

2016

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Daniel P. O'Gorman
Barry University

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Recommended Citation

Daniel P. O'Gorman, Closing a Parol Evidence Rule Loophole: The Consideration Exception and the Preexisting Duty Rule, 8 N.E. U. L.J. 307, (2016)

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Closing a Parol Evidence Rule Loophole: The Consideration Exception and the Preexisting Duty Rule

Daniel P. O’Gorman¹

The parol evidence rule and the preexisting duty rule are two classic contract-law doctrines. The parol evidence rule gives primacy to a written document over prior negotiations and agreements, and the preexisting duty rule provides that a promise to perform, or the performance of, a legal duty is not consideration. The former doctrine deals with the contract’s content and the latter doctrine deals with the agreement’s enforceability. One might therefore expect that the two would operate in their own corners of contract law without conflict.

Yet an exception to the parol evidence rule permits a party to rely on extrinsic evidence to show that a written agreement is not legally binding because it is not supported by consideration. If a party seeks to show that a written agreement was in fact a modification of a prior oral contract, and that the written agreement is not binding because it lacks consideration under the preexisting duty rule, the two rules come into conflict and one must give way. The Restatement (Second) of Contracts provides that the parol evidence rule should give way, and that position has been followed by some courts. Yet such an exception to the parol evidence rule threatens to undermine the rule’s evidentiary function, which is based on the belief that written evidence is more reliable than oral evidence, and its gatekeeping function, which is based on a distrust of the jury. Accordingly, an accommodation between the two doctrines is necessary to avoid undermining the parol evidence rule’s purposes.

This Article maintains that the consideration exception should not apply in a case involving a written agreement that a party asserts is an unenforceable modification under the preexisting duty rule, as long as the opposing party

1 Associate Professor, Barry University School of Law, J.D., New York University, 1993; B.A., University of Central Florida, 1990. The author is indebted to Dean Leticia M. Diaz for providing a research grant on behalf of Barry University School of Law, without which this Article would not have been possible. Thank you to the participants at the 11th International Conference on Contracts in February 2016, who provided valuable feedback on this Article’s topic, including Sidney DeLong, Keith A. Rowley, Dov A. Waisman, and Daniel D. Barnhizer. Thank you also to Helen H. Bender for bringing to the author’s attention *Audubon Indemnity Co. v. Custom Site-Prep, Inc.*, 358 S.W.3d 309 (Tex. Ct. App. 2011), an important case on this Article’s topic, and to Michael Morley for valuable discussions regarding this topic. Thank you to the editors of the *Northeastern University Law Journal* for their editorial work.

introduces sufficient evidence to create a genuine dispute regarding the prior agreement’s existence. Such an approach will preserve the parol evidence rule’s evidentiary and gatekeeping functions.

Introduction

The parol evidence rule and the preexisting duty rule are two titans of classical contract law. The parol evidence rule gives primacy to a written document (a so-called integrated agreement) over prior and contemporaneous agreements and negotiations not included in the integrated agreement.² The preexisting duty rule provides that a promise to perform, or the performance of, a legal duty is not consideration.³ The former doctrine deals with the contract’s content⁴ and the latter with an agreement’s enforceability.⁵ Because the doctrines deal with distinct subject matters, one might expect the two would peacefully operate in their own corners of contract law.

Yet an exception to the parol evidence rule permits a party to rely on extrinsic evidence to show that an integrated agreement is not binding because it is not supported by consideration.⁶ Thus, if a plaintiff seeks to show that an integrated agreement was a modification of a prior oral contract, and that the integrated agreement is not binding because it lacks consideration under the preexisting duty rule, the two doctrines come into conflict and one must give way.

For example, assume that the plaintiff and the defendant entered into a written contract under which the defendant promised to build a toolshed for the plaintiff and in exchange the plaintiff

2 See RESTATEMENT (SECOND) OF CONTRACTS §§ 213(1)–(2) (AM. LAW INST. 1981) (“A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them. A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.”).

3 See *id.* § 73 (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . .”).

4 See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 107 (6th ed. 2009) (noting that the parol evidence rule determines “the content of the contract.”).

5 See RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. a (AM. LAW INST. 1981) (noting that the preexisting duty rule results in the denial of enforcement to promises that would otherwise be valid).

6 See *id.* § 214(d) (“Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . lack of consideration . . .”).

promised to pay the defendant a specified amount of money. After the defendant builds the toolshed the plaintiff demands that the defendant also paint the toolshed at no extra cost to the plaintiff, alleging that the parties orally agreed prior to reducing their agreement to writing that the deal included the paint job. The defendant refuses, denying the existence of any such oral agreement. The plaintiff therefore sues the defendant for breach of contract. The defendant argues that the oral agreement never existed and that, even if it did, the failure to incorporate it into the written contract discharges it under the parol evidence rule. In response, the plaintiff argues that he is seeking to introduce the prior oral agreement to show that the written contract was in fact a modification of a prior oral agreement that included the paint job, and that the subsequent written contract lacks consideration under the preexisting duty rule because no new consideration was provided to the plaintiff for the deletion of the defendant's duty to paint the toolshed.

The *Restatement (Second) of Contracts* provides that in such a situation the parol evidence rule should give way to the preexisting duty rule and evidence of the prior oral agreement should be admissible,⁷ a position followed by some courts.⁸ Yet such an exception to the parol evidence rule threatens to undermine the rule's evidentiary function, which is based on the belief that written evidence is more reliable than oral evidence,⁹ and its gatekeeping function, which is based on

7 See *id.* § 214 cmt. c, illus. 5 ("A and B make an integrated agreement by which A promises to complete an unfinished building according to certain plans and specifications, and B promises to pay A \$2,000 for so doing. It may be shown that, by a contract made previously with B, A had promised to erect and complete the building for \$10,000; that he had not fully completed it though paid the whole price. This evidence is admissible to show that there is no consideration for B's new promise, since A is promising no more than he is bound by his original contract to perform.").

8 See *Audubon Indem. Co. v. Custom Site-Prep, Inc.*, 358 S.W.3d 309, 316-18 (Tex. Ct. App. 2011) (holding that parol evidence was admissible to determine whether a written agreement that differed from a prior oral agreement was a modification that lacked consideration under the preexisting duty rule); *Guar. Trust Co. of N.Y. v. Williamsport Wire Rope Co.*, 222 F.2d 416, 420-21 (3d Cir. 1955) (holding that parol evidence was admissible to show that a written agreement that was an attempted modification of a prior agreement lacked consideration under the preexisting duty rule).

9 See *Duncan Kennedy, Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1778 (1976) ("The evidentiary function includes both providing good evidence of the existence of a transaction and providing good evidence of the legal consequences the parties intended should follow."); Joseph M. Perillo,

a distrust of the jury.¹⁰ Accordingly, an accommodation between the parol evidence rule and the preexisting duty rule is necessary to avoid undermining the parol evidence rule’s purposes.

This Article maintains that the parol evidence rule’s consideration exception should not apply in a case involving a written agreement that a party asserts is an unenforceable modification under the preexisting duty rule, provided the opposing party introduces sufficient evidence to create a genuine dispute regarding the prior agreement’s existence. Such an approach preserves the parol evidence rule’s evidentiary and gatekeeping functions.

Part I of this Article provides a background of the parol evidence rule. Part II provides a background of the preexisting duty rule. Part III discusses how the parol evidence rule’s consideration exception applies with respect to the preexisting duty rule, and why it is a parol evidence rule loophole. Part IV provides a test to accommodate the parol evidence rule and the preexisting duty rule, thereby closing the loophole. Part V is a brief conclusion.

I. The Parol Evidence Rule

A. The Contours of the Parol Evidence Rule

The parol evidence rule provides that an integrated agreement usually supersedes prior and contemporaneous promises and agreements that were not incorporated into the integrated agreement.¹¹ Specifically, the rule provides that “[a] binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them” and “[a] binding completely integrated agreement discharges

Statute of Frauds in Light of the Functions and Dysfunctions of Form, 43 *FORDHAM L. REV.* 39, 64 (1974) (noting that the purpose of the evidentiary function is to “supply and preserve evidence of the contract.”).

10 See Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 *YALE L.J.* 365, 366 (1932) (arguing that the parol evidence rule is based on a distrust of the jury).

11 PERILLO, *supra* note 4, at 107; see also Arthur L. Corbin, *The Parol Evidence Rule*, 53 *YALE L.J.* 603, 603 (1944) (“When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. This is in substance what is called the ‘parol evidence rule’”).

prior agreements to the extent that they are within its scope.”¹² Despite its name, the rule is not considered a rule of evidence but a rule of substantive law, in that it determines contract rights and duties.¹³

For the parol evidence rule to apply the parties must have manifested assent to a binding integrated agreement.¹⁴ The manifestation of assent need not take any particular form, such as signing the document, and can include an oral manifestation or even assent by silence.¹⁵ But if either of the parties fails to manifest assent to the document, there is no integrated agreement and the parol evidence rule does not apply.¹⁶ Also, under the so-called conditional-delivery exception, where the parties to a written document agree orally that it is not effective unless and until a particular condition occurs, the document is not a binding integrated agreement until such condition occurs.¹⁷

12 RESTATEMENT (SECOND) OF CONTRACTS §§ 213(1)–(2) (AM. LAW INST. 1981).

13 *Id.* § 213 cmt. a. *But see* Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law’s Subsequent Development*, 1994 WIS. L. REV. 1119, 1244 n.473 (“These (and other) legalists’ views [that the parol evidence rule is not a rule of evidence] may be attributable to their having viewed the contemporary evidentiary regime—which favored liberal admission of evidence—as the only possible approach to evidence law. For example, Williston appears to justify his claim that the parol evidence rule is a matter of substantive law on the basis that ‘it defines the limits of a contract; it fixes the subject matter for interpretation, though not itself a rule of interpretation.’ That, of course, is exactly what a rule of evidence does: it determines *what* material is to be subject to the factfinder’s interpretation.”) (citation omitted).

14 *See* RESTATEMENT (SECOND) OF CONTRACTS § 213 (AM. LAW INST. 1981); *see also id.* cmts. b & c (noting that the court must make the preliminary determination that there is an integrated agreement); PERILLO, *supra* note 4, at 112 (“The first issue in a parol evidence problem is whether the parties intended the writing to be a final embodiment of their agreement in whole or in part.”).

15 *See* RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b (AM. LAW INST. 1981) (“The intention of the parties may . . . be manifested without explicit statement and without signature. A letter, telegram or other informal document written by one party may be orally assented to by the other as a final expression of some or all of the terms of their agreement.”); *id.* cmt. b, illus. 2 (providing an example of manifesting assent through silence).

16 *See id.* cmt. b, illus. 1 (providing illustration where the parties reduce their oral agreement to written form but the parties are not satisfied with the document and agree to have it redrafted).

17 *Id.* § 217.

An integrated agreement is “a writing or writings constituting a final expression of one or more terms of an agreement.”¹⁸ Thus, the parol evidence rule only applies when the last expression of the parties’ agreement is written.¹⁹ An integrated agreement need not, however, take any particular written form;²⁰ it can even be a written confirmation of the agreement.²¹ Also, it need not be a complete statement of the parties’ deal.²² But a document intended to be tentative and preliminary to a final draft is not an integrated agreement.²³ Whether a document has been adopted as an integrated agreement is decided by the judge, not the jury, even though it is an issue of fact.²⁴

Because the parol evidence rule does not apply unless the integrated agreement is binding, an integrated agreement does not supersede a prior agreement if the integrated agreement lacks consideration or is voidable and has been avoided.²⁵ Thus, “[a]greements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . lack of consideration [for the writing].”²⁶ For example, a majority of courts permit extrinsic evidence to show that a recital that consideration has been provided is false.²⁷ Also, extrinsic evidence is admissible to show

18 *Id.* § 209(1). John Henry Wigmore apparently coined the term “integration.” ARTHUR L. CORBIN, CORBIN ON CONTRACTS: ONE VOLUME EDITION 535 (1952).

19 PERILLO, *supra* note 4, at 107. An integrated agreement that is a confirmation of a prior oral agreement is considered a modification of the prior agreement. See RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b, illus. 2 (AM. LAW INST. 1981).

20 See RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b. (AM. LAW INST. 1981) (“No particular form is required for an integrated agreement.”).

21 *Id.* cmt. b, illus. 2.

22 *Id.* § 210(2).

23 PERILLO, *supra* note 4, at 112.

24 *Id.* at 112-13.

25 RESTATEMENT (SECOND) OF CONTRACTS § 213(3), cmt. d (AM. LAW INST. 1981).

26 *Id.* § 214(d); see also PERILLO, *supra* note 4, at 126 (“It is frequently said that the parol evidence rule does not preclude the showing of an absence of consideration.”).

27 PERILLO, *supra* note 4, at 126-27; see also RESTATEMENT (SECOND) OF CONTRACTS § 218(1) (AM. LAW INST. 1981) (“A recital of a fact in an integrated agreement may be shown to be untrue.”); E. ALLAN FARNSWORTH, CONTRACTS 429 (4th ed. 2004) (“Even if a completely integrated agreement recites that consideration was given, it may be shown that the recital is untrue.”).

that the only promise made by one of the parties was not intended by the parties to be performed, and thus the purported bargain is a sham.²⁸ The rationale for the exception for invalidating causes is that the parol evidence rule does not apply unless the integrated agreement is binding, and invalidating causes commonly do not appear on the document's face.²⁹

If the parties manifest assent to a binding integrated agreement, the next question is whether the integrated agreement discharges the prior or contemporaneous agreement that a party is seeking to enforce.³⁰ The parol evidence rule is misnamed in the sense that under the rule an integrated agreement can supersede prior written agreements as well as prior oral agreements.³¹ The rule does

28 PERILLO, *supra* note 4, at 127.

29 RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. c (AM. LAW INST. 1981). Interestingly, requiring that an integrated agreement be binding for the common-law parol evidence rule to apply results in a softer parol evidence rule for cases governed by the common law than for cases governed by Article 2 of the Uniform Commercial Code (U.C.C.). The U.C.C.'s parol evidence rule does not include a requirement that the integrated agreement be binding. *See* U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM'N 2012). Rather, the rule applies to "[t]erms 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" *Id.* Under the U.C.C., all that is necessary is a finding that "the writing was intended by both parties as a complete and exclusive statement of all the terms." *Id.* cmt. 3. And even if a requirement of a "binding" agreement could be supplied through the U.C.C. provision incorporating common-law rules, U.C.C. § 1-103, under the U.C.C. a modification does not need consideration to be binding, U.C.C. § 2-209(1), as long as it meets the test of good faith. *Id.* § 2-209 cmt. 2.

Thus, if the transaction involves the sale of goods and is therefore governed by Article 2 of the U.C.C., *see id.* § 2-102 ("Unless the context otherwise requires, this Article applies to transactions in goods . . ."), the consideration exception would not prevent the parol evidence rule from having the effect of superseding the prior promise or agreement, unless perhaps it could be shown that the integrated agreement was prepared in bad faith by one of the parties. If the parties form an oral contract and one of the parties sends a signed, written confirmation to the other that includes additional or different terms, but the other does not manifest assent to the written confirmation, whether the additional or different terms supersede the prior oral agreement would be determined by U.C.C. § 2-207(2), not the parol evidence rule. *See id.* § 2-207(2).

30 *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 213(1)–(2) (AM. LAW INST. 1981).

31 *See id.* cmt. a.

not, however, discharge agreements subsequent to the integrated agreement, even if they are oral.³²

If the binding integrated agreement contradicts the prior agreement, the prior agreement is discharged,³³ even if the integrated agreement does not contain all of the terms of the parties’ agreement (a so-called partial integration).³⁴ If the integrated agreement does not contradict the prior agreement, the prior agreement is still discharged if it was not agreed to for separate consideration and under the circumstances it would have been natural to include it in the integrated agreement.³⁵ If the prior agreement was agreed to for separate consideration or under the circumstances it was natural to omit it from the integrated agreement, the prior agreement is not discharged under the parol evidence rule and the integrated agreement is necessarily a partial integration and not a total integration.³⁶ In such a situation, the naturally-omitted agreement is often called a “collateral” agreement.³⁷ The natural-inclusion test is applied by

32 See PERILLO, *supra* note 4, at 116. Of course, such an attempted modification might be unenforceable for other reasons, such as a lack of consideration or as contrary to a no-oral-modification clause.

33 RESTATEMENT (SECOND) OF CONTRACTS § 213(1) (AM. LAW INST. 1981).

34 *Id.* cmt. b.

35 See *id.* § 216(2); see also PERILLO, *supra* note 4, at 116 (“Williston’s . . . rule states that when a term not found in the writing is offered into evidence by one of the parties and it would have been natural for the parties to have excluded that term from the writing, there is a partial integration with respect to that term; the term may be admitted into evidence if it does not contradict the writing.”).

36 RESTATEMENT (SECOND) OF CONTRACTS § 216(2) (AM. LAW INST. 1981).

37 McCormick, *supra* note 10, at 371. The idea of a collateral agreement not being discharged by a subsequent, integrated agreement gave rise to the so-called collateral-agreement test, but whether a prior agreement is collateral to the integrated agreement is simply a conclusion reached after applying the natural-inclusion test, and not itself a test. See JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 434 (5th ed. 2011) (“[T]o determine whether a particular extrinsic agreement was a collateral agreement, it is necessary to determine whether the parties ordinarily (naturally and normally) include such [an agreement] in the particular writing expressing their agreement. . . . If, however, they would not have naturally included such a matter in the writing, the extrinsic agreement is called ‘collateral’ and the evidence is admitted. . . . [Thus], the question of admissibility is determined by the ‘natural omission’ test and not by the label attached to the extrinsic agreement. . . . The so-called ‘collateral agreement’ test is not a test; it is a superfluous conclusory label attached after the critical natural omission test has been applied and the court has already determined whether the evidence should be admitted.”).

the court.³⁸ But if the parol evidence rule does not discharge the prior agreement, whether the prior agreement was actually made is an issue for the fact-finder.³⁹ With respect to the natural-inclusion test (also called the natural-omission test), there is disagreement as to whether an objective test (i.e., what reasonable parties similarly situated would have done) or a subjective test (i.e., what the parties actually intended) should be applied to determine if it would have been natural to include the prior agreement in the integrated agreement.⁴⁰

B. Rationales for the Parol Evidence Rule

Three different rationales have been provided for the parol evidence rule: an evidentiary function; a gatekeeping function; and a merger (or integration) function. Which of these can legitimately claim to be a basis for the rule is critical to determining whether the consideration exception undermines any of the parol evidence rule's purposes. Accordingly, each of the rationales is discussed below.

1. Evidentiary Function

One rationale, popularized by Professor Charles T. McCormick,⁴¹ is that, like the Statute of Frauds, the parol evidence

38 See RESTATEMENT (SECOND) OF CONTRACTS § 210(3) (AM. LAW INST. 1981) ("Whether an agreement is completely or partially integrated is to be determined by the court . . .").

39 RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. c (AM. LAW INST. 1981).

40 See PERILLO, *supra* note 4, at 116 (stating that under Williston's test, "[t]he question of whether it was natural to exclude the proffered term is answered by the court's conclusion of what reasonable parties similarly situated would naturally do with respect to the term. Williston's rule was adopted by the First Restatement and became and probably still is the majority approach Corbin rejects Williston's 'reasonable person' approach and is determined to search out the actual intention of the parties. The issue for Corbin is whether the parties actually agreed or intended that the writing was a total and complete statement of their agreement It is clear that Corbin's approach undercuts the traditional parol evidence rule The trend is now in Corbin's direction and will be accelerated by the Restatement (Second) which . . . has staked out a position similar to Corbin's."); see also McCormick, *supra* note 10, at 379 (stating that the natural-inclusion test is "aimed at abstract impersonal probabilities.").

41 Professor McCormick was a prominent evidence scholar in the mid-twentieth century. THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 370

rule performs an evidentiary function in that a written document is more reliable evidence of an agreement’s terms than oral testimony.⁴² As Professor E. Allan Farnsworth acknowledged, parties reduce their agreements to written form “to provide trustworthy evidence of the fact and terms of their agreement and to avoid reliance on uncertain memory.”⁴³ Presumably, parties do not reduce their agreement to writing to simply supersede prior agreements. Under the evidentiary rationale, the parol evidence is more akin to a rule of evidence than a rule of substantive law.

Subsequent contract-law scholars have echoed McCormick’s argument. As stated by Professor Joseph M. Perillo, “[t]he policy behind the rule is to give the writing a preferred status so as to render it immune to perjured testimony and the risk of ‘uncertain testimony of slippery memory.’”⁴⁴ Chancellor John Edward Murray, Jr., noted, “[s]ince memories of oral understandings are fallible and subject to favorable or unfavorable (conscious or unconscious) recollection, the recorded evidence of the parties’ intention as a permanent record of their intention not subject to the vagaries of memory should prevail.”⁴⁵ And the *Restatement (Second) of Contracts* seemingly acknowledges the parol evidence rule’s evidentiary function: “The parties to an agreement often reduce all or part of it to writing . . . to provide reliable evidence of its making and its terms and to avoid trusting to uncertain memory. . . . In the interest of certainty and security of transactions, the law gives special effect to a writing”⁴⁶

(Roger K. Newman ed. 2009).

42 See McCormick, *supra* note 10; see also David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation*, 57 SMU L. REV. 387, 469 (2004) (“Professor McCormick popularized the ‘evidentiary’ rationale for the parol evidence rule . . .”).

43 FARNSWORTH, *supra* note 27, at 415.

44 PERILLO, *supra* note 4, at 109 (quoting McCormick, *supra* note 10, at 366-67 & n.3).

45 MURRAY, *supra* note 37, at 418; see also JEFF FERRIELL, UNDERSTANDING CONTRACTS 335 (2d ed. 2009) (“Preventing the parties from introducing evidence beyond the terms of the written contract limits the parties’ opportunities to commit perjury. It also avoids the necessity of depending on fading and variable memories of the negotiations that led to the creation of the contract. Even scrupulously honest people have an uncanny ability to perceive events in a manner likely to serve their own interests.”).

46 RESTATEMENT (SECOND) OF CONTRACTS ch. 9, topic 3, intro. note (AM. LAW INST. 1981). See also Michael L. Closen & Charles N. Faerber, *The Case That There Is A Common Law Duty of Notaries Public to Create and Preserve Detailed Journal Records of Their Official Acts*, 42 J. MARSHALL L. REV. 231, 257-58 (2009)

McCormick acknowledged that the conditional-delivery exception to the parol evidence rule and the rule's inapplicability to an alleged subsequent oral modification weakened the argument that the rule has an evidentiary function, but he did not believe it eliminated it.⁴⁷ He argued that "[e]ach of these escapes from the writing presents difficulties to the one who attempts it, and, in any event, the fact that protection in some situations has not been perfect, does not disprove the desire to furnish it generally."⁴⁸

But for the parol evidence rule to perform an evidentiary function it must add to existing protections against unreliable evidence. For example, even without a parol evidence rule, "judges and juries have generally given greater weight to visual evidence (in the form of both writings and exhibits) than to oral evidence."⁴⁹ As one commentator has explained:

People are fascinated by the real thing. The bullets that were found lodged in the victim's heart, the actual handwritten memorandum that was used to seal the agreement, the remains of the automobile gas tank that ruptured on impact burning the occupants of the car.

("The legal preference for evidence in the form of a writing over mere oral history or testimony is so well established that it rises to the level of a general standard of conduct. It is simply well founded in human experience that written instruments generated contemporaneously with an event (that is not subject to dispute until later) are more likely to be trusted than subsequent orally described recollections of the event, as the former represent fresh, unchanged and accurate impressions while the latter are subject to the vagaries of human memory. This attitude is reflected in a number of the law's earliest and longest-enduring evidentiary and substantive rules, including . . . the parol evidence rule . . ."); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 122 (1987) ("It seems unlikely . . . that the [parol evidence] rule is completely untarnished by the desire to exclude unreliable testimony. While there are other reasons for giving primacy to written agreements, the rule is at least partly based upon the danger that jurors will overvalue testimony about oral agreements."); Note, *Some Suggested Reforms in the Application of the Parol Evidence Rule to Insurance Contracts*, 47 HARV. L. REV. 1010, 1017 (1934) ("One of the most important practical purposes of the parol evidence rule is to . . . prevent proof of a contract by untrustworthy testimony.").

47 McCormick, *supra* note 10, at 368 n.6.

48 *Id.*

49 Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 241 (1994).

....

... Until we see something tangible, [the event] is something that did not happen, or at least did not happen to real people⁵⁰

A judge could even instruct the jury regarding the weight to be given to different forms of evidence to help ensure that the jury does not give undue weight to oral testimony compared to written evidence.

How then does the parol evidence rule serve an evidentiary function in a way different from the typical fact-finder’s distrust of oral testimony compared to written evidence? For those who view the parol evidence rule as serving an evidentiary function, it does so by operating as a legal formality.⁵¹ When conducting a parol evidence rule analysis, the court assumes that the prior agreement was made, and then determines whether the prior agreement is inconsistent with the integrated agreement or whether it would have been natural to include the prior agreement in the integrated agreement.⁵² If the prior agreement is either inconsistent with the integrated agreement or it would have been natural to include it in the integrated agreement, a conclusive presumption arises that, contrary to the testimony of the proponent of the evidence, the prior agreement either never occurred as alleged or that the parties did not intend it to survive the integrated agreement (the proponent’s testimony to the contrary being either perjured, based on faulty memory, or an unreasonable interpretation of what transpired).⁵³

The parol evidence rule test has the characteristics of a legal formality because it does not ask directly whether the prior

50 ASHLEY S. LIPSON, *ART OF ADVOCACY: DEMONSTRATIVE EVIDENCE* § 2.02 (1994).

51 See Kennedy, *supra* note 9, at 1691 (referring to the parol evidence rule as a legal formality); see also Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. Rev. 1726, 1743 (2008) (“A legal formality is a type of act, such as the utterance of special words or the production of a document in a certain form, that has no extralegal significance.”).

52 See RESTATEMENT (SECOND) OF CONTRACTS §§ 213(1)–(2) (AM. LAW INST. 1981).

53 See McCormick, *supra* note 10, at 369 (noting that the parol evidence rule is a device that used a formula to determine whether an agreement “is ‘conclusively presumed’ to embody the whole agreement”).

agreement existed (in fact it is assumed for purposes of the test that it did occur) or whether the parties intended it to be discharged by not including it in the integrated agreement. Rather, provided that an objective standard is applied, the natural-inclusion test is used as a proxy for determining whether the prior agreement existed or, if it did, whether the parties intended it to be superseded. This test is necessarily over-inclusive in that it will discharge some agreements that did exist and that were not intended to be superseded. (It will never be under-inclusive because it only discharges promises and agreements.) Accordingly, the prior agreement must pass an over-inclusive, preliminary credibility test before the issue of whether the agreement in fact existed and, if so, whether it was intended to be superseded by the integrated agreement, is submitted to the fact-finder for determination. As noted by McCormick, the parol evidence rule “enables the judge to head off the difficulty [of whether the prior agreement existed and, if so, whether the parties intended it to be superseded by the integrated agreement] at its source, not by professing to decide any question as to the credibility of the asserted oral variation, but by professing to exclude the evidence . . . altogether because forbidden by a mysterious legal ban.”⁵⁴

If the objective standard essentially implements the reasonably-careful-person standard of negligence law,⁵⁵ the reasonably-careful person would usually incorporate prior agreements into an integrated agreement to ensure there was no dispute as to whether the agreement existed or whether it was superseded. Note that the reasonably-careful person “is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful person, who is always up to standard.”⁵⁶ If one applied the Hand formula to determine how a reasonably-careful

54 *Id.*

55 Under tort law, “[a] person acts negligently if the person does not exercise reasonable care under all the circumstances.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (AM. LAW INST. 2010). And “because a ‘reasonably careful person’ (or a ‘reasonably prudent person’) is one who acts with reasonable care, the ‘reasonable care’ standard for negligence [in tort law] is basically the same standard expressed in terms of the ‘reasonably careful person’ (or the ‘reasonably prudent person’).” *Id.* § 3 cmt. a.

56 W. PROSSER & W. KEETON, THE LAW OF TORTS 175 (5th ed. 1984).

person would behave under the circumstances,⁵⁷ the low cost of taking adequate precautions (ensuring that the agreement is included in the integrated agreement) would result in the parol evidence rule discharging many agreements that in fact existed and that were not intended to be superseded.⁵⁸

The parol evidence rule operating as a legal formality was recognized by Professor Duncan Kennedy, who characterized it as a legal formality that “operate[s] through the contradiction of private intentions.”⁵⁹ Like other formalities, it “means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored” (what he termed the “sanction of nullity”).⁶⁰ Thus, if the parties fail to reduce a portion of their oral agreement to written form, yet reduce other portions to written form, the parol evidence rule might discharge those prior agreements even if such a result is contrary to the parties’ intentions.

Interestingly, the parol evidence rule applies the same test as a proxy for answering two different questions: whether the prior agreement existed and, if it did, whether the parties intended to supersede it with the integrated agreement. But the contradiction and the natural-inclusion tests do an acceptable job of addressing both questions. If the prior agreement is contradicted by the integrated agreement or it would have been natural to include the prior agreement in the integrated agreement, there is reason to doubt both the agreement’s existence and whether the parties intended it to survive the integrated agreement.

That the parol evidence rule performs the evidentiary function of form does not, however, answer the question of why such a legal formality is necessary. Why not simply decide whether the prior agreement existed and, if so, whether the parties intended it to be discharged by the subsequent agreement, particularly if fact-finders tend to favor tangible evidence? As noted by Professor Eric A. Posner,

57 See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (setting forth a formula for determining whether a person’s conduct fell below the appropriate standard of care for purposes of determining negligence liability in tort).

58 See Daniel P. O’Gorman, *Contract Law and the Hand Formula*, 75 LA. L. REV. 127, 156 (2014) (discussing the Hand formula).

59 Kennedy, *supra* note 9, at 1691.

60 *Id.* at 1692.

a court could simply “[a]dmit extrinsic evidence, weigh it against the writing, and make an all-things-considered judgment.”⁶¹

The reason for the parol evidence rule to be cast as a legal formality is because the type of factual determinations involved are considered particularly subject to error. As noted by Professor Posner:

[N]egotiations that lead up to writings often involve give-and-take and take-back. A party might offer a particular term X and then retract it when it appears that the other party will not reciprocate by offering a term that the first party seeks. Courts that go back and look at the record of negotiations—often relying on the parties’ fallible memories—might mistakenly believe that term X was agreed to as part of the contract. The parol evidence rule . . . reflects doubts about judicial ability to understand the record of the negotiations.⁶²

In fact, parties presumably reduce their agreements to writing to avoid unpredictable fact-finding by a court or jury.

But the cure might be worse than the disease. After all, legal formalities result in determinations contrary to the parties’ intentions, and thus the question arises as to why it is better to err on the side of under-enforcement of prior agreements rather than over-enforcement. Why is it worse to enforce agreements that never existed than to not enforce agreements that did? Either way there will be an error rate. Also, the test likely results in an error rate in favor of sophisticated parties, who are more likely to know about the parol evidence rule.

The answer is that the parol evidence rule’s purpose of avoiding erroneous findings that an agreement had been made is considered essential to the stability of contracts, particularly business contracts, enabling parties to more accurately determine their rights and duties. As stated by one court:

Without the rule there would be no assurance of the enforceability of the written contract. If such assurance were removed today from our law, general disaster would result, because of the consequent destruction

61 ERIC A. POSNER, CONTRACT LAW AND THEORY 146 (2011).

62 *Id.*

of confidence, for the tremendous but closely adjusted machinery of modern business cannot function at all without confidence in the enforceability of contracts.⁶³

As stated by Professor Perillo, “[t]he objective is to secure business stability.”⁶⁴ These benefits were further explained by a commentator as follows with respect to increasing the predictability of outcomes in lawsuits:

[C]onsider the parol evidence rule, a doctrine usually conceived as part of contract, but which, at its core, is an evidentiary rule incorporating an approach . . . which quells fighting among the parties. . . . By favoring documentary evidence over testimony and limiting the scope of the jury’s fact-finding responsibility, the rule eliminates considerable fighting among the parties and ousts any need for cross-examination over particularly fractious matters. Also, by making more certain the factual record with which both parties will have to work at trial, the rule eliminates the possibility that each party will interpret factual ambiguities in its favor while constructing his litigation strategy. This diminution in uncertainty, which cuts against advocates’ tendencies to overestimate the strength of their cases, is an important inducement to settlement.⁶⁵

As stated by the New York Court of Appeals in the well-known case of *Mitchill v. Lath*, “[n]otwithstanding injustice here and there, on the whole it works for good.”⁶⁶

Also, the idea is that once a legal formality becomes well known, parties will use it and the instances of injustice caused by the formality’s over-inclusiveness will be reduced. Legal formalities thus perform a “channeling function,” encouraging parties to adopt the required form.⁶⁷ For example, Professor Kennedy noted that the reason for ignoring the parties’ wishes when applying a legal formality “is to

63 *Cargill Comm’n Co. v. Smartwood*, 198 N.W. 536, 538 (Minn. 1924).

64 PERILLO, *supra* note 4, at 109.

65 Rosen, *supra* note 13, at 1244-46.

66 *Mitchill v. Lath*, 160 N.E. 646, 647 (N.Y. 1928).

67 Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941).

force them to be self conscious and to express themselves clearly, not to influence the substantive choice about . . . what to contract for.”⁶⁸ Formalities “are supposed to help parties in communicating clearly to the judge which of various alternatives they want him to follow in dealing with disputes that may arise later in their relationship.”⁶⁹ Thus, all that parties need to do is incorporate their prior agreements into the integrated agreement, thereby communicating clearly to the judge that the agreement exists and that they intend for it to remain effective. Therefore, although the parol evidence rule, like the Statute of Frauds, causes erroneous determinations in some cases, the hope is that the overall error rate will be reduced as parties learn to include their entire agreement in the integrated agreement.

The parol evidence rule’s evidentiary function and its role as a legal formality cannot be easily ignored because this was the rule’s original purpose. Early English evidence law adopted a “best evidence” approach, “which encouraged production of only the most probative pieces of evidence.”⁷⁰ “For example, written evidence always prevailed over oral testimony, which was distrusted due to imperfect memory and omnipresent partiality, and, among documents, sealed records (official memorials of the courts and legislatures) were more reliable *by law* than unsealed records, and so on.”⁷¹

Sealed documents were considered the most reliable evidence, and therefore could not be varied by a prior unsealed written agreement or a prior oral agreement.⁷² Thus, at the time there was no need for a parol evidence rule.⁷³ But when the Statute of Frauds was enacted in 1677, requiring that certain categories of contracts be evidenced by a writing signed by the defendant (even if not under seal), concern arose that the writing requirement would be rendered meaningless if the jury could consider extrinsic evidence.⁷⁴ Thus, it was soon held that oral evidence could not be introduced to vary writings used to satisfy the Statute of Frauds.⁷⁵ The idea that the writing was the contract then extended from unsealed writings required under the

68 Kennedy, *supra* note 9, at 1692.

69 *Id.* at 1691.

70 Rosen, *supra* note 13, at 1244 n.473.

71 *Id.*

72 KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 88 (1990).

73 *Id.*

74 *Id.*

75 *Id.* at 88-89.

Statute of Frauds to all writings, and by the late seventeenth century a modern parol evidence rule took shape.⁷⁶ By the early eighteenth century the parol evidence rule appeared in legal treatises.⁷⁷

The rationale for the rule was that the writing provided greater certainty,⁷⁸ and the parol evidence rule was consistent with not only a best-evidence approach, but the objective theory of contract, which was the cornerstone of classical contract law.⁷⁹ As stated by P.S. Atiyah:

[A] reason behind the extreme objective approach is to be found in the importance of principle. The classical contract lawyers assumed that if it was open to a man to deny that his apparent intent was his real intent, many cases might occur in which the Courts would *wrongly* accept such a defense. In order to exclude the possibility of such erroneous decisions being made, therefore, it was desirable to exclude the question from consideration altogether. This line of reasoning is seen perhaps most clearly in those cases in which the Courts laid down the parol evidence rule This rule . . . was emphatically affirmed in a case in 1842 Erskine J. expressed clearly the anxiety that opening the door to [extrinsic] evidence might simply lead to more erroneous than correct decisions. If the parol evidence rule were once weakened, he insisted, ‘every man’s will and intention, however expressed, would be liable to be defeated, not, as now sometimes the case, by his own defective expression of that will, but contrary to his own plainly declared intention.’⁸⁰

76 *Id.* at 89.

77 *Id.* at 110 n.240.

78 *Id.*

79 See Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1749 (2000) (“[C]lassical contract law doctrines lay almost wholly at the objective, standardized, and static poles, and also tended to be binary. In contrast, modern contract law employs substantive rather than formal reasoning, and pervasively (although not completely) consists of principles that are individualized, dynamic, multi-faceted, and, in appropriate cases, subjective.”).

80 P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 459-60 (1979) (quoting *Shore v. Wilson*, 9 Cl. & F. 514, 8 E.R. 513 (1842)); see also McCormick, *supra* note 10, at 367 n.3 (“Coke reports Popham, C.J., as saying, in the *Countess of Rutland’s* case: ‘Also it would be inconvenient that matters

The rule's evidentiary function is still referenced by courts.⁸¹ Consider the following from a Missouri appellate court:

In Missouri, we state the parol evidence rule in classical terms. In the absence of fraud, accident, mistake, or duress, the parol evidence rule prohibits evidence of prior or contemporaneous oral agreements which vary or contradict the terms of an unambiguous, final and complete writing. We justify the rule on two basic, classical premises: (1) a written document is more reliable and accurate than fallible human memory, and (2) varying written terms by extrinsic oral evidence opens the door to perjury.⁸²

A federal appellate court has also stated: "[T]he parol evidence rule both 'promotes the use of, and protects, written agreements; and it gives the trial judge a polite means of keeping *suspect oral evidence* from the jury.'"⁸³ And another court: "Underlying . . . the parol evidence rule . . . is the rationale that claims based upon *oral representations* are inherently unreliable."⁸⁴

-
- in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory.'").
- 81 See *Demetree v. Commonwealth Trust Co.*, No. Civ. A. 14354, 1996 WL 494910, at *4 (Del. Ch. Aug. 27, 1996) ("The theoretical underpinnings of the parol evidence rule are particularly applicable in cases such as this one where a very long period has passed since the execution of the contract, making oral testimony concerning expectations of the parties at the time potentially less reliable. See 32A C.J.S., EVIDENCE § 851, p. 216 (1964) (the parol evidence rule is founded on the maxim that 'written evidence is so much more certain and accurate than that which rests in fleeting memory only, that it would be unsafe, when parties have expressed the terms of their contract in writing, to permit weaker evidence to control').").
- 82 *Jake C. Byers, Inc. v. J.B.C. Invs.*, 834 S.W.2d 806, 811-12 (Mo. Ct. App. 1992).
- 83 *Intercorp, Inc. v. Pennzoil Co.*, 877 F.2d 1524, 1537 (11th Cir. 1989) (emphasis added) (quoting G. Wallach, *The Declining "Sanctity" of Written Contracts—Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 MO. L. REV. 651, 654 (1979)).
- 84 *Cirillo v. Slomin's Inc.*, 768 N.Y.S.2d 759, 767 (N.Y. Sup. Ct. 2003) (emphasis added).

2. Gatekeeping Function

Professor McCormick also argued that the parol evidence rule was based on distrust of the jury.⁸⁵ He asserted that the proponent of the extrinsic agreement was often the economic underdog and among the “have nots,” and the opponent of the prior agreement often among the “haves.”⁸⁶ He thus believed that “[t]he average jury will, other things being equal, lean strongly in favor of the side which is threatened with possible injustice and certain hardship by enforcement of the writing.”⁸⁷

McCormick considered oral testimony inherently unreliable because of the passage of time and the conscious or unconscious bias of the party testifying about the oral agreement, and that it was doubtful whether a jury was likely to take sufficient account of this unreliability.⁸⁸ Also, upon concluding that a prior, oral agreement existed, it would be even more difficult for a jury to conclude that the parties intended the integrated agreement to supersede the prior, oral agreement.⁸⁹ The danger was heightened by the jury being untrained, and “a body numerous enough to invite emotional organ-playing by counsel.”⁹⁰ McCormick argued that “[f]rom all these sources springs grave danger that honest expectations, based upon carefully considered written transactions, may be defeated through the sympathetic, if not credulous, acceptance by juries of fabricated or wish-born oral agreements.”⁹¹

In contrast to juries, McCormick believed that

[t]he danger of undermining confidence in written bargains is one which can be appreciated by a trial judge, who looks back on many similar cases and is trained to take a long view. Moreover, he is likely . . . to discount testimony for the warping of self-interest. The jury, on the other hand, is likely to pass over these

85 See McCormick, *supra* note 10, at 366.

86 *Id.*

87 *Id.*

88 *Id.* at 366-67.

89 *Id.* at 367.

90 *Id.* at 368.

91 *Id.* at 367.

considerations in its urge of sympathy for a party whom the shoe of the written contract pinches.⁹²

Thus, McCormick maintained “[t]hat the parol evidence rule chiefly stems from an anxiety to protect written bargains from re-writing by juries”⁹³ By creating a rule to be applied by the court, the court can play a gatekeeping function, ensuring that the prior agreement passes a court-imposed test prior to being submitted to the jury, who, only then, would be permitted to determine whether the agreement was actually made.

Of course, whether the prior agreement was actually made, and, if so, whether the parties intended it to be superseded by the integrated agreement, could itself have simply been made an issue for the judge rather than the jury, but this was precluded by the notion that the jury was a “symbol of political liberty.”⁹⁴

Forbidden this straight path by their own preconceptions, by a zig-zag route [the courts] came out near the same goal. The approach was made through doctrinal devices which gave no hint of any departure from the usual division of functions between judge and jury, but which were subtly convenient for jury control in cases where written transactions were threatened by claims of agreed oral variations not credited by the judge.⁹⁵

In other words, a test was created where little or no fact-finding would be performed by the court.

The gatekeeping function cannot fully explain, however, the parol evidence rule. For example, while Professor Arthur L. Corbin

92 *Id.* at 367-68.

93 *Id.* at 368 n.6.

94 *Id.* at 368-69.

95 *Id.* at 369. McCormick argues that phrasing the question as whether the prior, oral agreement was “collateral” to the integrated agreement provided further facial support for the issue being for the court: “The word [*collateral*], through long usage in other connections, had acquired a rich patina of technical legalism. Consequently, it would not occur to any one to suggest the submission to a jury of the question whether an alleged oral warranty by a landlord (at the time of making a written lease) that the drains of the house were in good order, was ‘collateral’ to the lease.” *Id.* at 371.

acknowledged that there might be truth to McCormick’s argument when the rule is applied in jury cases, he was quick to point out that the rule also applied in bench trials.⁹⁶ But this can be explained by a desire to have the rule protect against the possibility that judges will also be sympathetic to the economic underdog. In any event, “the pervasive attitude that judges provide the best protection against perjured testimony probably has been the reason for [the rule’s] continued viability.”⁹⁷

3. Merger (or Integration) Function

A third rationale for the parol evidence rule is that “the offered term is excluded because it has been superseded by the writing, that is, it was not intended to survive the writing—a theory of merger [or integration].”⁹⁸ This theory was pioneered by Professor James Bradley Thayer in the late nineteenth century⁹⁹ and later supported by his former student John Henry Wigmore in the early twentieth century.¹⁰⁰ “Viewed in this way, the rule simply affirms the primacy of a subsequent agreement over prior negotiations and even over prior agreements.”¹⁰¹ Professor Michael B. Metzger explained the merger rationale as follows:

Under this view, the parol evidence rule is nothing more than a particularized version of the basic

96 Corbin, *supra* note 11, at 609.

97 Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel’s Next Conquest?*, 36 VAND. L. REV. 1383, 1387 (1983).

98 PERILLO, *supra* note 4, at 109; *see also* McCormick, *supra* note 10, at 374 (referring to the rationale as “the theory of ‘integration’”).

99 JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 409 (1898). Thayer was a professor at Harvard Law School in the late nineteenth century, and his book *A Preliminary Treatise on Evidence at the Common Law* was a meticulous historical study on the roots of evidence. Newman, *supra* note 41, at 540.

100 WIGMORE, EVIDENCE c. 86 (2d ed. 1923). Wigmore was a professor at Northwestern University Law School in the late nineteenth and early twentieth centuries, and the leading evidence scholar in the first half of the twentieth century. Newman, *supra* note 41, at 588. He served as the dean of the law school for 28 years. *Id.*

101 FARNSWORTH, *supra* note 27, at 418. *See also* Pierce, *supra* note 42, at 469 (“The most logical rationale for the parol evidence rule is the ‘merger’ concept that a subsequent integrated writing of the parties will discharge all prior oral or written agreements.”).

contractual interpretation rule which stipulates that later final expressions of intent prevail over earlier tentative expressions of intent. . . .

Under this view the primary purpose of the rule is to prevent courts from interpreting earlier, tentative agreements or negotiations as part of an integrated writing that the parties actually intended as the final expression of their agreement. Thus, according to this view the rule's justification is based upon the finality of the parties' written agreement. Courts exclude oral or written terms extraneous to such a writing *not because doubt exists concerning the terms' reliability*, but rather because the terms are irrelevant, since the parties superseded them in the final integrated writing.

This last view of the rule—the rule as insurer that the final expression of intent governs—seems to be currently in vogue.¹⁰²

Importantly, Professor Corbin believed the merger rationale was the parol evidence rule's true basis:

Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties. No contract whether oral or written can be varied, contradicted, or discharged by an antecedent agreement. Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today. This, it is believed, is the substance of what has been unfortunately called the 'parol evidence rule.'¹⁰³

Later, Professor Farnsworth agreed that "[i]t is this purpose that the parol evidence rule ought to serve—giving legal effect to whatever intention the parties may have had to make their writing a complete expression of the agreement that they reached, to the exclusion of all

102 Metzger, *supra* note 97, at 1389-90 (footnotes omitted) (emphasis added).

103 Corbin, *supra* note 11, at 607.

prior negotiations, whether oral or written.”¹⁰⁴ He agreed with Corbin that the “the true basis of the parol evidence rule is something other than a desire to keep from the jury an inherently unreliable type of evidence.”¹⁰⁵

The merger rationale is supported by the fact that the parol evidence rule applies to prior *written* evidence in addition to prior oral evidence;¹⁰⁶ there is no special rule precluding the admissibility of an oral modification of a written contract;¹⁰⁷ and the rule is considered a rule of substantive law, not a rule of evidence.¹⁰⁸

If the merger theory is accepted, the parol evidence rule analysis becomes not much different from determining whether a subsequent oral agreement supersedes a prior oral or written agreement.¹⁰⁹ There remain, however, important differences. The parol evidence rule might still operate as an over-inclusive legal formality. For example, the use of the contradiction and natural-inclusion tests as a proxy for determining whether merger was intended results in a test different from that employed when deciding whether an oral agreement supersedes a prior written agreement, at least if an objective natural-inclusion standard is used. Of course, if a subjective standard is used any difference would seem to disappear, except that the issue remains one for the court, not the jury.

104 FARNSWORTH, *supra* note 27, at 418.

105 *Id.* at 417.

106 MURRAY, *supra* note 37, at 418; *see also* FARNSWORTH, *supra* note 27, at 416 (“That the rule is not limited to oral negotiations is clear. A host of cases have applied the so-called parol evidence rule to exclude such writings as letters, telegrams, memoranda, and preliminary drafts exchanged by the parties before execution of a final written agreement.”).

107 Corbin, *supra* note 11, at 609.

108 FARNSWORTH, *supra* note 27, at 417.

109 McCormick, *supra* note 10, at 374. *See also* MURRAY, *supra* note 37, at 417-18 (“Where the subsequent agreement is oral, the question is simply whether the parties intended the subsequent expression to control the earlier expression of agreement. Courts have no difficulty analyzing that question in the usual fashion of whether the subsequent agreement was so intended by the parties. They so do without mentioning the parol evidence rule. An oral subsequent agreement may constitute a final and complete expression of the parties’ intended agreement.”); RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b (AM. LAW INST. 1981) (“Indeed, the parties to an oral agreement may choose their words with such explicit precision and completeness that the same legal consequences follow as where there is a completely integrated agreement.”).

Whether the merger theory has been widely accepted is a matter of contention. Chancellor Murray maintained that Corbin's view has not been accepted by the courts or the *Restatement (Second) of Contracts*, though it influenced the *Restatement*.¹¹⁰ In contrast, Farnsworth argued that while "[t]he view that the rule is evidentiary in purpose once had currency . . . [n]ow the conceit that the parol evidence rule is rooted in the relative unreliability of testimony based on 'slippery memory,' in contrast with the 'certain truth' afforded by a writing, has fallen from favor."¹¹¹ Metzger, in the 1980s, likewise argued that the merger theory "seems to be currently in vogue."¹¹² Farnsworth acknowledged, however, that the evidentiary purpose "has not vanished entirely."¹¹³

4. Conclusion Regarding the Rationales for the Parol Evidence Rule

Although the merger theory appears to be in vogue,¹¹⁴ the evidentiary function and the gatekeeping function remain important justifications for the rule.¹¹⁵ First, as previously discussed, the merger theory has not been widely accepted by the courts, and would likely be a surprise to practicing lawyers. In fact, courts continue to explain the rule in terms of the unreliability of parol evidence.¹¹⁶ Second, most parol evidence rule issues involve whether the prior agreement was in fact made, not whether the parties intended the integrated agreement to supersede an acknowledged prior agreement.¹¹⁷ Third, although aspects of the parol evidence rule weaken the evidentiary and gatekeeping rationales, rarely are the substantive bases for rules implemented perfectly. Also, there is no reason to believe that the rule is not justified by multiple bases, and that some aspects of the rule can only be explained by reference to one of the bases. Merely because a particular aspect of the rule can only be explained by one basis does not inevitably lead to the conclusion that the other bases do not play a role with respect to other aspects of the rule. Accordingly, the

110 MURRAY, *supra* note 37, at 418.

111 FARNSWORTH, *supra* note 27, at 416.

112 Metzger, *supra* note 97, at 1389-90.

113 *Id.*

114 *Id.* at 1390.

115 *See id.* at 1391.

116 *Id.*

117 *Id.*

evidentiary and gatekeeping functions should be taken into account when applying the rule and its exceptions.

II. The Preexisting Duty Rule

The preexisting duty rule provides that the promise to perform, or the performance of, a legal duty that is neither doubtful nor the subject of honest dispute is not consideration.¹¹⁸ Thus, a promise to perform an existing contract duty is not consideration for a contract modification because the promisor is under a preexisting duty to perform as promised.¹¹⁹ Rather, “a modification to an existing contract must be supported by consideration independent from that which was given in order to form the original contract.”¹²⁰

The preexisting duty rule dates to the sixteenth century and was an outgrowth of the existing rule that a promise given in recognition of a past benefit was not consideration.¹²¹ For example, in *Greenleaf v. Barker* a creditor promised to pay 20 shillings if the debtor would pay the 5 pounds owed by him.¹²² The King’s Bench held that the creditor’s promise was unenforceable because the debtor in exchange promised no more than the performance of his preexisting legal duty.¹²³ After some subsequent cases with contrary holdings, the preexisting duty rule was confirmed in *Stilk v. Myrick* in 1809, in which a ship captain’s promise to pay additional wages to sailors after two members of the crew deserted was held unenforceable.¹²⁴

Two rationales have been provided for the preexisting duty rule. The first is formalistic, and “a logical consequence of the doctrine of consideration and its requirement of detriment”¹²⁵ Consideration for a promise has typically been described as something that is either

118 See RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW INST. 1981); PERILLO, *supra* note 4, at 162.

119 MURRAY, *supra* note 37, at 277.

120 Lokan & Assocs., Inc. v. Am. Beef Processing, LLC, 311 P.3d 1285, 1288 (Wash. Ct. App. 2013).

121 TEEVEN, *supra* note 72, at 69.

122 *Greenleaf v. Barker*, 78 Eng. Rep. 449 (K.B. 1590), reprinted in C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 403-04 (1949).

123 TEEVEN, *supra* note 72, at 69.

124 170 Eng. Rep. 1168 (1809). For a critical commentary on how the decision in *Stilk v. Myrick* became the “rule of *Stilk v. Myrick*,” see GRANT GILMORE, THE DEATH OF CONTRACT 22-28 (1974).

125 PERILLO, *supra* note 4, at 162.

a detriment to the promisee or a benefit to the promisor.¹²⁶ For example, the classic definition of consideration was provided by the English Exchequer Chamber in *Currie v. Misa* as follows: "A valuable consideration, in the sense of the law, may consist of either some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other."¹²⁷ Under the formalistic rationale, promising to perform, or the performance of, a preexisting duty might be a detriment to the promisor or a benefit to the promisee, but it is not a "legal detriment" or "legal benefit," i.e., a detriment or benefit "in the sense of the law."

The second rationale is practical: the preexisting duty rule polices against unfair pressure. Under this theory, without the preexisting duty rule

anyone who knows that the other party to the contract would face economic and other difficulties if the promisor refused to perform absent additional consideration would be able to exact an enforceable promise to pay additional consideration before performing his contractual duty. The pre-existing duty rule, therefore, provides an effective defense against such extorted promises.¹²⁸

And "[b]ecause of the likelihood that the promise was obtained by an express or implied threat to withhold performance of a legal duty, the promise does not have the presumptive social utility normally found in a bargain."¹²⁹ "And the lack of social utility in such bargains provides what modern justification there is for the rule that performance of a contractual duty is not consideration for [the] new promise."¹³⁰

For example, in *Alaska Packers Association v. Domenico*, salmon fishermen sued their former employer for additional wages promised by the employer.¹³¹ The fishermen, after arriving in Alaska, had refused to work unless paid more wages than agreed to between the

126 FARNSWORTH, *supra* note 27, at 47.

127 [1875] LR 10 Ex. 153, 162 (Eng.).

128 MURRAY, *supra* note 37, at 277.

129 RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. a (AM. LAW INST. 1981).

130 *Id.* cmt. c.

131 *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 100 (9th Cir. 1902).

parties.¹³² The employer, unable to obtain replacement workers on such short notice and in such a remote location, ultimately acceded to the fishermen’s demand and promised to pay the additional wages.¹³³ After the salmon season ended, the fishermen demanded the additional wages but the employer refused to pay.¹³⁴ The fishermen sued, but the court, not having to address the issue of duress, held that the promise was unenforceable because of the preexisting duty rule: “Consent to such a demand, under such circumstances, if given, was, in our opinion, without consideration, for the reason that it was based solely upon the [fishermen’s] agreement to render the exact services, and none other, that they were already under contract to render.”¹³⁵

This rationale treats the preexisting duty rule as just that, a “rule,” rather than a standard,¹³⁶ in that the rule “renders unnecessary any inquiry into the existence of such an invalidating cause, and denies enforcement to some promises which would otherwise be valid.”¹³⁷ Accordingly, it creates a conclusive presumption of extortion based simply on the likelihood of extortion. The pre-existing duty rule has therefore been criticized because it applies even when the modification is made in good faith and not because of wrongful pressure.¹³⁸

132 *Id.* at 100-01.

133 *Id.* at 101.

134 *Id.*

135 *Id.* at 102.

136 See *MindGames, Inc. v. W. Publ’g Co.*, 218 F.3d 652, 657 (7th Cir. 2000) (“A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard’s rationale. A speed limit is a rule; negligence is a standard.”); Kennedy, *supra* note 9, at 1687-94 (discussing the distinction between rules and standards).

137 RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. a (AM. LAW INST. 1981).

138 MURRAY, *supra* note 37, at 278-79; see also FARNSWORTH, *supra* note 27, at 270 (“Courts have become increasingly hostile to the pre-existing duty rule. . . . Although it serves in some instances to give relief to a promisor that has been subjected to overreaching, it serves in other instances to frustrate the expectations of a promisee that has fairly negotiated a modification. It does not, for example, distinguish between the situation in which the contractor’s demand for more money is motivated merely by opportunism and greed and the situation in which the demand is prompted by the discovery of circumstances or the occurrence of events that makes the contractor’s performance much more burdensome.”); RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt.

For example, in *Levine v. Blumenthal*, the plaintiff leased to the defendants premises for the operation of a retail clothing store.¹³⁹ The defendants alleged that during the lease term they informed the plaintiff that it was impossible for them to pay the increased rent required for the second year of the lease term because their business was suffering, and the plaintiff agreed to not increase it until their business improved.¹⁴⁰ When the lease term expired without the defendants exercising an option to renew, the plaintiff sued the defendants for the additional rent that had not been paid.¹⁴¹ The court held that the plaintiff's promise to accept reduced rent, even if made, was unenforceable because it lacked consideration:

It is elementary that the subsequent agreement, to impose the obligation of a contract, must rest upon a new and independent consideration. . . . The principle is firmly imbedded in our jurisprudence that a promise to do what the promisor is already legally bound to do is an unreal consideration. It has been criticized, at least in some of its special applications, as 'mediaeval' and wholly artificial—one that operates to defeat the 'reasonable bargains of business men.' But these strictures are not well grounded. They reject the basic principle that a consideration, to support a contract, consists either of a benefit to the promisor or a detriment to the promisee—a doctrine that has always been fundamental in our conception of consideration. It is a principle, almost universally accepted, that an act or forbearance required by a legal duty owing to the promisor that is neither doubtful nor the subject of honest and reasonable dispute is not a sufficient consideration. . . .

. . . .

c (AM. LAW INST. 1981) ("[T]he rule has not been limited to cases where there was a possibility of unfair pressure, and it has [therefore] been much criticized as resting on scholastic logic.").

139 *Levine v. Blumenthal*, 186 A. 457, 457 (N.J. 1936), *aff'd*, 189 A. 54 (N.J. Ct. Err. & App. 1937).

140 *Id.* at 457.

141 *Id.* at 457-58.

So tested, the secondary agreement at issue is not supported by a valid consideration; and it therefore created no legal obligation. General economic adversity, however disastrous it may be in its individual consequences, is never a warrant for judicial abrogation of this primary principle of the law of contracts.¹⁴²

Thus, the absence of wrongful pressure was irrelevant; the lack of new consideration meant the modification was not binding.

As a result of criticism, the preexisting duty rule has been subject to a variety of exceptions. For example, under Article 2 of the U.C.C. a modification involving a transaction in goods does not require consideration to be enforceable.¹⁴³ Rather, the modification need only meet the test of good faith.¹⁴⁴ Thus, the question of extortion is addressed directly, rather than through a prophylactic rule such as the preexisting duty rule. Also, the preexisting duty rule does not apply if the legal duty is either doubtful or the subject of honest dispute.¹⁴⁵ Further, if the asserted preexisting duty is voidable or unenforceable the person is not considered under a duty to perform.¹⁴⁶ Thus, if the parties enter into a voidable contract, a subsequent modification that is favorable to just one party, and that is not voidable, is binding despite the preexisting duty rule.¹⁴⁷ Similarly, if an oral agreement is unenforceable under the Statute of Frauds, a subsequent written modification that is favorable to just one party is binding despite the preexisting duty rule. Detrimental reliance on a modification that lacks consideration could also make the modification binding under the doctrine of promissory estoppel.¹⁴⁸ Further, under the so-called unanticipated-circumstances doctrine, “[a] promise modifying a duty under a contract not fully performed on either side is binding . . . if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made”¹⁴⁹

142 *Id.* at 458-59.

143 U.C.C. § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM’N 2012).

144 *Id.* cmt. 2.

145 RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW INST. 1981).

146 *Id.* cmt. e.

147 *Id.* cmt. e, illus. 13.

148 *See id.* § 90(1).

149 *Id.* § 89. If the court in *Levine v. Blumenthal*, 186 A. 457, 457 (N.J. 1936), *aff’d*, 189 A. 54 (N.J. Ct. Err. & App. 1937), had applied the unanticipated-circumstances doctrine, the outcome would likely have been different.

III. The Clash of Titans: The Parol Evidence Rule vs. the Preexisting Duty Rule

There are two different fact patterns in which a parol evidence rule issue arises. The first is when the parties' only manifestation of assent to an agreement is upon assent to the integrated agreement. For example, the parties might agree at the outset of negotiations that a binding agreement will not exist unless and until their agreement is reduced to a written document signed by both parties. In such a situation, only the parol evidence rule is implicated. The preexisting duty rule is not implicated because, lacking a prior agreement, there was no preexisting duty at the time the parties manifested assent to the integrated agreement (at least not stemming from a prior agreement).

The second is when the parties manifest assent to a binding agreement (oral or written) and thereafter confirm the agreement in an integrated agreement, but the integrated agreement is not accurate in all respects. In this situation, the *Restatement (Second) of Contracts* treats the confirmation as an offer of substituted terms and the offeree's manifestation of assent to the written confirmation as an acceptance of those terms.¹⁵⁰ In this situation, not only is the parol evidence rule implicated, but the preexisting duty rule as well, provided that one of the parties alleges that the integrated agreement did not include any new consideration.

A difficulty is distinguishing between these two situations, particularly when the alleged prior agreement is oral. Often, it will be unclear whether preliminary, oral negotiations rose to the level of an oral contract, or whether the first manifestation of assent was when the agreement was reduced to written form. The difficulty might arise either from conflicting testimony or from determining, even if the facts are undisputed, when the parties' negotiations rose from preliminary negotiations to an oral contract.

In general, it will not be difficult for a party to assert facts that, if believed, could lead a reasonable fact-finder to conclude that an oral agreement was formed prior to the integrated agreement. And because the parol evidence rule only applies if the integrated agreement is binding,¹⁵¹ and thus does not prevent the use of extrinsic evidence

150 RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b, illus. 2 (AM. LAW INST. 1981).

151 *Id.* §§ 213(1)–(2).

to establish that the integrated agreement lacks consideration, the parol evidence rule would not apply when the integrated agreement is alleged to be a one-sided modification of a prior oral agreement. In other words, the consideration exception provides that, in general, the preexisting duty rule prevails over the parol evidence rule in this clash of titans.

Accordingly, if a plaintiff sues for the breach of a promise that was not included in an integrated agreement to which the parties subsequently manifested assent, the parol evidence rule would not apply if the plaintiff alleges that the parties formed an enforceable oral contract prior to the integrated agreement and that the only difference between the two is the omission from the integrated agreement of the promise sued upon. Because the court, when applying the parol evidence rule, must assume the existence of the prior promise or agreement, the court cannot apply the parol evidence rule since, as a result of the assumption, the integrated agreement is considered non-binding under the preexisting duty rule. The proponent of the extrinsic agreement avoids application of the contradiction test and the natural-inclusion test and the agreement’s existence is submitted to the fact-finder for determination. Of course, “slight variations of circumstance are commonly held to take a case out of the [preexisting duty] rule,”¹⁵² but the new performance must in fact be bargained for.¹⁵³ Thus, at least in the case of a prior oral agreement, the defendant could argue that it manifested assent to the integrated agreement in exchange for the modification (an exchange of written evidence of the deal for the modification), but evidence of an actual bargain of this nature would be necessary.

The *Restatement (First) of Contracts* provided the following illustration of the consideration exception to the parol evidence rule based on the preexisting duty rule:

A and B make an integrated agreement by which A promises to complete an unfinished building according to certain plans and specifications, and B promises to pay A \$2000 for so doing. It may be shown that by a contract made previously A had promised to erect and complete the building for \$10,000; that he had not fully completed it though paid the whole price.

152 *Id.* § 73 cmt. c.

153 *Id.* cmt. a.

This evidence is admissible because it establishes that there is not sufficient consideration for the new agreement, since A is promising no more than he is bound by his original contract to perform.¹⁵⁴

This illustration was used as support in *Guaranty Trust Co. of N.Y. v. Williamsport Wire Rope Co.*¹⁵⁵ In *Williamsport Wire* the trustees of a corporation in receivership (Lycoming Trust Co.) sold what they believed were the corporation's only remaining assets for \$30 at an auction on September 17, 1952.¹⁵⁶ Around ten days later the trustees signed a general assignment in the buyer's favor covering all the corporation's remaining claims.¹⁵⁷

Six years earlier, stockholders, former stockholders, and former bondholders of the Williamsport Wire Rope Co. had sued to set aside the sale of Williamsport's assets to Bethlehem Steel Co.¹⁵⁸ In January 1952 a special master had recommended that the sale be set aside and that Bethlehem restore to former stockholders whatever stock had been sold to Bethlehem after July 1936.¹⁵⁹ In December 1936 Lycoming had sold shares it owned in Williamsport Wire Rope Co. to Bethlehem, and when the court adopted the special master's report on October 14, 1952, Bethlehem paid \$6 million for distribution to the former Williamsport stockholders (including Lycoming).¹⁶⁰ Thus, Lycoming's assets became unexpectedly greater than either the liquidating trustees or the buyer had believed at the time of the auction and the general assignment.¹⁶¹

The trustees and the buyer made conflicting claims to \$300,000 of the total amount deposited by Bethlehem for former stockholders.¹⁶² The special master admitted over objection parol evidence to show that the general assignment was not intended to include the claim

154 RESTATEMENT (FIRST) OF CONTRACTS § 238 cmt. a, illus. 2 (1932).

155 222 F.2d 416 (3d Cir. 1955).

156 *Id.* at 418.

157 *Id.*

158 *Id.* at 417.

159 *Id.* at 419; *Guar. Trust Co. of N.Y. v. Williamsport Wire Rope Co.*, 107 F. Supp. 759, 760 (M.D. Pa.), *vacated*, 107 F. Supp. 762 (M.D. Pa. 1952).

160 *Williamsport Wire*, 222 F.2d at 419.

161 *Id.* at 418.

162 *Id.* at 419.

against Bethlehem.¹⁶³ The special master recommended that the trustees prevail, and the district court ruled in their favor.¹⁶⁴

On appeal, the issue was whether it was error to admit such parol evidence.¹⁶⁵ The court held that the parol evidence was admissible, among other reasons, to show that if the written assignment purported to assign more than had been previously agreed upon, the written assignment lacked consideration:

Parol evidence is also admissible to establish the failure of consideration. Restatement, Contracts, Sec. 238, Illustration 2 (1938). Here the appellant had already agreed to pay \$30 for the assignment and transfer of the items on the list in the sheriff’s office. The sale was completed on September 17, 1952.

‘A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner.’ Pa.Stat.Ann. tit. 69, § 161 (1931).

Only afterward, possibly more than ten days afterward, was the idea of a general assignment put forth by appellant as something it wanted in addition to the rubber stamp endorsements. Since \$30 constituted the consideration only for the items on the list referred to in the advertisement, the general assignment, if it did attempt to give appellant more than what was on the list, was without consideration and must accordingly fall.¹⁶⁶

Thereafter, the *Restatement (Second) of Contracts*, published in 1981, included three illustrations involving the parol evidence rule and the preexisting duty rule. The first is notable because it involved a prior *oral* agreement that was not discharged because the subsequent integrated agreement was a modification without consideration, showing that the consideration exception applies even

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 420-21.

when the parol evidence rule's evidentiary function is implicated.¹⁶⁷ The second illustration involved an integrated modification induced by an agreement not incorporated into the integration, showing that if the parol evidence rule discharges the inducing agreement thereby causing the modification to be a non-binding modification due to lack of consideration (the new consideration having been the inducing agreement), the integration is non-binding even though the prior agreement would have been part of the integrated agreement (thereby supplying consideration) had it not been discharged by the parol evidence rule.¹⁶⁸ The third illustration was based on the *Restatement (First)*'s illustration.¹⁶⁹ The comment also stated that "[t]he circumstance may . . . show an agreement to discharge a prior agreement without regard to whether the integrated agreement is binding, and such an agreement may be effective."¹⁷⁰

A recent example of a court relying on the *Restatement (Second)* and using the consideration exception to circumvent the parol evidence rule is *Audubon Indemnity Co. v. Custom Site-Prep, Inc.*¹⁷¹ In *Audubon* the issue was whether an indemnification agreement in a written subcontract agreement, under which the subcontractor promised to indemnify the general contractor, was binding.¹⁷² One of the subcontractor's defenses to the indemnification agreement was that it lacked consideration.¹⁷³ Consistent with their past practices, the subcontractor and the general contractor had operated on the project pursuant to an oral agreement and did not have a written contract until after the subcontractor performed the work on the

167 RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. d, illus. 5 (AM. LAW INST. 1981).

168 *Id.* cmt. d, illus. 6. The illustration was in support of the following statements in the comment: "[A]n integrated agreement may be effective to render inoperative an oral term which would have been part of the agreement if it had not been integrated. The integrated agreement may then be without consideration, even though the inoperative term would have furnished consideration." *Id.* cmt. d.

169 *Id.* § 214 cmt. c, illus. 5. *See also id.* § 214 cmt. c, reporter's note ("Illustrations 5 and 6 are based on Illustrations 2 and 3 to former § 238.").

170 *Id.* § 213 cmt. d.

171 358 S.W.3d 309 (Tex. Ct. App. 2011).

172 *Id.* at 312.

173 *Id.* at 313.

project.¹⁷⁴ The general contractor and the subcontractor had not discussed indemnification at the time of the oral contract.¹⁷⁵

After the work was completed, the subcontractor sent an invoice to the general contractor and the general contractor cut a check for the amount invoiced.¹⁷⁶ But before tendering the check, the general contractor signed and sent a written “subcontract agreement” to the subcontractor under which the subcontractor promised to perform the work (already performed), and also promised to indemnify the general contractor for any claims based on the subcontractor’s work.¹⁷⁷ The written agreement included a merger clause.¹⁷⁸ The parties testified that the general contractor typically required the subcontractor to sign a written, form subcontract agreement before the general contractor paid for the work and that they were typically signed after the work was completed.¹⁷⁹ The subcontractor signed the written agreement.¹⁸⁰

Thereafter, the project owner sued the general contractor based on the subcontractor’s negligence, and the trial court ordered the dispute to arbitration.¹⁸¹ The arbitrator found in favor of the owner, and the general contractor’s insurance carrier paid the award.¹⁸² The insurance carrier then sued the subcontractor for contractual indemnity under the subcontract agreement’s indemnification provision.¹⁸³

The subcontractor argued that the indemnification agreement was unenforceable because it lacked consideration, the subcontractor having fully performed at the time it was signed and the parties never having discussed indemnification at the time of the oral contract.¹⁸⁴ In response, the insurance carrier argued that the subcontractor’s lack of consideration defense was barred by the parol evidence rule.¹⁸⁵ If the parol evidence rule applied, the insurance carrier would

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 314.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.* at 315, 318.

185 *Id.* at 315.

prevail because a lack of an indemnification agreement in the oral agreement would obviously conflict with the integrated agreement's indemnification provision.¹⁸⁶ The insurance carrier also argued that signing an indemnification agreement was an implied term of the oral contract.¹⁸⁷

The appellate court rejected the insurance carrier's parol evidence rule argument, holding that a court may consider parol evidence to show a lack of consideration, citing to, among other authority, the *Restatement (Second) of Contracts*.¹⁸⁸ The court also held that parol evidence was admissible to determine whether the integrated agreement was the only agreement (simply memorializing the prior oral agreement) or whether it was a modification of a prior oral contract thereby needing independent consideration.¹⁸⁹ The court stated that "[i]f the terms of a subsequent written contract differ from what the parties intended in their original oral agreement—i.e., if the written contract modified the agreed upon terms—the written contract requires new consideration."¹⁹⁰

Thus, as shown by *Williamsport Wire* and *Audubon Indemnity*, the parol evidence rule can be circumvented by an allegation that the integrated agreement was a one-sided modification of a prior oral contract. Having made such an allegation, the consideration exception applies, and the issue proceeds past the parol evidence rule and goes directly to the fact-finder to determine whether the prior oral contract was made and, if so, its scope. If the fact-finder concludes that the prior contract existed and that the integrated agreement was a one-sided modification, the integrated agreement is unenforceable under the preexisting duty rule.

It bears noting, however, that the consideration exception is inapplicable in a variety of situations. For example, if the agreement is considered a transaction in goods,¹⁹¹ the preexisting duty rule and the consideration exception could not be used to circumvent the parol evidence rule because under the U.C.C. consideration is not

186 See RESTATEMENT (SECOND) OF CONTRACTS § 213(1) (AM. LAW INST. 1981) ("A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.").

187 *Audubon*, 358 S.W. 3d at 316.

188 *Id.*

189 *Id.* at 316-17.

190 *Id.*

191 See U.C.C. § 2-102 ("Unless the context otherwise requires, this Article applies to transactions in goods . . .") (AM. LAW INST. & UNIF. LAW COMM'N 2012).

necessary for a contract modification.¹⁹² Thus, because the U.C.C. retains the parol evidence rule,¹⁹³ yet discards the preexisting duty rule (at least with respect to contract modifications),¹⁹⁴ when the agreement is a transaction in goods the parol evidence rule trumps the preexisting duty rule.

Also, as previously discussed, if the prior agreement is voidable or unenforceable, the preexisting duty rule does not apply and the parol evidence rule trumps the preexisting duty rule. Thus, if the party who would ordinarily invoke the consideration exception happened to have contracted with a party who had the power to void the original contract (say, due to infancy), that party could no longer invoke the exception. The consideration exception would also not apply to oral agreements within the Statute of Frauds. For example, assume that in the well-known case of *Mitchill v. Lath* the buyer and seller had formed an oral contract for the sale of the parcel of land and the removal of the offensive icehouse before assenting to the integrated agreement.¹⁹⁵ This oral agreement would be unenforceable under the Statute of Frauds' land-contract provision.¹⁹⁶ Even if the subsequent integrated agreement omitted the promise to remove the icehouse, with all other consideration remaining the same, the integrated agreement would be binding because the prior oral agreement was unenforceable. Thus, the consideration exception to the parol evidence rule would not apply.

While such results have the effect of reinforcing the parol evidence rule by narrowing the consideration exception, there is no logical connection between the cases in which it is narrowed and the rule's purposes. Using the consideration exception for cases involving the preexisting duty rule (as opposed to say, showing that the recited consideration is a sham) results in a hodgepodge of disparate results driven by the finer points of the preexisting duty rule, rather than by the parol evidence rule's evidentiary and gatekeeping purposes.

Interestingly, however, most courts and attorneys are likely unaware of this parol evidence rule loophole. For example, in *Petereit v. S.B. Thomas, Inc.*, the plaintiffs, who were distributors, sued the defendant manufacturer for breach of an oral contract under which

192 *Id.* § 2-209(1).

193 *Id.* § 2-202.

194 *Id.* § 2-209(1).

195 *Mitchill v. Lath*, 160 N.E. 646, 646 (N.Y. 1928).

196 RESTATEMENT (SECOND) OF CONTRACTS § 125(1) (AM. LAW INST. 1981).

the defendant promised not to realign the plaintiffs' sales territories.¹⁹⁷ The district court, acting as fact-finder, found that the parties had formed an oral contract when, at a meeting, the defendant's representative laid out the terms of the proposed business relationship and the distributors then began delivering products within days of the meeting (and in some instances even before).¹⁹⁸ Consistent with the defendant's business practice, it sent letters to some of the plaintiffs shortly after the meeting or the commencement of the distributorship to confirm the terms previously agreed upon.¹⁹⁹ The letters, contrary to the oral agreement, noted that the distributor's territory was not permanently assigned.²⁰⁰ The letters requested the distributor to contact the defendant if there were any questions or if the letter was unclear.²⁰¹

On appeal, one of the issues was whether, under the parol evidence rule, the written confirmations were an integrated agreement that discharged the defendant's prior promise in the oral contract that it would not realign the plaintiffs' territories.²⁰² The appellate court acknowledged that "[s]ome, if not all, plaintiffs began their business relationship with defendant at a meeting with a [defendant] representative."²⁰³ The court noted that at a typical meeting the defendant made an offer, and "[i]f the distributor accepted, nothing else needed to be done to have an enforceable contract."²⁰⁴ Because the oral contracts were of an indefinite duration, the Statute of Frauds did not render them unenforceable under the Statute's one-year provision.²⁰⁵ The court, however, held that the written confirmations, sent within a few days of the meeting or the effective date of the distributorship, were integrated agreements to which the plaintiffs manifested assent by not questioning the terms and by performing thereafter for many years.²⁰⁶ As integrated agreements, the letters therefore discharged any prior inconsistent terms in the oral contract,

197 *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1172-73 (2d Cir. 1995).

198 *Id.* at 1173.

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.* at 1177.

203 *Id.* at 1176.

204 *Id.*

205 *Id.*

206 *Id.* at 1176-78.

thereby discharging the prior promise that the sales territories would not be altered.²⁰⁷

In reaching this conclusion, the court relied on the parol evidence rule’s evidentiary function, repeatedly referring to the preference for written agreements over prior *oral* agreements when discussing the rule. For example, the court stated that “[i]t is a cornerstone of contract law that written agreements hold a special place in the eyes of the law” and that evidence of a prior “unwritten” agreement should not have any effect on an integrated agreement.²⁰⁸ The court noted that “to permit *oral testimony*, or prior or contemporaneous conversations, or circumstances, or usages [etc.], in order to . . . contradict what is written would be dangerous and unjust in the extreme.”²⁰⁹ The court stated that permitting oral testimony in this case to contradict the written confirmations could lead to injustice:

Were we to hold otherwise, the recipient of a writing confirming the terms of a contemporaneous oral agreement could escape an unfavorable written provision that the recipient believes differs from the oral understanding simply by silence. The recipient could perform under the agreement and years later renounce the written terms of the contract to the surprise of the offeror. Such a rule would nullify the benefits of reducing an agreement to written form, and is one we decline to make.²¹⁰

The court, however, never considered the parol evidence rule’s consideration exception, and whether the written confirmation, although an integrated agreement to which the parties manifested assent, was not “binding” under the preexisting duty rule. This is particularly surprising because the court treated the written confirmation as an offer and acceptance of substituted terms:

207 *Id.* at 1179.

208 *Id.* at 1177.

209 *Id.* (quoting *TIE Communications, Inc. v. Kopp*, 589 A.2d 329, 333 (Conn. 1991) (quoting in turn *Glendale Woolen Co. v. The Protection Ins. Co.*, 21 Conn. 19, 37 (1851) (emphasis added) (alteration in original))).

210 *Id.* at 1178.

The logical outcome of the [parol evidence] rule is that when there is an oral agreement that one party reduces to a writing, the other party's assent to the writing, by words or conduct, even though a term of the writing differs from the oral understanding, is an acceptance of the substituted term

To the extent the writing differed from any oral understanding of the parties, it was a substitution of new terms.²¹¹

And although there was a dissenting opinion, it was based solely on the belief that the district court had made a factual finding that the plaintiffs had not manifested assent to the confirmation letters, not that the letters—even if integrated agreements—lacked consideration.²¹²

IV. Closing the Loophole

When the parties manifest assent to an integrated agreement, and one of the parties disputes the existence or terms of the alleged prior agreement, permitting the proponent of the prior agreement to invoke the consideration exception based on the preexisting duty rule is a parol evidence rule loophole.²¹³ In such a situation, the consideration exception can be used as a means of escaping the parol evidence rule's evidentiary and gatekeeping functions. To avoid frustrating these purposes, the loophole should be closed.

Of course, applying the consideration exception in such a situation is consistent with the parol evidence rule's merger function. If the parol evidence rule were based solely on whether the parties

211 *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b, illus. 2 (AM. LAW INST. 1981)).

212 *Id.* at 1187-88 (Kearse, J., dissenting). The court did not discuss whether the contract was governed by Article 2 of the U.C.C. If the U.C.C. governed, then the consideration exception would not apply because the U.C.C. does not require consideration for an effective modification. *See* U.C.C. § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

213 A *loophole* has been defined as "a means of escape; *esp* : an ambiguity or omission in the text through which the intent of a statute, contract, or obligation may be evaded." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 734 (11th ed. 2003).

intended the integrated agreement to supersede the prior agreement, such an intention is irrelevant if the integrated agreement is not binding under the preexisting duty rule. The preexisting duty rule is designed to prevent an agreement from being binding even when the parties intended it to supersede a prior agreement. Thus, under the merger rationale the preexisting duty rule would, and should, trump the parol evidence rule. The merger theorists would have no cause to complain, except to the extent they disliked the preexisting duty rule, another matter entirely.

But the use of the consideration exception in a situation involving the preexisting duty rule is inconsistent with the parol evidence rule's evidentiary and gatekeeping functions. Under the evidentiary theory, the parol evidence rule is not designed to only protect against the enforcement of preliminary agreements that the parties intended to be superseded by the integrated agreement; it is designed to police against fraudulent and mistaken claims of a prior agreement. By failing to apply the parol evidence rule's consistency test and natural-inclusion test in these situations, the rule's evidentiary function of form is lost. Similarly, the rule's gatekeeping function is lost, submitting the issue directly to the jury.

As discussed in Part I, the evidentiary and gatekeeping functions remain important justifications for the parol evidence rule. Accordingly, it is necessary to ensure that these functions are not frustrated by the use of the consideration exception in this fashion. At the same time, however, it is necessary to ensure that the preexisting duty rule's purpose of policing against extorted modifications will not be frustrated. Essentially, there is a conflict between two over-inclusive rules, each of which should be accommodated to avoid frustrating their purposes. The question, of course, is how best to accommodate their competing purposes when the rules clash.

A possible solution would be to simply reject the consideration exception for situations involving the preexisting duty rule, and to therefore apply the parol evidence rule. If the prior agreement contradicts the integrated agreement or it would have been natural to include the alleged prior term within the integrated agreement, it is discharged, even if the integrated agreement is not supported by consideration under the preexisting duty rule. This would fully protect the parol evidence rule's evidentiary and gatekeeping functions.

It would do so, however, at the expense of the preexisting duty rule's policing function. In many cases there will be no dispute that a prior agreement was formed, and the only issue is whether the

integrated agreement was intended to supersede terms in the prior agreement that were not incorporated into the integrated agreement. In such a situation, the parol evidence rule's evidentiary function plays a more limited role, and the merger function is more strongly implicated. As previously discussed, even when the merger function is implicated, the parol evidence rule being cast as a legal formality still results in an over-inclusive test to determine intent to merge. Thus, simply because the merger function is more strongly implicated than the evidentiary function does not mean that the parol evidence rule is simply relegated to directly determining the parties' intentions.

But when the rule's merger function is more strongly implicated than its evidentiary function, the preexisting duty rule's countervailing extortion-policing function should be accounted for, because the merger function is in fact designed to implement the parties' intentions, even if in an over-inclusive way. And as previously discussed, the preexisting duty rule is designed to render an agreement unenforceable despite the parties' intentions that it be enforceable.²¹⁴ Accordingly, simply rejecting the consideration exception in cases involving the preexisting duty rule should be rejected.

This discussion, however, points the way to a solution. The solution is to be found in identifying the nature of the parol evidence rule dispute in a particular case: Are the parties disputing the existence of the prior agreement or its terms, or are they simply disputing whether the parties intended the prior agreement to be superseded by the integrated agreement? In other words, is the parol evidence rule's evidentiary function implicated or its merger function?

If there is a dispute about the existence of the prior agreement or its terms, a possible accommodation could be to require the plaintiff to prove the prior agreement by clear and convincing evidence, rather than by a preponderance of the evidence.²¹⁵ As noted by Professor Eric Posner, "courts sometimes impose higher evidentiary requirements . . . in order to maintain the spirit of the [parol evidence] rule."²¹⁶ For

214 See *infra* Part II.

215 See *Parker v. Parker*, 238 A.2d 57, 61 (R.I. 1968) ("To verbalize the distinction between the differing degrees more precisely, proof by a 'preponderance of the evidence' means that a jury must believe that the facts asserted by the proponent are more probably true than false; proof 'beyond a reasonable doubt' means the facts asserted by the prosecution are almost certainly true; and proof by 'clear and convincing evidence' means that the jury must believe that the truth of the facts asserted by the proponent is highly probable.").

216 POSNER, *supra* note 61, at 149.

example, a party seeking to reform an integrated agreement because of a mistake in integration must establish the mistake by clear-and-convincing evidence so as not to frustrate the parol evidence rule’s purpose.²¹⁷ Similarly, for the Statute of Frauds’ multiple-documents exception to apply in the absence of explicit incorporation by reference, evidence of the connection between the documents must be clear and convincing.²¹⁸ Courts have also held that a party who relies on a lost document to satisfy the Statute of Frauds must prove the document’s contents by clear-and-convincing evidence.²¹⁹ And a similar recommendation for the parol evidence rule itself was proposed by Dean W. G. Hale, who argued that the rule should create a rebuttable presumption that an integrated agreement is complete, which could only be overcome by clear-and-convincing evidence.²²⁰

But under such a solution the fact-finder would likely need to be the jury. As previously discussed, to maintain the legitimacy of the parol evidence rule as an issue of law for the court, the court should not make factual findings. And if the jury, rather than the court, is the fact-finder, the parol evidence rule’s gatekeeping function will be frustrated.

A solution that would preserve the parol evidence rule’s evidentiary *and* gatekeeping functions would be to have the parol evidence rule apply when the evidentiary function is implicated but not when the merger function is implicated. A party, however, should not be permitted to invoke the parol evidence rule by simply denying the existence of the prior agreement. Rather, some minimal showing should be necessary to ensure that the parol evidence rule’s evidentiary function is truly implicated. As previously discussed, the court should (for the most part) not act as the fact-finder when resolving a parol evidence rule issue. Accordingly, the required showing by the defendant should not involve the court weighing the evidence and acting as a finder of fact.

The solution is to invoke the summary-judgment standard and determine whether there exists a genuine dispute of material

217 RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. c. (AM. LAW INST. 1981).

218 *Id.* § 132 cmt. a.

219 *See, e.g.,* Weinsier v. Soffer, 358 So. 2d 61, 63 (Fla. Dist. Ct. App. 1978) (holding that proof of the contents of a lost document must be “clear, strong and unequivocal”).

220 W. G. Hale, *The Parol Evidence Rule*, 4 OR. L. REV. 91, 122 (1925).

fact.²²¹ The parol evidence rule's evidentiary function would thus only be implicated if the party seeking to invoke the parol evidence rule introduces sufficient evidence to enable a reasonable fact-finder to conclude that the prior agreement, as alleged by the opposing party, did not exist. Because the parol evidence rule is considered a substantive rule, and not a rule of evidence,²²² the court would apply the summary-judgment standard of the state whose law governs the dispute.²²³ The burden of establishing that there is a genuine dispute regarding the prior agreement's existence should be placed on the party invoking the parol evidence rule because it is seeking to displace the consideration exception.

If the party invoking the parol evidence rule introduces admissible evidence creating a genuine dispute regarding whether the alleged prior agreement existed or regarding its terms, a presumption should arise that the parol evidence rule will apply, so that the rule's evidentiary and gatekeeping functions are preserved. If, however, the party invoking the rule does not create a genuine dispute, and only the merger function of the parol evidence rule is implicated, the consideration exception should apply (because the issue of intent to supersede does not trump the preexisting duty rule) and the undisputed prior agreement would be admissible to render the integrated agreement unenforceable under the preexisting duty rule.

But having the accommodation hinge solely on whether there is a genuine dispute of fact regarding the existence of the prior agreement might undercut the preexisting duty rule's function of policing for extortion. For example, the parol evidence rule might discharge a prior agreement and thus enforce the subsequent integrated agreement even though the subsequent agreement might have been a modification without consideration, which ordinarily raises the suspicion of extortion. Accordingly, further refinement

221 See, e.g., FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

222 RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a (AM. LAW INST. 1981).

223 State summary-judgment standards often differ from the federal standard. See JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 769 (2004) (discussing the differences).

is necessary to not sacrifice the preexisting duty rule’s extortion-policing function.

The appropriate refinement is to provide the proponent of the prior agreement with the opportunity to create a genuine dispute as to whether she manifested assent to the integrated agreement as a result of the other party’s wrongful refusal to perform the alleged prior agreement. If the proponent carries this burden, then the parol evidence rule would not apply and the fact-finder would decide whether the prior agreement existed, what its terms were (so as to determine if there was consideration for the integrated agreement), and whether the parties intended the subsequent integrated agreement to supersede the prior agreement. This refinement accommodates the preexisting duty rule’s extortion-policing function.

To show how this proposed solution works, we will return to the hypothetical involving the building and painting of the toolshed discussed in the Introduction.²²⁴ The plaintiff sues a defendant for breach of the alleged prior agreement to paint the toolshed, a promise that was not incorporated into the integrated agreement, which only included a promise to build the toolshed. In response, the defendant argues that the prior agreement was discharged under the parol evidence rule because it would have been natural to include such a promise in the integrated agreement. In reply, the plaintiff alleges that the parties formed an oral agreement prior to the integrated agreement, and that the only difference between the alleged prior agreement and the integrated agreement is that the defendant’s promise to paint the toolshed was not included in the integrated agreement. The plaintiff argues that the integrated agreement was therefore an attempted modification that lacked consideration under the preexisting duty rule and is thus not binding.

Under existing law, because the court must assume the existence of the prior agreement as alleged by the plaintiff, and because of the consideration exception, the parol evidence rule would not apply (no “binding” integrated agreement) and the issue of the agreement’s existence and its terms would be submitted to the fact-finder for determination. Although the fact-finder might conclude, under a preponderance-of-the-evidence standard, that the prior agreement was not formed, or, if formed, that the integrated agreement included modifications favorable to both parties and was

224 See *infra* Introduction.

intended to supersede the prior agreement (leading to a conclusion that the integrated agreement is a binding modification), the benefits of the parol evidence rule's evidentiary and gatekeeping functions are frustrated.

Under this Article's proposed approach, if the defendant introduced admissible evidence creating a genuine dispute of fact as to whether the prior agreement existed as alleged—such as by submitting an affidavit denying the alleged promise or so testifying in court—a presumption would arise that the parol evidence rule will apply, so that its evidentiary and gatekeeping functions are not frustrated. For example, the defendant might testify that he never promised the plaintiff that he would paint the toolshed. The plaintiff would then be given an opportunity to introduce admissible evidence creating a genuine issue of material fact as to whether the defendant threatened not to perform the original agreement unless the plaintiff agreed to the modification. If the plaintiff does so, then the parol evidence rule would not apply. For example, the plaintiff might testify that the defendant threatened to not build the toolshed unless she signed the integrated agreement.

Adopting this Article's solution would not threaten the parol evidence rule's general exception for admitting extrinsic evidence to support invalidating causes, such as illegality, fraud, duress, mistake, or sham consideration.²²⁵ An integrated agreement is not designed to render evidence of such invalidating causes inadmissible, whereas the very purpose of an integrated agreement is to render inadmissible evidence of a prior agreement. Thus, the proposed solution is appropriately limited to the situation involving the consideration exception and the preexisting duty rule.

Let us now return to the facts of *Williamsport Wire*, *Audubon Indemnity*, and *Petereit* to analyze how the analysis would proceed under the facts of those cases. In *Williamsport Wire* there was no genuine dispute as to the scope of the parties' prior agreement; it was undisputed that the prior agreement did not include a claim for stock sold to Bethlehem.²²⁶ Accordingly, the parol evidence rule's evidentiary function was not implicated, and it would be appropriate to apply the consideration exception and to admit the prior agreement.

225 RESTATEMENT (SECOND) OF CONTRACTS § 214(d) (AM. LAW INST. 1981).

226 *Guar. Trust Co. of N.Y. v. Williamsport Wire Rope Co.*, 222 F.2d 416, 419-20 (3d Cir. 1955).

In *Audubon Indemnity*, however, there was a genuine dispute as to whether the parties had agreed, even if impliedly, as part of their oral agreement as to whether an indemnification agreement would be part of the deal. Accordingly, the insurance carrier would be able to create a genuine dispute regarding the terms of the prior oral agreement. Thus, a presumption would arise that the parol evidence rule applies. The subcontractor did not argue that it manifested assent to the integrated agreement as a result of wrongful pressure. Although the parties agreed that the general contractor typically required the subcontractor to sign a written agreement before being paid,²²⁷ there was no allegation that the general contractor pressured the subcontractor to sign the written agreement, the subcontractor alleging that the general contractor told the subcontractor that it (the general contractor) needed a written document in its file relating to payment.²²⁸ Accordingly, the parol evidence rule should have applied.

In *Petereit*, the defendant maintained that no specific territories had been assigned to distributors on a permanent basis.²²⁹ Accordingly, there existed a genuine dispute as to whether there was an oral agreement for permanent territories, and the plaintiffs did not allege that they assented to the written confirmations as a result of a threat by the defendant to not perform the existing oral contract. Thus, the court was correct to apply the parol evidence rule.

V. Conclusion

Applying the parol evidence rule’s consideration exception to a situation in which the proponent of extrinsic evidence alleges that an integrated agreement is not binding because it modifies a prior agreement and lacks consideration under the preexisting duty rule threatens the parol evidence rule’s evidentiary and gatekeeping functions. It is therefore a parol evidence rule loophole, and an accommodation between the parol evidence rule and the preexisting duty rule is necessary. The appropriate accommodation is to apply the parol evidence rule if the party seeking to invoke the rule creates a genuine dispute as to whether the prior agreement existed, unless the proponent of the extrinsic evidence creates a genuine dispute as to

227 *Audubon Indem. Co. v. Custom Site-Prep, Inc.*, 358 S.W.2d 309, 314 (Tex. Ct. App. 2011).

228 *Id.*

229 *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1177 (2d Cir. 1995).

whether she manifested assent to the integrated agreement because the other party wrongfully threatened to breach the prior contract. Such an approach accommodates the parol evidence rule's evidentiary and gatekeeping functions and the preexisting duty rule's extortion-policing function.