have been included in the writing?

Applying the rationale used in *Snyder* to the facts in *Schiavone*, the question to be answered was whether the evidence of trade usage, which is the "up to 500 ton" interpretation, is reasonably harmonious with the written terms and underlying obligations of the parties as expressed in the written agreement. According to the express terms, the buyer in *Schiavone* expected delivery of 500 tons of steel solids for which he was willing and able to pay. Instead, the buyer received 210 tons of steel solids. Since the buyer did not even obtain one-half of the quantity of steel that he had bargained for and had expected, can it be said that the seller's interpretation was reasonably harmonious with the terms and obligations in the written agreement? There can be little doubt that the answer should be no. It is apparent that the *Snyder* harmony test is designed to give greater credence to the reasonable expectations of the parties in a written agreement.

COLUMBIA NITROGEN AND SOUTHERN CONCRETE: A DIFFERENCE OF OPINION

While most of the consistency interpretation problems stem from the attempted introduction of additional terms under subsection (b), a similar reign of confusion and unpredictability has presented itself with respect to the implementation of subsection (a), the more liberal exception to section 2-202. For example, in *Columbia Nitrogen Corp. v. Royster*[66] and *Southern Concrete Service, Inc. v. Mableton Construction, Inc.*,[67] two courts reached opposite conclusions, not only in result, but also

64. *See* text accompanying footnotes 35-37 *supra*.

65. If one of the primary objects of entering into and enforcing agreements with another is to protect reasonable expectations of the parties, then the uncertainty and resulting unpredictability fostered by *Schiavone* is most damaging to the desired stability of legal relationships. *See* note 7 *supra*.

66. 451 F.2d 3 (4th Cir. 1971).

67. 407 F. Supp. 581 (N.D. Ga. 1975).

in construing the admissibility requirements under subsection (a).

In *Columbia Nitrogen*, the parties entered into a written agreement that Royster would sell a minimum of 31,000 tons of phosphate each year for a three year period to Columbia. The written agreement described the price per ton, but also contained an escalation clause designed to adjust upwardly the price in the event of a rise in production costs. Due to a drastic fall in phosphate prices, Columbia purchased less then one-tenth of the 31,000 tons it was obligated to order in the first year of the agreement. Royster sued Columbia for its alleged violation of the written agreement.

Columbia defended by offering evidence of both trade usage and course of dealing. The usage of trade evidence was offered to show, that because of the uncertainty of crops, weather conditions, farming practices, and government programs, express price and quantity terms were considered to be projections by members in the trade. The evidence was presented to infer a course of dealing over the six year history of past transactions between Columbia and Royster. In these prior transactions, in which Royster was the purchaser of nitrogen from Columbia and not, as in the present dispute, the seller of phosphate, there were repeated and substantial deviations from the price and quantity terms stated in the agreement. The district court excluded the evidence as being in contradiction to the "express, plain, unambiguous language of . . ." the writing.[68] Defendant appealed from the court's pre-trial ruling.

The Fourth Circuit Court of Appeals correctly found that the common law rule requiring a showing of ambiguity was not a prerequisite for the admission of extrinsic evidence pertaining to course of dealing and usage of trade.[69] Royster contended

68. 451 F.2d at 8.

69. Under the common law, if the court found a written agreement to be ambiguous, parol evidence was then admissible to explain the ambiguous term. Consolidated Jewelers, Inc. v. Standard Financial Corp., 235 F.2d 31 (6th Cir. 1963); Dunlop Tire & Rubber Corp. v. Thompson, 273 F.2d 396 (8th Cir. 1959); Storybook Homes, Inc. v. Carlson, 19 Ill. App. 3d 579, 312 N.E.2d 27 (1974).

Though the U.C.C. does not require a preliminary finding of ambiguity as a prerequisite to admission of parol evidence, where a court finds terms of a writing to be ambiguous, extrinsic evidence to explain the intent of the parties is admissible. Loeb & Co. v. Martin, 295 Ala. 262, 327 So. 2d 711 (1976) (parol evidence of custom and usage admissible to explain ambiguous written agreement term calling for sale of "all cotton produced on 400 acres"); Port City Constr. Co. Inc. v. Henderson, 48 Ala. App. 639, 266 So. 2d 896 (1972) (written agreement to furnish and pour concrete at construction site, parol evidence admissible to explain ambiguous quantity term—"all concrete for slab—"). Flamm v. Scherer, 40 Mich. App. 1, 198 N.W.2d 702 (1972) (ambiguity in the written agreement: parol evidence of the type seed

that such parol evidence should be inadmissible because it was inconsistent with the detailed provisions of the written agreement pertaining to "the base price, escalation clauses, minimum tonnage, and delivery schedules."[70]

The *Columbia Nitrogen* court rejected defendant's argument that a final written expression of the parties, renders inadmissible, extrinsic evidence of course of dealing and trade usage. Although the court did recognize that a positive finding of consistency between the proffered extrinsic evidence and the written terms was necessary for admissibility under section 2-202(a), its inquiry into the consistency issue was superficial.[71] Observing neither an express statement in the written agreement rejecting trade usage and course of dealing evidence nor provisions pertaining to the adjustment of prices and quantities in a declining market, the court reasoned that "[t]his neutrality provides a fitting occasion for recourse to usage of trade and prior dealing to supplement the contract and explain its terms."[72]

The *Columbia Nitrogen* admissibility issue, framed within *Snyder's* interpretation of consistency, would require the court to decide whether evidence offered to prove that the written price and quantity terms were mere projections, was harmonious or consistent with the writing and the inherent obligations resulting therefrom. Although this inquiry would limit the potentially broad application of admissibility under subsection (a), the final outcome would accurately reflect the parties' actual intentions.

Though the parties did not expressly prohibit the admissibility of course of dealing and trade usage evidence, this fact alone is not dispositive that such evidence qualifies as an exception under section 2-202(a). Moreover, the prerequisite of consistency should not be satisfied by a finding of neutrality, but instead, should be determined by the recognition of a consistent or harmonious relationship between the proffered extrinsic evi-

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contracted to be purchased was admissable); LenKay Sani Products Corp. v. Benitez, 47 App. Div. 2d 524, 362 N.Y.S.2d 572 (N.Y. Sup. Ct. 1975) (Parol evidence admissible to resolve ambiguity in term "plastic stirers"). *See* Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965).

70. 451 F.2d at 9.

71. In applying the "consistency" requirement of subsection (b) to subsection (a) of U.C.C. § 2-202, the *Columbia Nitrogen* court cited Division of Triple T Serv., Inc. v. Mobil Oil Corp., 60 Misc. 2d 720, 304 N.Y.S. 2d 191, 203 (1969) in support of the proposition that parol evidence of usage of trade and course of dealing should be excluded "whenever it cannot be reasonably construed as consistent with the terms of the contract." *Id.* at 9.

72. 451 F.2d at 10.

dence of a previous adjustment of bargained for terms and the present agreement which contained no such provision for adjustment.

There remains some doubt as to the strength of the evidence of course of dealing and trade usage found admissible by the *Columbia Nitrogen* court. Although the evidence referred to prior transactions between the parties, the parties' relationship in those transactions was the opposite of their positions in *Columbia Nitrogen*.[73] Furthermore, the proffered evidence of prior dealings involved the purchase and sale of nitrogen rather than phosphate,[74] the subject matter of the instant factual situation. Since the court in *Columbia Nitrogen* did not note these factual distinctions nor examine their effect upon the agreement, and considering its simplistic neutrality analysis of the consistency question, the value of *Columbia Nitrogen* as a precedent for further disputes under section 2-202(a) is doubtful.

In *Southern Concrete*, a Georgia federal district court took a contrary approach. There, a written agreement called for the sale by plaintiff to defendant of "approximately[75] 70,000 cable yards"[76] of concrete from September 1, 1972 to June 15, 1973.

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73. *Id.* at 8. *See* Southern Concrete Serv., Inc. v. Mabelton Contractors, 407 F. Supp. 581, 583 (N.D. Ga. 1975).

74. *Id.*

75. Where the term of an agreement, such as quantity, is absent or imprecise, it is probable that the parties had not reached a final agreement. Where an agreement is silent about adjusting price and quantity terms to reflect market conditions, parol evidence that such terms were mere projections to be adjusted according to market forces and that parties had adjusted the same terms in prior dealings was held admissible. Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971). Where the quantity term of an agreement for sale of cotton called for "all cotton produced on 400 acres," such quantity term was ambiguous and subject to parol evidence of custom and usage. Loeb & Co. v. Martin, 295 Ala. 262, 327 So. 2d 711 (1976). Where agreement was silent as to the applicability of custom and usage, parol evidence of custom and usage in the potato processing industry was admissible to explain ambiguous quantity term of agreement for delivery to defendant potato-snack food processor of a stated total of 100,000 cwt. sacks of processing potatoes. Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc. 59 Cal. App. 3d 948, 131 Cal. Rptr. 183 (1976).

Where an agreement merely establishes the shipping date as "you are going to try to have an approximate December 1st shipping date . . .", such time term is ambiguous and subject to parol evidence of a firm delivery date. MacGregor v. McReki, Inc., 30 Colo. App. 196, 494 P.2d 1297 (1971).

Where word "approximately" was used with quantity terms in purchase orders for used railroad ties, parol evidence was properly admitted to establish the terms of the agreement. Durbano Metals, Inc. A & K R.R. Materials, Inc., 574 P.2d 1159 (Utah 1978).

Where agreement for sale of fish omitted any reference to the quantity of fish to be purchased, parol evidence was admissible to establish such term. Alaska Independent Fishermen's Marketing Ass'n v. New England Fish Co., 15 Wash. App. 154, 548 P.2d 348 (1976).

76. Southern Concrete Serv., Inc. v. Mabelton Contractors, 407 F. Supp. 581, 582 (N.D. Ga. 1975).

During the time period of the agreement, the defendant ordered only 12,542 cubic years of concrete. Defendant attempted to admit evidence of an understanding that through trade usage under section 2-202(a), the quantity terms were meant to be renegotiable by the parties.

Although the opinion cited Official Comment 2 to section 2-202 which provides that the written agreement absorbs trade usage "unless carefully negated," the court held that for extrinsic evidence of a significant variance of quantity and price to be admissable by one of the parties, both parties must initially state their desire for admissibility in the written agreement. The court reasoned that evidence under subsection (a) will still be admissible when the parties have expressed such a desire, but not so freely as to endanger economic stability.

The effect of this holding is to circumvent the meaning, purpose, and express language of subsection (a), which permits explanation and supplementation of a writing without contradiction of the particular terms expressed therein. The requirement that the parties must include a special clause providing for admissibility of certain terms is unduly harsh where extrinsic evidence is necessary to determine the parties' intentions. Moreover, in *Southern Concrete*, the quantity term of the writing was not precise. The quantity term "approximately 70,000 cubic yards"[77] indicates that the parties were not certain of the exact amount and invites evidence of trade usage.

Employing the *Snyder* rationale, the question would have been whether evidence of trade usage that is offered to show that the written quantity term permitted the parties to renegotiate quantity was harmonious or consistent with the obligations reasonably inferred from the writing. Considering the latitude in the term "approximately," the facts in this case were more conducive to admitting extrinsic evidence than in *Schiavone*, wherein the quantity term was expressly stated as "500 tons."

Southern Concrete is another example of the diverse, unorthodox approaches that courts have employed in applying section 2-202 which can only dissipate the Code's policy for uniform decisions. The court disregarded the provisions of subsection (a) and the applicable comment language which openly encourages evidence of trade usage. If the court had concluded that the evidence was inadmissible on the basis of the inconsistency between the trade usage evidence and the writing under subsection (a), then the decision would be supportable.[78] However, the court exceeded its judicial province of interpreting the

77. *Id.*

78. The court did, however, acknowledge the lack of consistency between defendant's attempted offer of additional terms, under subsection (b), and the writing.

statutory section with respect to the facts of the instant case and instead, attempted to draft a new statutory requirement.

According to *Southern Concrete*, to admit evidence of trade usage under subsection (a) in order to show the unilateral right to depart from the essential terms of the written agreement, the parties must expressly agree in writing to the right of such departure. If *Southern Concrete's* reasoning is correct, then subsection (a) is mere surplusage and should not be considered an exception to inadmissibility under the codified parol evidence rule as it is presently set forth in section 2-202.

CONCLUSION

There is an inherent contradiction in admitting evidence that explains, supplements, and adds terms to a final written expression of an agreement, and then characterizing these alterations as consistent[79] with the writing. Such an approach to the parol evidence rule will only distort the reasonable intent of contracting parties, and thus displace the basic free market right of parties to bargain as they choose.[80] While *Snyder's* interpretation of consistency is by no means a panacea guaranteed to cure the ambivalent tensions which have arisen in application of the rule, its interpretation of consistency provides a more functional meaning which is essential to future predictable and uniform decision-making.

In replacing the *Hunt Foods'* test of "consistency,"[81] the Maryland Court of Special Appeals in, *Snyder*, advanced a more realistic approach for courts to apply in considering whether parol evidence should be admitted to explain the intended meaning of a written agreement. Proffered evidence is inadmissible where there is an "absence of reasonable harmony in terms of the language and respective obligations of the parties."[82] By not confining its inquiry to the comparison of terms alone, i.e., does a proffered extrinsic term expressly contradict the written term, *Snyder* refused to superficially administer the parol evidence rule. The written terms of an agreement are more than

79. Once a writing is determined to be a final expression of the parties intentions, any variation, whether by explanation or supplementation, no matter how slight, must be viewed as at least an implicit contradiction of that writing.

80. "The great advantage of contract over the other principles is that, under ideal conditions, it is capable of bringing about the desired order automatically, without any individual's having to understand anything more than his own immediate interest." L. FULLER, THE PROBLEMS OF JURISPRUDENCE, 730 (1949).

81. *See* text accompanying notes 38-52 *supra*.

82. 38 Md. App. 152, 380 A.2d 618, 623 (1977).

an arrangement of words; they are symbols which both express and imply the respective duties and rights of the parties. In requiring a basic harmony, not only between the proffered evidence and the written language, but also between the proffered evidence and the underlying "respective obligations of the parties," the *Snyder* court has restored the legitimacy of section 2-202.

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