# **ARTICLE: On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation**

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**Text**

**[\*660]**

I. Introduction

As a general rule, extrinsic evidence, whether written or oral, is not admissible to prove either the intent of the parties to a contract or the meaning of contractual terms when the parties have executed an unambiguous, fully-integrated (i.e., final and all-inclusive) written agreement. The trial court may consider various types of extrinsic evidence, however, in determining whether a particular agreement is fully integrated or ambiguous, and even in choosing among rival interpretations of an agreement where ambiguity is not present. If the trial court determines that an agreement is not fully integrated, then the trier of fact may consider extrinsic proof that supplements it. If the trial court determines that an agreement is ambiguous, then the trier of fact may consider extrinsic proof of the parties' contractual intent.

This Article identifies and examines the rules of construction used by Texas courts in determining contractual intent under Texas law, as well as the circumstances under which extrinsic evidence may be admitted either to supplement existing contractual terms or to demonstrate contractual intent. Practitioners responsible for drafting contracts and their colleagues who handle contract litigation should benefit from this examination. Part II of this Article discusses the fundamental common-law tenets of construction and interpretation applicable to all contract disputes. Part III **[\*661]** addresses the concepts of ambiguity and integration, the common-law parol evidence rule, the parol evidence provisions of the Uniform Commercial Code, and the circumstances under which extrinsic evidence may be considered by Texas courts and juries.

II. The Construction and Interpretation of Written Agreements Governed by Texas Law [[1]](#footnote-2)1

As modern commercial agreements become increasingly complex, the potential for misunderstanding among the parties to those agreements also seems to grow. When litigation results, the threshold issues for the parties, their counsel, and the court are often the same: What are the complete terms of the parties' agreement, and what was the parties' intent in entering into it?

In Texas, as in every jurisdiction, a considerable body of law guides the resolution of these questions. Texas courts also utilize many precisely-articulated--if not consistently applied--interpretational rules and evidentiary principles. These rules and principles impose context upon practically every negotiation, drafting session, and lawsuit involving the written word. For that reason, no lawyer should draft a contract or adopt a contract litigation strategy without accounting for the effect of these rules and principles.

A. A Prefatory Note on Construction and Interpretation

Courts and commentators frequently treat contract construction and contract interpretation as if the distinction between the two were either crystal clear and essential, or nonexistent and immaterial. While many of the judicial opinions and learned treatises cited herein use the terms "interpretation" and "construction" interchangeably, the two terms have different meanings. To paraphrase Professor Corbin, interpretation of a contract is the process of determining the meaning of the words and symbols used in the contract, while construction of a contract is the process of determining the legal effect of those words and symbols in light of many **[\*662]** factors external to the contract itself. [[2]](#footnote-3)2 Both processes regularly require the trial court to consider extrinsic evidence--that is, evidence beyond the "four corners" of the written agreement--in order to ascertain the parties' true intentions and to give proper effect to the understanding memorialized by the written agreement.

Some contracts must be interpreted by courts of law, others need not. All contracts that come before a court must be construed. Thus, even if a written contract requires no interpretation because the objective meaning of the words and symbols used in the contract is sufficiently clear, the **[\*663]** court must still construe the contract before giving it effect. [[3]](#footnote-4)3

B. The Goal of Contract Construction and Interpretation

Words are the clothes that thoughts wear--only the clothes.

--Samuel Butler [[4]](#footnote-5)4

In construing a written agreement, a court's primary concern is to ascertain and give effect to the true intent of the contracting parties as expressed in the written instrument. [[5]](#footnote-6)5 Texas courts, which for purposes of this Article will also include any federal court considering a written agreement subject to Texas law, must give effect to the objective intent of the parties as it is expressed or apparent in writing. [[6]](#footnote-7)6 In so doing, the court **[\*664]** must consider not only the meaning given to the terms of the agreement by the parties to it (i.e., interpretation), but also the legal effect that the parties intended the agreement to have (i.e., construction). The Texas Supreme Court has also instructed courts to "construe a contract from a utilitarian standpoint, bearing in mind the particular business activity sought to be served"; however, they "need not embrace strained rules of construction that would avoid ambiguity at all costs." [[7]](#footnote-8)7

C. Primary Rules of Construction and Interpretation

Rules? . . . In a knife fight?

--from Butch Cassidy and the Sundance Kid [[8]](#footnote-9)8

Over time, a set of rules of construction and interpretation has developed. These rules exist to guide courts and litigants in their efforts to construe contracts so as to give effect to the parties' intentions at the time of contracting. These rules are not codified, and less than universal agreement exists among Texas courts or commentators as to whether all of the rules set forth below are legitimate guides to construction, or as to what priorities, if any, courts are to observe among the various rules.

The rules that follow do not require a court to find ambiguity or less-than-full integration before they may be applied. Rather, courts are to use the rules in ascertaining the existence of an ambiguity or a less-than-fully integrated agreement, as well as in resolving any such ambiguity or filling the "gaps" created by partial integration. In the words of the Restatement, courts should use the rules "in determining what meanings are reasonably possible as well as in choosing among possible meanings." [[9]](#footnote-10)9

1. Surrounding Circumstances

A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color **[\*665]** and content according to the circumstances and the time in which it is used.

--Justice Oliver Wendell Holmes, Jr. [[10]](#footnote-11)10

In applying the terms of a contract--even a fully integrated and facially unambiguous contract--to the subject of the contract, courts should take the circumstances surrounding the contract into account. [[11]](#footnote-12)11 In the words of the Texas Supreme Court:

The words of a legal instrument are simply indices to external things, and words always need interpretation. It is always necessary to determine their association with external objects, and all circumstances should be considered that go to make clear the sense in which they were used, i.e., their association with things. [[12]](#footnote-13)12

In City of Pinehurst v. Spooner Addition Water Co., the court found the **[\*666]** contract to be unambiguous and wrote:

It is the general rule of the law of contracts that where an unambiguous writing has been entered into between the parties, the Courts will give effect to the intention of the parties as expressed or as is apparent in the writing. In the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls. [[13]](#footnote-14)13

In considering what the parties intended by the words used in the contract, the City of Pinehurst court said: "Where a question relating to the construction of a contract is presented, as here, we are to take the wording of the instrument, considering the same in the light of the surrounding circumstances, and apply the pertinent rules of construction thereto and thus settle the meaning of the contract." [[14]](#footnote-15)14

In Sun ***Oil*** Co. v. Madeley, the Texas Supreme Court considered the role of extrinsic evidence in construing an admittedly unambiguous written contract:

In addition to their difference of opinion on the proper interpretation of the contract, the parties also dispute the role of extrinsic evidence in construing an unambiguous contract. Sun argues the courts may only consider extrinsic evidence after the instrument itself is first found to be ambiguous. Lessors argue that when the construction of a contract is at issue, the court must first consult surrounding circumstances to determine whether or not the contract is ambiguous. [[15]](#footnote-16)15

Having recited the above-quoted passages from City of Pinehurst, the Madeley court concluded: "Lessors state the proper rule. Evidence of surrounding circumstances may be consulted. If, in the light of surrounding circumstances, the language of the contract appears to be capable of only a single meaning, the court can then confine itself to the writing." [[16]](#footnote-17)16

Courts are to construe commercial contracts in accordance with the customs and practices of the industry and locale(s) to which the contract **[\*667]** relates. [[17]](#footnote-18)17 As a consequence, unless the parties' contrary intent is clearly manifested, [[18]](#footnote-19)18 "surrounding circumstances" may include the course of dealing between the parties, [[19]](#footnote-20)19 operative usages of trade, [[20]](#footnote-21)20 or the course of the parties' performance of the contract. [[21]](#footnote-22)21

Hanssen v. Qantas Airways Ltd. involved a dispute between a tour operator (Hanssen) and Qantas Airways regarding the extent to which group package seats were "guaranteed" as a result of paying a 10% deposit for each seat reserved. [[22]](#footnote-23)22 At the heart of the dispute was the following passage from a December 2, 1985, letter from Qantas:

Further to our previous discussions, Halley's comet has created an enormous amount of interest in the South Pacific. In order to protect the group space for those who have solid commitments, we are requiring a 10% deposit to Qantas for all groups during this time period. . . . Please forward your MCO deposit to this office by 05 DEC 85, **[\*668]** or we will have to release the seats you have blocked, whether confirmed or not. [[23]](#footnote-24)23

On December 5, 1985, Hanssen paid Qantas a 10% deposit for 406 seats. [[24]](#footnote-25)24 On January 13, 1986, Hanssen met with representatives of Qantas and a domestic Australian carrier whose airline was to provide "shuttle" transportation for Hanssen's group. [[25]](#footnote-26)25 During that meeting, both representatives told Hanssen that they had not yet been able to confirm all 406 seats, but that they were still working on it. [[26]](#footnote-27)26 On January 15, 1986, Hanssen, who by that time had sold only 117 of his allotted 406 tour packages, wrote Qantas that he "was discontinuing all of his marketing efforts because his seats had not been confirmed." [[27]](#footnote-28)27 Hanssen then sued Qantas for, inter alia, the revenues that he reasonably expected to make from selling 406 tour packages. [[28]](#footnote-29)28 The trial court granted summary judgment in Hanssen's favor, and Qantas appealed. [[29]](#footnote-30)29

The Fifth Circuit reversed the summary judgment, finding that the December 2, 1985, letter was reasonably susceptible to two meanings: (1) as the district court reasoned, that Qantas agreed to confirm or guarantee all seats on which a deposit was made; and (2) that Hanssen may lose his requested seats, even those already confirmed, unless those reservations were guaranteed by a deposit. [[30]](#footnote-31)30 Finding that ample evidence of industry practice supported the second reading, the Fifth Circuit remanded the case for "a full trial considering standard airline practice and other extrinsic evidence to determine the meaning and intent of the parties' agreement." [[31]](#footnote-32)31

The importance of the "surrounding circumstances" rule cannot be overemphasized. Unlike all other primary rules of construction, this rule affirmatively invites the trial court to consider extrinsic proof even in the absence of a pleading of, much less a finding of, ambiguity, and even in those cases in which the parties stipulate that the contract is fully integrated. [[32]](#footnote-33)32 Indeed, Hanssen indicates that Texas courts will look to sur- **[\*669]** rounding circumstances to construe a written agreement even if doing so creates ambiguity. [[33]](#footnote-34)33 Thus, while the "surrounding circumstances" rule still does not permit proof of the parties' subjective intent, it does substantially undercut the exclusionary effect of the parol evidence rule and any notion that ambiguity must be pleaded or found in order to permit the court to consider certain forms of extrinsic proof.

2. Construing the Contract as a Whole

The rules of contract construction and interpretation also require that courts read all parts of a contract as a whole. [[34]](#footnote-35)34 No single provision taken alone should have controlling effect; rather, courts must consider all provisions with reference to the whole agreement. [[35]](#footnote-36)35 Moreover, courts should reconcile those provisions that appear to be in conflict as needed to reflect the true intentions of the parties. [[36]](#footnote-37)36

[The intent of the parties] must be deduced not from specific provisions or fragmentary parts of the instrument, but from the entire agreement, because the intent is not evi- **[\*670]** denced by any part or provision of it, nor by the instrument without any part or provision, but by every part and term so construed as to be consistent with every other part and with the entire contract. The actual intent of the parties when thus ascertained must prevail over the dry words, inapt expressions, and careless recitations in the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement. [[37]](#footnote-38)37

In Concord ***Oil*** Co. v. Pennzoil Exploration & Production Co., the Texas Supreme Court considered the propriety of the district court's construction of fractional conveyances in an ***oil*** and gas lease that appeared, on its face, to convey different fractions to the same parties. [[38]](#footnote-39)38 Citing Luckel v. White [[39]](#footnote-40)39 and a body of related cases, Justice Owen, for the majority, wrote:

The principal import of our decision in Luckel is that the document must be read as a whole to see what actually has been granted. While we have not always articulated this precept, the result in each case . . . has been consistent with the directives in Luckel that the conveyance must be considered as a whole to determine the intent of the parties and that seemingly conflicting positions are to be harmonized if possible. [[40]](#footnote-41)40

Finding that "the granting clause contains classic language used in granting an interest in minerals," [[41]](#footnote-42)41 and "bearing in mind that our objective is to determine the intent of the parties in light of all the provisions of the deed," [[42]](#footnote-43)42 the majority concluded that the grant of 1/12 of rents and royalties indicated that the grantor also conveyed a possessory mineral estate of a 1/12 interest in the minerals, notwithstanding contrary specific language that the conveyance was only a 1/96 interest in the minerals. [[43]](#footnote-44)43 **[\*671]**

3. The "Plain Meaning" Rule

Courts should give each word and phrase in a written agreement its plain, grammatical meaning unless it definitely appears that such meaning would defeat the parties' intent, as evidenced by the entire agreement. [[44]](#footnote-45)44 Put another way: wherever possible, courts should give words and phrases in agreements their ordinary, popular, and common meaning. [[45]](#footnote-46)45

However, this rule should yield if following it would cause a result that is contrary to the clearly manifested intention of the parties. [[46]](#footnote-47)46 For instance, if the parties stipulate to the meaning of a particular term, the stipulated meaning, rather than the "plain" meaning, will prevail. [[47]](#footnote-48)47 Likewise, a technical term or term of art will prevail over a common-usage definition where the circumstances so dictate. [[48]](#footnote-49)48

4. Presumption that Each Provision Has Meaning and Purpose

Courts are to construe contractual provisions, if possible, in such a way as to give each provision meaning and purpose so that no provision is rendered meaningless or moot. [[49]](#footnote-50)49 If a contract or contractual provision is susceptible to two reasonable constructions, one of which would render it meaningful and the other moot, the construction making the contract or **[\*672]** provision meaningful must prevail. [[50]](#footnote-51)50

For example, in KMI Continental Offshore Production Co. v. ACF Petroleum Co., the contract at issue contained a purchase option. [[51]](#footnote-52)51 The two parties offered competing interpretations of the contract, one of which would render the purchase option meaningless in certain circumstances. [[52]](#footnote-53)52 Because appellee's interpretation of the contract would defeat the purchase option under certain circumstances, the court adopted the appellant's interpretation, by which the purchase option was always available. [[53]](#footnote-54)53

In Coker v. Coker, the Texas Supreme Court considered a property settlement agreement incorporated into a decree of divorce. [[54]](#footnote-55)54 Paragraph 5 of the agreement provided, in relevant part:

5. Wife shall receive as her sole and separate property, free and clear of any claim, right or title of husband, . . . that certain right, commission or account receivable heretofore earned by husband during his employment with the firm of Majors & Majors in connection with the sale of the "Jinkens ranch property in Tarrant County, Texas," such future commission or account receivable being in the approximate sum of $ 25,000.00. [[55]](#footnote-56)55

Paragraph 8 of the agreement further provided:

8. Husband represents and warrants to the wife that, to the best of his knowledge, approximately $ 25,000.00 remains due and owing to him as his portion of commissions earned in connection with the sale of the "Jinkens **[\*673]** property in Tarrant County, Texas," and he hereby guarantees to wife that she will receive the said sum of $ 25,000.00, from Majors & Majors, or from any other payor of such commissions receivable. Such commission is payable to her as payments are made by purchasers to sellers . . . . In the event, for any reason she fails to receive such installments of commission exactly as husband would have prior to his assignment of his rights thereto to wife, husband agrees to pay to wife in Dallas County, Texas all such sums of money, which she has failed to receive, up to the guaranteed sum of $ 25,000.00. [[56]](#footnote-57)56

Before Majors & Majors received $ 25,000.00 in commissions payable through the husband's assignment to his ex-wife, the purchaser defaulted on its payment obligations to the seller. [[57]](#footnote-58)57 The wife sued her ex-husband for the difference between what she had received and $ 25,000. [[58]](#footnote-59)58 The issue before the Texas Supreme Court was whether the husband had agreed to pay his ex-wife a minimum of $ 25,000.00, or whether she was only entitled to such commissions as he would have received if he had not assigned his interest to her. [[59]](#footnote-60)59

The trial court construed paragraph 8 as an absolute guarantee that the husband would pay the wife at least $ 25,000.00, granted her motion for summary judgment, and ordered her exhusband to pay her the difference between $ 25,000.00 and the amount of commissions she had received prior to the buyer's default. [[60]](#footnote-61)60 The court of appeals affirmed in an unpublished opinion. [[61]](#footnote-62)61 The supreme court reversed the summary judgment, holding that paragraphs 5 and 8, when read together as they must be in order to give meaning to both provisions, created an ambiguity as to the parties' intent. [[62]](#footnote-63)62 Ironically, as did the Fifth Circuit in Hanssen v. Qantas Airways Ltd., [[63]](#footnote-64)63 the court found ambiguity as a consequence of its adherence to a primary rule of construction, the rule that "courts must favor an interpretation that affords some consequence to each part of the instrument **[\*674]** so that none of the provisions will be rendered meaningless." [[64]](#footnote-65)64

Similarly, in Advertising & Policy Committee of the Avis Rent A Car System v. Avis Rent A Car System, the court of appeals rejected appellant's proposed reading of an Executive Licensing Agreement (ELA), reasoning that

not only does the ELA not expressly provide for the binding effect of A & P Committee decisions [as argued by appellant], but to construe Section 5 in accordance with appellant's interpretation would render ineffective other provisions of the ELA that unquestionably recognize Avis' ownership of, and right to control and change, the Avis system. [[65]](#footnote-66)65

In Lenape Resources Corp. v. Tennessee Gas Pipeline Co., the Texas Supreme Court reiterated the importance of construing a contract so as to give meaning to each provision, as well as the primacy of general rules of construction over the more arcane "secondary" rules discussed below. [[66]](#footnote-67)66 The gas purchase contract at issue contained the following provision:

8. Prices:

(a) The price to be paid by Buyer to Seller from the effective date hereof for all gas delivered hereunder, or for the contract quantity if available and not taken by Buyer, shall be $ 2.067 per Mcf, escalating on the first day of January, 1979 and the first day of each month thereafter for the term of this Agreement to the product obtained by multiplying the price in effect hereunder for the preceding month by the monthly equivalent of the annual inflation adjustment factor applicable for such month, as such factor is defined in Section 102(b)(2) of the Natural Gas Policy Act of 1978, Public Law 95-621. [[67]](#footnote-68)67

The price provision seems clear enough. Unfortunately, the "annual inflation adjustment factor" in the Natural Gas Policy Act (NGPA) is **[\*675]** contained in section 101(a), not in section 102(b)(2). [[68]](#footnote-69)68 The adjustment factor set forth in section 102(b)(2) applies only to gas subject to section 102, and includes both the section 101(a) adjustment and a second adjustment unique to section 102 gas. [[69]](#footnote-70)69 The buyer (Tennessee) took the position that the price due for appellants' gas should be adjusted only by the section 101(a) factor because appellants' gas was not otherwise subject to section 102. [[70]](#footnote-71)70 Lenape and the other sellers (appellants), on the other hand, sought to have the price of their gas "doubly" escalated, using the section 102(b)(2) adjustment. [[71]](#footnote-72)71

The court considered each of the rules of construction proffered by Tennessee in support of its reading of section 8(a), but found that "each application of these rules of construction . . . leads to the complete negation of the line 'defined in Section 102(b)(2) of the Natural Gas Policy Act of 1978.' " [[72]](#footnote-73)72 In the spirit of giving meaning and purpose to each provision of the contract, the court concluded that section 8(a) was ambiguous as a matter of law and, therefore, the trial court's consideration of parol evidence was proper. [[73]](#footnote-74)73 Then, after reviewing the proffered parol evidence regarding industry custom and the course of negotiations leading to the contract at issue, the court found no error in the trial court's finding that the parties intended the price of appellants' gas to be adjusted in accordance with section 102(b)(2) of the NGPA. [[74]](#footnote-75)74

Most recently, in American Stone Diamond, Inc. v. Lloyds of London, the district court held that the insured's reading of the subject policy exclusion rendered it meaningless, while the reading proffered by the insurer **[\*676]** did not. [[75]](#footnote-76)75 The district court found that the insurer's reading was the only acceptable one, entitling the insurer to summary judgment. [[76]](#footnote-77)76

5. Presumption Against Illegality

If a contract or contractual provision is susceptible to two reasonable constructions, one of which comports with statutory law, regulation, or common law, and one of which does not, the court should construe the contract or contractual provision in such a way as to make it legal. [[77]](#footnote-78)77

6. Presumption Favoring Express Terms over Implied Terms or Subsequent Conduct

As noted above, course of performance, course of dealing, and usage of trade are among the "surrounding circumstances" that courts should consider when construing or interpreting a written contract. [[78]](#footnote-79)78 Nevertheless, these considerations yield to contrary express terms in a writing. [[79]](#footnote-80)79

Historically, Texas courts have not favored implying provisions into agreements. [[80]](#footnote-81)80 Implied provisions are permitted only when necessary to **[\*677]** effectuate the intent of the parties as evidenced by the agreement as a whole. [[81]](#footnote-82)81 In order to imply a provision not explicitly set forth in an instrument, it must appear that the implied provision was "so clearly within the contemplation of the parties that they deemed it unnecessary to express it." [[82]](#footnote-83)82 It is not enough that an implied provision is necessary to make an agreement "fair," or that without such a provision the agreement would be improvident, unwise, or unjust. [[83]](#footnote-84)83 Moreover, Texas courts will generally refrain from any construction that requires the insertion of a qualifying phrase to alter the ordinary meaning of the literal text. [[84]](#footnote-85)84

Arguably, any prior course of dealing between the parties, routine usages of trade, and technical or specialized terms used in the industry or location in which the parties do business should be "so clearly within the contemplation of the parties that they deemed it unnecessary" to include specific terms in the contract memorializing these implied terms. [[85]](#footnote-86)85 However, this argument probably does not apply to the parties' course of performance under the agreement being scrutinized. Performance that occurs after the parties entered into the agreement seems less likely to have been clearly within the parties' contemplation at the time they entered into the agreement because, unlike the parties' prior course of dealing and existing trade usage, such performance often involves future events that are unknown at the time of the agreement.

Consider the Texas Supreme Court's relatively hostile treatment of course of performance evidence in East Montgomery County Municipal Utility District No. 1 v. Roman Forest Consolidated Municipal Utility District. [[86]](#footnote-87)86 In Roman Forest, a dispute arose over the county's obligation **[\*678]** to pay for water service and sewage treatment under separate, contemporaneous contracts. [[87]](#footnote-88)87 Notwithstanding fairly clear language in the water service contract that the county was only obligated to pay a share of operating expenses for a water well used both by the county and by Roman Forest, Roman Forest attempted to include in its charges to the county a portion of the cost of operating its own internal water distribution system. [[88]](#footnote-89)88 Likewise, notwithstanding relatively clear language in the sewage treatment contract that the county was only obligated to pay for "waste treatment and disposal services to be rendered by [Roman Forest] to [the county]," [[89]](#footnote-90)89 Roman Forest attempted to include the cost of its own internal sewer collection system in the operating budget from which it charged the county. [[90]](#footnote-91)90

East Montgomery County sought a declaratory judgment that it was not obligated to pay for any or all of the costs of Roman Forest's internal water and sewage systems. [[91]](#footnote-92)91 However, the county brought suit only after it had accepted and paid invoices from Roman Forest, including those costs incurred, for several years. [[92]](#footnote-93)92 The court of civil appeals found the county's repeated acceptance and payment of these invoices for charges not included in the express terms of the contract to be decisive:

The interpretation placed upon a contract by the parties to it is the highest evidence of their intent. [The county] without objection paid the bills prepared by [Roman Forest] for a period of over two years, and only when [the county] encountered financial difficulty did they dispute the interpretation of the contract. [[93]](#footnote-94)93

The Supreme Court did not agree: "The conduct of the parties is only relevant after the court has determined [as a matter of law] that the contract is ambiguous. Neither party contends that the contract is ambiguous. The conduct of the parties is therefore irrelevant." [[94]](#footnote-95)94

An excellent example of the conflicting results that may occur when **[\*679]** different courts purport to rely on the same "rules" of construction and interpretation is provided by Thornton v. D.F.W. Christian Television, Inc., in which the Dallas Court of Appeals considered the proper construction of an agreement that was never alleged by either party to be ambiguous. [[95]](#footnote-96)95 The dispute concerned the parties' disagreement over who had the right to some $ 600,000 in escrowed funds pursuant to the terms of their contract. [[96]](#footnote-97)96 Opal Thornton obtained a permit from the FCC to build a television station. [[97]](#footnote-98)97 D.F.W. Christian Television (DFW) agreed to pay $ 600,000 into escrow and to construct the physical facilities in exchange for Thornton's agreement to form a corporation (TV-55), obtain consent from the FCC to assign the construction permit to TV-55, and sell 49% of TV-55's stock to DFW. [[98]](#footnote-99)98 The written agreement provided that "the $ 600,000 would be released to Thornton upon her delivery of 49% of TV-55 stock to the escrow agent. If Thornton failed to deliver the stock within 90 days of execution of the agreement, the escrow agent was to return the $ 600,000 to DFW." [[99]](#footnote-100)99 If DFW failed to build the facilities as agreed, DFW was to return its 49% share of the stock to Thornton. [[100]](#footnote-101)100 Thornton was not required to return DFW's $ 600,000 "if [DFW's] failure to construct the television station was due to DFW's breach of the agreement." [[101]](#footnote-102)101

After DFW deposited the $ 600,000 into escrow, Thornton then incorporated TV-55 and deposited all of TV-55's stock into the escrow account. [[102]](#footnote-103)102 The escrow agent paid the $ 600,000 to Thornton as agreed. [[103]](#footnote-104)103 However, DFW did not procure a site and never built the station. [[104]](#footnote-105)104 Thornton therefore refused to return DFW's $ 600,000 and sued DFW, claiming that DFW's failure to build the station amounted to breach of contract and fraud. [[105]](#footnote-106)105 DFW then counterclaimed, "alleging that Thornton breached the purchase agreement by failing to obtain a construction site for the station and by failing to return the $ 600,000." [[106]](#footnote-107)106

After a bench trial, at which the trial court apparently considered no **[\*680]** extrinsic evidence of the contract's meaning, "the trial court concluded as a matter of law that Thornton was entitled to retain the $ 600,000 only in the event that DFW's failure to construct the facilities was due to its breach of contract." [[107]](#footnote-108)107 The trial court further "concluded that DFW's failure to build the station was not a breach of the parties' agreement and that Thornton breached the agreement by failing to return DFW's $ 600,000." [[108]](#footnote-109)108

Thornton appealed, and the court of appeals held that "the trial court's interpretation of the agreement to require the return of DFW's $ 600,000 if Thornton failed to obtain a valid construction permit was in error." [[109]](#footnote-110)109 The court of appeals explained:

In this case, neither party pleaded that the purchase agreement was ambiguous. When there is no pleading of ambiguity with respect to an agreement, all questions relating to the agreement's construction are questions of law. Because ambiguity has not been pleaded and construction is a question of law, we independently construe the purchase agreement in determining the correctness of the trial court's conclusions of law relating to the construction of that agreement.

In construing an unambiguous agreement, this Court's primary concern is to ascertain and give effect to the intentions of the parties as expressed in the agreement. To achieve this objective, we must construe the meaning of the language used in the agreement. When the language is plain, it must be enforced as written. We consider the entire agreement in an effort to harmonize and give effect to all its terms so that none will be rendered meaningless. No single provision of the agreement taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole agreement. Words and phrases in agreements should be given their ordinary, popular, and common meaning. Language in an agreement should be accorded its plain, grammatical meaning unless the parties intended otherwise as such intent is evidenced from the agreement. **[\*681]**

When we apply these rules of construction, the plain language of the purchase agreement provides that if DFW does not build the station, then appellant receives DFW's forty-nine percent share of the stock in TV-55. If DFW's failure to build the station constitutes a breach under the agreement, then the plain language of the agreement provides appellant does not have to return the $ 600,000 paid in escrow by DFW. The language of the agreement is clear that the $ 600,000 was to be paid into escrow by DFW as consideration for appellant forming TV-55 and depositing its stock into escrow. The agreement specifically provides the $ 600,000 would be returned to DFW only in the event appellant did not form TV-55 and deposit its stock into escrow.

. . . .

. . . The purchase agreement as a whole shows no intent of the parties to provide as a specific remedy to DFW the return of the $ 600,000 if appellant breached the agreement in such a manner. To the contrary, the agreement provides the $ 600,000 is to be returned to DFW only in the event appellant failed to form TV-55 and deposit its stock in escrow. [[110]](#footnote-111)110

The Texas Supreme Court granted DFW's application for writ of error and reversed the court of appeals, but did not cite a single authority in its brief, per curiam opinion. [[111]](#footnote-112)111 The supreme court held that the trial court had correctly determined that Thornton was required to return DFW's $ 600,000:

We agree with DFW that the express language of the parties' agreement limits the circumstances under which Thornton may retain the $ 600,000. Because DFW did not breach the agreement, the contract requires Thornton to return the money.

The contract specifically addresses what was to happen if DFW failed to construct the station. First, Thornton **[\*682]** was entitled to the return of DFW's 49% share of the stock. This was to occur regardless of whether DFW breached the agreement in failing to build the station. In contrast, Thornton's right to the $ 600,000 was not unconditional if the station was not constructed. The provision of the agreement at issue states that "if [DFW's] failure to construct is due to a breach by DFW, Thornton will not be required to return the escrow money previously paid hereunder." This provision expressly contemplates that Thornton is required to return the $ 600,000 in the event that DFW's failure to construct the station is not due to DFW's breach. [[112]](#footnote-113)112

Thus, looking at the same contract, which the parties stipulated to be unambiguous, the trial court and the Texas Supreme Court both concluded that Thornton was entitled to keep DFW's $ 600,000 only if DFW's failure to construct the facilities was due to DFW's breach of the contract, [[113]](#footnote-114)113 whereas the court of appeals concluded that DFW was entitled to recover its $ 600,000 from Thornton only if Thornton failed to form TV-55 and deposit its stock in escrow. [[114]](#footnote-115)114 Although both appellate courts presumably sought to effectuate the parties' intent based upon the conventional rules of construction, they reached different conclusions. [[115]](#footnote-116)115 Results such as these tend to support a view of the rules of construction as somewhat improvisational. [[116]](#footnote-117)116 **[\*683]**

D. Secondary Rules of Construction and Interpretation

In addition to, or sometimes in conjunction with, the foregoing primary rules of construction and interpretation, Texas courts also rely from time to time upon a number of "secondary" rules. These secondary rules are easier both to define and to apply than the foregoing, more general principles. However, they are applicable to far fewer disputes, and courts are therefore much less likely to use them to decide an issue of contract interpretation or construction than their favored and more general counterparts. [[117]](#footnote-118)117

A court may apply any of the following secondary rules of construction, but should do so only if two or more provisions of a contract, or two or more reasonable readings of the provisions of a contract, remain in "irreconcilable conflict" after the court has applied the foregoing rules. [[118]](#footnote-119)118

1. Presumption Favoring the Nondrafting Party (Contra Proferentem)

Generally, contract terms are construed against the party responsible for drafting the contract or contractual provision. [[119]](#footnote-120)119 In Temple-Eastex Inc. **[\*684]** v. Addison Bank, a bank refused to honor its letter of credit in favor of Temple-Eastex. [[120]](#footnote-121)120 The bank contended that it was not required to pay Temple-Eastex because the letter of credit provided that it was payable upon the submission of a "sight draft," whereas Temple-Eastex had attempted to collect by demand letter. [[121]](#footnote-122)121 The trial court found that Temple-Eastex's method of presentment was consistent with industry custom and practice. [[122]](#footnote-123)122 The court of appeals reversed the trial court's judgment, holding that, inter alia, Temple-Eastex failed to comply with the terms of the letter of credit. [[123]](#footnote-124)123

Reversing the court of appeals, the Texas Supreme Court extensively analyzed the meaning of the term "sight draft" as used within the industry. [[124]](#footnote-125)124 The court stated: " 'While comprehensive, the word ["draft"] is not ambiguous and has a well-understood meaning.' " [[125]](#footnote-126)125 The Texas Supreme Court ruled against the bank, explaining:

In Texas, a writing is generally construed most strictly against its author and in such a manner as to reach a reasonable result consistent with the apparent intent of the parties. . . . As a result, the bank's letter of credit is construed most strictly against the bank because it drafted the letter of credit. [[126]](#footnote-127)126

**[\*685]**

At least one Texas court of appeals has held that this rule applies to unambiguous contracts. In Hill Constructors, Inc. v. Stonhard, Inc., the trial court granted summary judgment in favor of a construction subcontractor (Stonhard) who sued the general contractor (Hill) on a flooring tile subcontract. [[127]](#footnote-128)127 The general contractor had prepared the subcontract and the related change-order contract. [[128]](#footnote-129)128 The subcontract required that the subcontractor " 'not proceed until unsatisfactory conditions have been corrected.' " [[129]](#footnote-130)129 The tile floor installed by the subcontractor was faulty because the concrete subfloor--which a different subcontractor, over which Stonhard did not exercise any control, had installed--contained invisible depressions that the subcontractor did not call to Stonhard's attention prior to performing its work. [[130]](#footnote-131)130 The court of appeals affirmed, construing the subcontract to mean that the subcontractor was not to begin work until the contractor had corrected all known unsatisfactory conditions. In so doing, the court strictly construed the subcontract against Hill because Hill had drafted it. [[131]](#footnote-132)131

However, the Texas Supreme Court has previously held that a court should resort to strict construction against the drafter only when the contract is ambiguous. [[132]](#footnote-133)132 Likewise, the Fifth Circuit recently chastised a district court for relying on the presumption against the drafting party (contra proferentem) when construing a contract that the Fifth Circuit determined to be unambiguous:

The district court further erred by relying, at the outset, on the rule of strict construction against the drafter . . . . We note that the rule contra proferentem "is not one of the favored rules of construction. Indeed, it is said that it is to be resorted to only when the other rules fail." Certainly, "the rule has no application where . . . the intent of the **[\*686]** parties is clear and a resort to the rule will defeat that intent." [[133]](#footnote-134)133

2. Presumption Favoring Specific Terms over General Terms

Specific language in a contract will prevail over general provisions. [[134]](#footnote-135)134 However, this preference will yield if the parties clearly manifest a contrary intent. [[135]](#footnote-136)135

3. Presumption Favoring Terms Stated Earlier in the Agreement over Terms Stated Later

In harmonizing the provisions of a written agreement, "terms stated earlier in an agreement must be favored over subsequent terms." [[136]](#footnote-137)136 However, Texas courts will give deference to a later provision or reservation that disclaims the effects of any prior terms on its effect. In N.M. Uranium, Inc. v. Moser, the court of civil appeals considered the terms of the following royalty agreement:

Lessor, whose royalty interest shall never bear costs of production or marketing[,] hereby reserves as royalty sums equal to the following:

. . . . **[\*687]**

B. For uranium bearing ores extracted by solution mining the royalty shall be (1/16th) one-sixteenth of the sales revenue received for the uranium oxide (U3O8) attributable to the production produced and sold from the Leased Premises . . . . However, for five (5) years from January 1, 1975, lessor's royalty for the first 450,000 pounds of uranium oxide produced and sold from the Leased Premises during a calendar year will not exceed $ 1.50 per pound. . . .

. . . .

The following shall apply to the royalties reserved in paragraphs A, B, C and D above:

. . . .

Any provision herein to the contrary notwithstanding, Lessor, at Lessor's expense, shall have the continuing right and option at any time and from time to time to take Lessor's royalty in kind. Lessor may exercise such option by giving sixty (60) days' advance written notice to Lessee. [[137]](#footnote-138)137

Faced with these two royalty provisions, the first for $ 1.50 per pound, and the second for royalty in kind, the court of civil appeals construed the disclamatory language of the later provision in favor of the Lessor: "We hold that the lease . . . is not ambiguous. The introductory words 'Any provision herein to the contrary notwithstanding,' which appear in the concluding paragraph in the royalty section . . . , is sic directed to the royalty reserved in paragraph B and the limitation contained therein." [[138]](#footnote-139)138 Therefore, the court of civil appeals found, as a matter of law, that Lessors were entitled to a 1/16th in-kind royalty. [[139]](#footnote-140)139

4. Presumption Favoring Words over Numbers or Symbols

"When there is a variance between unambiguous written words and **[\*688]** [numbers or symbols], the written words control." [[140]](#footnote-141)140

5. Presumption Favoring Handwriting over Typing and Typing over Printing

Except where the parties clearly manifest a contrary intent, handwritten contract provisions are favored when compared to typewritten or printed provisions, and typewritten provisions are favored when compared to printed provisions. [[141]](#footnote-142)141 In Raney v. Uvalde Wool & Mohair Co., appellant (Raney) contracted to sell appellee (Uvalde) 25,000 fleeces of spring kid and adult mohair at a price, respectively, of $ 1.75 per pound and $ 1.47 per pound. [[142]](#footnote-143)142 When Raney delivered only 41,000 pounds of mohair, Uvalde complained that it was entitled to an additional 46,500 pounds, which it had to buy at a higher price on the open market to fulfill its contractual commitments to a third party. [[143]](#footnote-144)143 Following judgment for Uvalde at the trial court, Raney appealed, arguing, inter alia, [[144]](#footnote-145)144 that the written contract "was clear and unambiguous on its face and called for 'number of head' and not for fleeces." [[145]](#footnote-146)145 The court of civil appeals rejected this argument:

While it is true that the contract was a printed form contract and contained a blank column that was titled "Number Head," this blank was filled in in longhand and read "25,000 fleeces Spring Adult and Kid Mohair." Where the written and printed words in a contract are in conflict, the written words control. [[146]](#footnote-147)146

**[\*689]**

E. Other Rules Applicable to Specific Types of Agreements

1. Guaranty Agreements

"A guarantor is entitled to have his agreement strictly construed so that it is limited to his undertakings, and it will not be extended by construction or implication." [[147]](#footnote-148)147 Where the meaning of a guaranty agreement is uncertain, a court should give its terms "a construction which is most favorable to the guarantor." [[148]](#footnote-149)148

2. Promissory Notes

Under Texas law, a promissory note will normally appear integrated in order that it may be negotiable, even though the parties may have collateral agreements. [[149]](#footnote-150)149 To reconcile the policy that a court must presume that a negotiable instrument is integrated with the reality that the instrument may not truly represent the parties' entire agreement, the courts and the legislature have recognized certain exceptions to the parol evidence rule. [[150]](#footnote-151)150 "The rule does not preclude enforcement of prior or contemporaneous agreements which . . . are not inconsistent with and do not vary or contradict the express or implied terms or obligations thereof." [[151]](#footnote-152)151 Likewise, a party may show that a condition of delivery, as opposed to a condition of payment, exists. [[152]](#footnote-153)152

3. Purchase Options

Courts are to construe agreements creating a purchase option in favor of the prospective buyer. [[153]](#footnote-154)153

4. Grants of Real Property or Other Property Rights

If a court finds uncertainty as to the scope or terms of an agreement **[\*690]** granting property rights to another, the court will generally construe that uncertainty against the grantor. [[154]](#footnote-155)154

5. Reservations of Rights

If a court finds uncertainty as to the scope or terms of a reservation of rights, the court will generally construe that uncertainty against the party whom the parties intended the reservation to benefit. [[155]](#footnote-156)155

6. Restrictive Covenants or Restraints on Alienation

Texas law generally disfavors restrictive covenants, including restraints on alienation. [[156]](#footnote-157)156 Therefore, courts will strictly construe restrictive clauses in written instruments concerning the use or disposition of real property, and courts should resolve all doubts in favor of free and unrestricted use or disposition of real property. [[157]](#footnote-158)157

7. Insurance Policy Provisions [[158]](#footnote-159)158

"Exceptions and limitations in an insurance policy are strictly con- **[\*691]** strued against the insurer." [[159]](#footnote-160)159 Therefore, Texas courts "must adopt the construction of an exclusionary clause urged by the insured as long as that construction itself is not unreasonable, even if the construction offered by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." [[160]](#footnote-161)160

III. The Permissible Uses of Extrinsic Evidence in Construing and Interpreting Written Agreements Governed by Texas Law

Few things are darker than [the parol evidence rule], or fuller of subtle difficulties.

--James B. Thayer [[161]](#footnote-162)161

The parol evidence rule generally bars the admissibility of extrinsic evidence regarding prior or contemporaneous agreements when it is offered to alter, add to, or contradict the terms of a fully integrated, unambiguous, written agreement. [[162]](#footnote-163)162 Extrinsic evidence is admissible to clarify, **[\*692]** explain, or give meaning to a writing that is ambiguous or facially incomplete, but only insofar as the evidence does not vary or contradict those terms of the writing that are unambiguous, complete, and final. [[163]](#footnote-164)163

In order to better understand the body of common and statutory law permitting or proscribing the use of extrinsic evidence to construe and interpret written agreements, it may be helpful to distinguish between (1) extrinsic evidence offered to prove the intent of the contracting parties at the time the contract was executed, and (2) extrinsic evidence offered to add to, subtract from, or otherwise modify the terms of a written agreement. The former "interpretive" type of evidence is not subject to the parol evidence rule, and a party may bring it to the trial court's attention (although, for reasons discussed later, the jury may never consider this interpretive evidence). The latter "supplementary" type of evidence is subject to the parol evidence rule, and the trier of fact may not consider it until the trial court first finds that a written agreement is either not fully integrated or is ambiguous. [[164]](#footnote-165)164

A. Ambiguity and the Role of "Interpretive" Evidence

Words, like eyeglasses, blur everything that they do not make clearer.

--Joseph Joubert [[165]](#footnote-166)165

**[\*693]**

1. What Is, and Is Not, Ambiguous?

An instrument is ambiguous if its terms are "uncertain and doubtful or it is reasonably susceptible to more than one meaning, taking into consideration circumstances present when the particular writing was executed . . . ." [[166]](#footnote-167)166 In such a case, the trier of fact must determine the meaning of the terms. [[167]](#footnote-168)167 On the other hand, if a written instrument "is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and it can be construed as a matter of law." [[168]](#footnote-169)168

In the words of the Texas Supreme Court in Universal C.I.T. Credit Corp. v. Daniel:

A contract is ambiguous only when the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning. . . . In other words, if after applying the established rules of interpretation to the contract it remains reasonably susceptible to more than one meaning it is ambiguous, but if only one reasonable meaning clearly emerges it is not ambiguous. [[169]](#footnote-170)169

**[\*694]**

The Daniel court considered the proper interpretation of an agreement whereby an automobile dealer (Daniel), would sell and assign (by indorsement) promissory notes and mortgages on automobiles bought on credit to Universal. [[170]](#footnote-171)170 Daniel's assignments to Universal would be either "full recourse" or "without recourse." [[171]](#footnote-172)171 At issue was Daniel's obligation to purchase from Universal, at a price equal to the outstanding balance on the promissory note, vehicles that Universal repossessed due to the purchaser's failure to repay the promissory note. [[172]](#footnote-173)172

The court of civil appeals determined that the agreement was ambiguous and adopted an interpretation favoring Universal. [[173]](#footnote-174)173 The Texas Supreme Court found that the interpretation of the agreement offered by Universal and accepted by the court of civil appeals was unreasonable because it would have the effect of rendering two key paragraphs of the agreement superfluous, and would permit Universal to change Daniel's endorsement from "without recourse" to "full recourse." [[174]](#footnote-175)174 On the other hand, the Texas Supreme Court found that Daniel's proffered reading of the agreement rendered none of the provisions meaningless and permitted the entire contract to "take[] on meaning and become[] harmonious." [[175]](#footnote-176)175 The court concluded that only Daniel's proffered reading was reasonable, reversed the court of civil appeals's judgment, which the intermediate court had based on a finding of ambiguity and on a reading of the contract that the supreme court disavowed, and affirmed the judgment of the trial court in Daniel's favor. [[176]](#footnote-177)176

In Hettig & Co. v. Union Mutual Life Insurance Co., the promissory note at issue contained the following "limiting clause":

Notwithstanding the foregoing, however, in the event of acceleration of the Note at any time and subsequent invol- **[\*695]** untary or voluntary prepayment, the premium payable in respect thereof shall in no event exceed an amount equal to the excess, if any, of (i) interest calculated at the highest applicable rate permitted by the usury laws of the State of Texas, as construed by courts having jurisdiction thereof, on the principal balance of the Note from time to time outstanding from the date hereof to the date of such acceleration, over (ii) interest theretofore paid and accrued on the Note. [[177]](#footnote-178)177

The court of appeals framed the dispute between the borrowers (Hettig & Co. et al.) and the lender (Union Mutual) as follows:

The dispute over the proper prepayment premium rests on conflicting interpretations of the . . . language [quoted above], or limiting clause, in the second subparagraph. The lender does not dispute that if the limiting clause applies, the premium due was $ 431,034.38 as claimed by borrowers. Similarly, borrowers do not dispute that if the limiting clause is inapplicable, the higher amount demanded by the lender was correct.

Borrowers argue that "acceleration" in the limiting clause can be effected either by the lender as a penalty for the borrowers' default, or by the borrowers' notice of intent to prepay the note. Thus, after borrowers "accelerate" the note by giving such notice, as here, the payment is a "voluntary prepayment," so that the limiting clause is applicable.

The lender, in contrast, argues that "acceleration" is a term of art commonly understood as a right that can be exercised only by the holder of a note. Because the lender did not accelerate the note, and the limiting clause applies only to accelerations, the limiting clause does not apply to borrowers' prepayment. [[178]](#footnote-179)178

After rejecting Union Mutual's "term of art" argument because it rendered the term "voluntary prepayment" meaningless, [[179]](#footnote-180)179 the Fifth Circuit **[\*696]** turned to the question of the clause's meaning in light of Texas usury law:

Absent other considerations, we would be inclined to agree with borrowers that the limiting clause applies on its face to both voluntary prepayments initiated by borrowers and involuntary prepayments following default. The lender, however, argues that the limiting clause's obvious purpose is to escape Texas usury law. A note which allows acceleration upon default and provides for collection of unearned interest is usurious if the amount of total interest collected exceeds the allowable rate for the accelerated period of the note. In contrast, a prepayment penalty is not regarded as "interest" within the meaning of the usury statutes, so that a voluntary prepayment which calls for a prepayment premium exceeding the allowable interest rates does not constitute usury.

The lender therefore argues that the limiting clause, necessary to prevent the note from being usurious upon prepayment after default, is unnecessary when prepayment is voluntary. This argument is supported by the placement of the limiting clause at the end of the second subparagraph, where by implication it would apply only to prepayments upon default as covered in that subparagraph. The lender concludes that the only sensible purpose of the limiting clause is to prevent prepayments after default from being usurious, and that it should be read to fulfill this purpose. Borrowers respond that the limiting clause may have been intended to cover voluntary prepayments as a hedge against change in Texas usury law. We are unpersuaded. The note . . . contains a usury "savings clause" which explicitly covers such a change in law. [[180]](#footnote-181)180

The Fifth Circuit concluded that, while Union Mutual's proffered interpretation was unsatisfying because it left the "voluntary prepayment" term in the limiting clause meaningless, Hettig & Co.'s interpretation, "while more syntactically defensible, ignores a plain commercially reasonable purpose for the limiting clause"--namely, avoiding the operation **[\*697]** of Texas usury law. [[181]](#footnote-182)181 Therefore, "because the note is as reasonably susceptible to one interpretation as the other," the court "remanded the case for trial to consider any extrinsic evidence which sheds light on the actual meaning of" the limiting clause. [[182]](#footnote-183)182

Ambiguity does not exist simply because the parties offer conflicting interpretations of the same contract or contractual provision. [[183]](#footnote-184)183 Nor is an instrument ambiguous because it requires a careful reading, [[184]](#footnote-185)184 or because a fair reading of it does not comport with the desires of one party. [[185]](#footnote-186)185 Additionally, a contract is not rendered ambiguous by obscurity in its language, or by the fact that, in places, it is of doubtful meaning. [[186]](#footnote-187)186

Recently, in Columbia Gas Transmission Co. v. New Ulm Gas, Ltd., the Texas Supreme Court considered a dispute over which of two pricing provisions in a natural gas contract was applicable under the facts of the case. [[187]](#footnote-188)187 Both parties moved for summary judgment. [[188]](#footnote-189)188 The trial court denied both motions for summary judgment, found the agreement to be ambiguous, and submitted to the jury the question of which party's interpretation of the contract was correct. [[189]](#footnote-190)189 The jury found for New Ulm, awarding roughly $ 4 million in damages and fees. [[190]](#footnote-191)190 Columbia appealed, and the court of appeals agreed with the trial court that the contract was ambiguous, but reversed and remanded due to the improper exclusion of evidence, which constituted harmful error. [[191]](#footnote-192)191 New Ulm and Columbia both sought a **[\*698]** writ of error. [[192]](#footnote-193)192

The Texas Supreme Court reversed the court of appeals and rendered judgment in Columbia's favor, holding that the agreement was not ambiguous because Columbia's proffered interpretation was the only reasonable one. [[193]](#footnote-194)193 In so holding, Justice Abbott reiterated the court's long-standing mantra: "In determining the parties' agreement, we are to examine all parts of the contract and the circumstances surrounding the formulation of the contract." [[194]](#footnote-195)194 Justice Abbott continued:

When this contract was signed in 1980, it is undisputed that the parties knew that a huge volume of gas would be deregulated on January 1, 1985. The effect this deregulation would have on the price of gas was not known, however. It is therefore not surprising that the parties incorporated a market-out provision (section 3.1.3) that established a complex procedure to adjust the section 3.1.1 price to the market price of gas. The interpretation of 3.1.3 proffered by New Ulm would frustrate the intent of this provision.

. . . .

Moreover, New Ulm's interpretation ignores the contract language. . . . The only way these otherwise conflicting provisions can be harmonized is by concluding that 3.1.3 is the controlling price mechanism once it is invoked. [[195]](#footnote-196)195

Thus, "the contract is not ambiguous and . . . the parties' intent should not have been submitted to the jury." [[196]](#footnote-197)196

At issue in Clardy Manufacturing Co. v. Marine Midland Business Loans, Inc. was whether a signed letter of intent constituted an unambiguous, fully-integrated agreement that one party to the letter could enforce against the other--not simply to the extent of the recitations in the letter, but to the full extent of the not-yet-formalized agreement contemplated by the letter. [[197]](#footnote-198)197 The trial court found that Marine Midland had obligated it- **[\*699]** self, by the letter of intent, to make a loan to Clardy once Clardy had met certain preconditions. [[198]](#footnote-199)198 Citing many of the leading authorities on the meaning of ambiguity, the enforcement of unambiguous contracts, and the rules of construction, the Fifth Circuit reversed, holding that a letter setting forth "the financial accommodations that Marine would be willing to consider," was "neither so definite nor so all inclusive as to warrant . . . a conclusion" that Marine would make the accommodations. [[199]](#footnote-200)199

There is nothing in this agreement which suggests that Marine was binding itself to issue a commitment letter upon the successful completion of the due diligence outlined in the letter. . . . The letter states, "If the Credit Facilities close," any remaining deposit after costs will be applied to the facilities fee. However, "If Marine declines to close the Credit Facilities," the deposit will be returned less costs. If the issuance of a commitment letter was guaranteed upon the successful completion of due diligence, Marine would have no power to decline to close the credit facilities.

Having considered the entire writing, we conclude that the language of the letter agreement between Clardy Manufacturing and Marine is reasonably susceptible to only one meaning. In part, the proposal letter serves to set out the terms and conditions of the credit facilities, or loans, that Marine is considering extending to Clardy Manufacturing. Beyond this, the letter also contains an agreement by Marine to undertake further efforts to assess whether Clardy Manufacturing satisfied its credit criteria by conducting due diligence as outlined in the letter. The letter does not, however, constitute a satisfaction contract. We find that the letter agreement between Clardy Manufacturing and Marine is unambiguous and does not require us to consider extrinsic evidence to determine its meaning. [[200]](#footnote-201)200

**[\*700]**

2. Ambiguity Is an Issue of Law to Be Determined by the Court

Whether a written agreement is ambiguous is a question of law that the court decides by looking at the contract as a whole in light of the circumstances present at the time the parties executed the contract. [[201]](#footnote-202)201

3. Pleading and Evidentiary Considerations

a. A Party Need Not Plead Ambiguity in Order for the Trial Court to Consider Certain Kinds of Extrinsic Evidence

The Texas Supreme Court has stated in both City of Pinehurst v. Spooner Addition Water Co. and Sun ***Oil*** Co. v. Madeley that ambiguity need not be pleaded by either party in order to permit the trial court to look at extrinsic evidence of circumstances surrounding the formation and execution of the agreement. [[202]](#footnote-203)202

The Texas Supreme Court's recent decision in Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd. reaffirmed the use of evidence of surrounding circumstances to choose between competing constructions **[\*701]** of an unambiguous contract. [[203]](#footnote-204)203 In Columbia Gas, the trial court and the court of appeals found the contract to be ambiguous, although they reached different conclusions as to the consequence of that finding. [[204]](#footnote-205)204 The supreme court found that, in light of the evidence of circumstances surrounding the contract's formation, the contract was not reasonably susceptible to more than one meaning, and therefore it was not ambiguous. [[205]](#footnote-206)205 Nonetheless, the Texas Supreme Court fully considered the proffered extrinsic evidence before (and despite) finding that the contract was unambiguous. [[206]](#footnote-207)206

Thus, considering Columbia Gas, Madeley, and City of Pinehurst, a trial court may (1) hear and consider evidence of the circumstances surrounding the formation and execution of the contract and (2) apply the rules of construction whenever the parties disagree as to the proper construction of a writing. [[207]](#footnote-208)207 Neither a pleading nor a finding of ambiguity is required.

b. Ambiguity Must Be Pleaded in Order to Create a Fact Issue for the Jury

While no rules require the pleading of ambiguity in order to present extrinsic evidence of surrounding circumstances to the court, a party who challenges a proffered reading of a written contract must normally plead that the contract is ambiguous in order to create an issue for the trier of fact. [[208]](#footnote-209)208 When there is no pleading of ambiguity with respect to the writing, all questions relating to the agreement's construction become questions of law for the trial court to determine. [[209]](#footnote-210)209 **[\*702]**

c. Ambiguity Must Be Found in Order to Create a Fact Issue for the Jury [[210]](#footnote-211)210

Even if a party who challenges a proffered reading of a written contract pleads that the contract is ambiguous, thereby permitting the court to consider extrinsic evidence beyond that allowed when no ambiguity is pleaded, ambiguity is still an issue of law for the court to decide. [[211]](#footnote-212)211 If the trial court finds that the contract is unambiguous as a matter of law, the trier of fact may not consider any extraneous evidence of the parties' intent with regard to the contract. [[212]](#footnote-213)212 On the other hand, if the trial court finds that the written instrument is ambiguous, the trier of fact may then look to parol evidence to determine the parties' intent. [[213]](#footnote-214)213 In summary, if ambiguity is not pleaded, or pleaded but not found to exist, the court (not the trier of fact) determines as a matter of law the rights of the parties and their probable intention under the agreement.

4. Summary Judgment Considerations

While it is true that ambiguity must be pleaded and proved before a jury may hear extrinsic evidence, any time the parties offer rival constructions or interpretations of an agreement, the trial court may consider substantial amounts of extrinsic proof even if neither party pleads ambigu- **[\*703]** ity. [[214]](#footnote-215)214 In such cases, the trial court exercises an important fact-finding role in making a legal determination: whether there is sufficient (conflicting) factual evidence to permit the jury to interpret the contract.

The interpretation of a written agreement becomes an issue for the trier of fact only when, after application of the pertinent rules of construction, there remains a genuine uncertainty as to which of two (or more) meanings is proper. [[215]](#footnote-216)215 "If the contract is worded so that it can be given a certain and definite meaning or interpretation, it is not ambiguous; [therefore,] the court will construe it as a matter of law." [[216]](#footnote-217)216 In such a case, summary judgment on the contract is proper. [[217]](#footnote-218)217 On the other hand, when a contract contains an ambiguity, summary judgment is improper because the interpretation of the ambiguous instrument becomes a fact issue. [[218]](#footnote-219)218

Coker v. Coker is a typical case. [[219]](#footnote-220)219 There, the district court granted the wife's summary judgment against the husband with regard to a property settlement agreement incorporated into a divorce decree. [[220]](#footnote-221)220 As detailed earlier, the property settlement contained two separate provisions that recited the husband's obligations with respect to commissions due him from the sale of certain property and payable over to the wife as part of the agreement. [[221]](#footnote-222)221 After determining that the two provisions of the agreement, taken together and in light of the circumstances surrounding the agreement, did in fact create an ambiguity, the Texas Supreme Court reversed **[\*704]** and remanded the court of appeals's decision affirming the summary judgment. [[222]](#footnote-223)222

Trial counsel should carefully consider whether pleading ambiguity is required in order to proffer the desired extrinsic proof. If the trial court may consider the evidence without a pleading of ambiguity, counsel may be well advised to forego a pleading of ambiguity and rely instead upon the rules of construction to support the desired reading of the contract. By pleading ambiguity when it is not required, counsel may unwittingly permit the court or jury to consider unfavorable evidence that would be otherwise inadmissible, and the availability of summary judgment may be unnecessarily lost. [[223]](#footnote-224)223

5. The Legal Effect of the Trial Court's Finding of (Un)ambiguity [[224]](#footnote-225)224

The district court's determination of whether a contract is ambiguous is **[\*705]** a conclusion of law that an appellate court will review de novo. [[225]](#footnote-226)225

B. Integration and the Role of "Supplementary" Evidence

The parties to an agreement often reduce all or part of it to writing. Their purpose in so doing is commonly to provide reliable evidence of [the agreement's] 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 adopted as a final expression of an agreement. [[226]](#footnote-227)226

If the parties to a written contract intend it to serve as a final and complete expression of their agreement, then the contract is integrated. [[227]](#footnote-228)227 "An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." [[228]](#footnote-229)228

Why does it matter whether a particular contract is or is not integrated? It matters because "when parties have concluded a valid integrated agreement with respect to a particular subject matter, the [parol evidence] rule precludes the enforcement of inconsistent prior or contemporaneous agreements" regarding the subject matter of the integrated agreement. [[229]](#footnote-230)229 More importantly for the purposes of this discussion, Professor Corbin stated the rule as follows: "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." [[230]](#footnote-231)230 **[\*706]**

While it is true that, in the passages quoted above, the Texas Supreme Court and Professor Corbin state the rule differently, both statements are correct and significant. According to the Hubacek court, if the written contract is fully integrated, then any other prior or contemporaneous agreement between the same parties, regarding the same subject matter, is unenforceable to the extent that it varies or contradicts the written contract. [[231]](#footnote-232)231 Second, and perhaps more important for the purposes of this discussion, Professor Corbin states that, if the written contract is fully integrated, then any evidence of any other prior or contemporaneous agreement between the same parties, regarding the same subject matter, is inadmissible for purposes of varying or contradicting the written agreement. [[232]](#footnote-233)232

The parol evidence rule does not bar either evidence regarding or the enforcement of subsequent agreements among the parties to a fully integrated written contract, [[233]](#footnote-234)233 nor does it bar proof of understandings offered for a purpose other than to vary or contradict the integrated written agreement.

Both the parol evidence rule and the doctrine of integration exist so that parties may rely on the enforcement of agreements that have been reduced to writing. If it were not for these established principles, even the most carefully considered written documents could be destroyed by "proof" of other agreements not included in the writing. The importance of these principles is well established in Texas law, and in contract law generally. True, Texas law recognizes a number of exceptions to the parol **[\*707]** evidence rule. We believe, however, that these exceptions are carefully and narrowly crafted to permit a court to consider parol evidence only in certain well-defined circumstances. If it were otherwise, the exceptions would become the rule, and the general prohibition against parol evidence would cease to have any legal effect. [[234]](#footnote-235)234

This Article discusses the many exceptions to the parol evidence rule at greater length below. However, there are a number of questions that a court should answer before reaching the point of ruling on the admissibility of parol evidence. As the court in Loe v. Murphy correctly commented:

The mere statement of the parol evidence rule . . . does not aid us in the determination of this cause, for it can be seen from both of the above-stated expressions of the rule [referring to the passages from Corbin and Hubacek quoted above] that the first question with which we are faced is whether the note here involved is the integrated agreement of the parties. [[235]](#footnote-236)235

1. Integration Is an Issue of Law to Be Determined by the Court

"Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule." [[236]](#footnote-237)236 "Whether a writing has been adopted as an integrated agreement is . . . to be determined in accordance with all relevant evidence." [[237]](#footnote-238)237 Thus, while the court must determine whether the agreement is integrated before admitting parol evidence for the trier of fact's consideration, the trial court is free to rely on the very same parol evidence in reaching its threshold determination that the agreement is or is not integrated. [[238]](#footnote-239)238

The parol evidence rule is a rule of substantive law that denies efficacy to prior or contemporaneous expressions relating to the identical subject matter encompassed in the final written contract between the parties. [[239]](#footnote-240)239 **[\*708]** Accordingly, evidence admitted in violation of the rule has no probative force, even if admitted without objection, and cannot support a verdict or judgment. [[240]](#footnote-241)240

2. Written Contracts May Be Fully or Partially Integrated

There are various degrees of integration. Therefore, once a threshold determination has been made that a written contract, to some extent at least, represents an integrated agreement between the parties, the next step in construing the contract is to determine whether the written contract is fully integrated or only partially integrated. [[241]](#footnote-242)241

A fully integrated contract is one that is a final and complete expression of all the terms agreed upon between (or among) the parties. A partially integrated contract is one that is a final and complete expression of all the terms contained in that agreement, but not a final and complete expression of all the terms agreed upon between [or among] the parties. [[242]](#footnote-243)242

However, according to the Second Restatement, "an agreement is not completely integrated if the writing omits a consistent additional agreed term which is (a) agreed to for separate consideration, or (b) such a term as in the circumstances might naturally be omitted from the writing." [[243]](#footnote-244)243 **[\*709]**

3. The Extent to Which a Written Contract Is Integrated Is an Issue of Law to Be Determined by the Court

"Whether an agreement is fully or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule." [[244]](#footnote-245)244

A party may prove complete or partial integration on the basis of "any relevant evidence." [[245]](#footnote-246)245 While a written, facially integrated, and unambiguous contract signed by both parties may be decisive of the extent of integration, "a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties." [[246]](#footnote-247)246 The Second Restatement offers the following illustration:

A, a college, owns premises which have no toilet or plumbing facilities or heating equipment. In negotiating a lease to B for use of the premises as a radio station, A orally agrees to permit the use of [toilet and plumbing] facilities in an adjacent building and to provide heat. The parties subsequently execute a written lease agreement which makes no mention of [the use of the adjacent] facilities or heat. The question of whether the written lease was adopted as a completely integrated agreement is to be decided on the basis of all relevant evidence of the **[\*710]** prior and contemporaneous conduct and language of the parties. [[247]](#footnote-248)247

a. Texas Law Presumes that a Written Contract Is Fully Integrated

"A written agreement presumes that all prior agreements of the parties relating to the transaction have been merged into the written instrument." [[248]](#footnote-249)248 In other words, courts presume that written agreements are fully integrated. [[249]](#footnote-250)249 This presumption of full integration does not apply to contracts governed by the Uniform Commercial Code, [[250]](#footnote-251)250 and is rebuttable in cases governed by Texas common law. [[251]](#footnote-252)251 The rationale for presuming full integration is fairly straightforward: "Once the parties have reduced their agreement to writing 'they are presumed to have selected from prior negotiations only the promises and agreements for which they choose to be **[\*711]** bound.'" [[252]](#footnote-253)252

b. The Significance of "Merger" or "Integration" Clauses

Typically, to manifest their intention of creating a completely integrated agreement, parties will include a clause stating something to the effect that "there are no representations, promises, or agreements between the parties except those found in the writing." [[253]](#footnote-254)253 Such clauses are called "merger" or "integration" clauses. [[254]](#footnote-255)254

Merger, with respect to the law of contracts, refers to the extinguishment of one contract by its absorption into another contract and is largely a matter of the intention of the parties. Before one contract is merged into another, the last contract must be between the same parties as the first, must embrace the same subject matter, and must have been . . . intended by the parties [to extinguish the prior agreement]. A written agreement is not superseded . . . by a subsequent integration relating to the same subject matter if the subsequent agreement is such that it might naturally be made as a separate agreement. Parties to a contract may adjust the details of a transaction without abrogating the entire agreement. However, if the parties to one contract execute another whose terms are so inconsistent with the first that they cannot both stand, the first agreement is conclusively presumed to have been superseded by the second. An integration clause is in essence the merger doctrine memorialized. [[255]](#footnote-256)255

In Advertising & Policy Committee of the Avis Rent A Car System v. **[\*712]** Avis Rent A Car System, the contract at issue contained the following merger language: "This Agreement supercedes all prior agreements whether written or oral between the parties hereto and contains the entire agreement of the parties and no representations, inducements, promises or agreements, oral or otherwise, between the parties not embodied herein shall be of any force or effect." [[256]](#footnote-257)256 This language prompted the court of appeals to, rather matter-of-factly, recite that the agreement was wholly integrated. [[257]](#footnote-258)257

Similarly, the lease agreement at issue in Weinacht v. Phillips Coal Co. included the following language:

This Lease merges the prior negotiations and understandings of the parties hereto and embodies the entire agreement of the parties and there are not other agreements, assurances, conditions, covenants (express or implied) or other terms with respect to the [subject matter of the lease agreement], whether written or verbal or antecedent or contemporaneous with the execution hereof. [[258]](#footnote-259)258

Rejecting, as did the trial court, appellant's claim that the written contract did not extinguish an alleged oral agreement regarding royalty interests, the court of appeals concluded that the written agreement was fully integrated. [[259]](#footnote-260)259

However, the mere fact that a written contract contains a merger or integration provision does not guarantee full integration. [[260]](#footnote-261)260 In Bob Robertson, Inc. v. Webster, the sales contract might have appeared at first glance to be fully integrated because of the following "integration" provision: "THE FRONT AND BACK HEREOF COMPRISE THE ENTIRE AGREEMENT AFFECTING THIS ORDER AND NO OTHER AGREEMENT OR UNDERSTANDING OF ANY NATURE CONCERNING SAME HAS BEEN MADE OR ENTERED INTO." [[261]](#footnote-262)261 Upon further reflection, the court of appeals concluded that the sales contract was not fully integrated, reasoning that "this merger clause is con- **[\*713]** tradicted by the instrument itself, which refers to delivery numerous times and yet contains no delivery date. It cannot be said that an oral agreement regarding time of delivery is inconsistent with the terms of the written agreement . . . ." [[262]](#footnote-263)262

4. Bases for Finding Partial Integration

For a court to determine that a written agreement is not fully integrated, it must decide as a matter of law that (1) the writing is facially incomplete and requires extrinsic evidence to clarify, explain, or give meaning to its terms, [[263]](#footnote-264)263 or (2) when viewed in light of the circumstances surrounding its execution, the writing does not appear to be the complete embodiment of the terms relating to the subject matter of the writing. [[264]](#footnote-265)264

a. Facially Incomplete Contracts

It is often clear from the face of a writing that it is incomplete and cannot be more than a partially integrated agreement. Incompleteness may also be shown by other writings, which may or may not become part of a completely or partially integrated agreement. Or it may be shown by any relevant evidence, oral or written, that an **[\*714]** apparently complete writing never became fully effective, or that it was modified after initial adoption. [[265]](#footnote-266)265

An agreement may be facially incomplete because, inter alia, (1) numerous blanks in the written agreement are not filled in, [[266]](#footnote-267)266 (2) the written agreement explicitly refers to and incorporates another document, [[267]](#footnote-268)267 or (3) the agreement omits necessary terms. [[268]](#footnote-269)268

In First National Bank v. Walker, Walker, who owned fifteen percent of Instant Ice, was asked to sign a personal guaranty for a $ 30,000 loan from the bank to Instant Ice. [[269]](#footnote-270)269 Walker went to the bank, which gave him a blank guaranty form and asked him to sign it. [[270]](#footnote-271)270 Walker indicated that he would sign the blank guaranty upon the condition, inter alia, that the extent of Walker's guaranty would be limited to the amount of his ownership interest in Instant Ice. [[271]](#footnote-272)271 Walker testified that the bank's officer agreed to his conditions, whereupon Walker executed the blank form of guaranty and left it for the bank's officer to complete it as was agreed. [[272]](#footnote-273)272

The printed form of guaranty executed by Walker contained two blanks in addition to the date. Paragraph 1 provided that "unless a different definition is stated in paragraph twelve hereof, the expression 'guaranteed indebtedness,' as that term is used herein, means 'all indebtedness of every kind and character . . . limited to [$ 30,000] at any one time . . . .' " [[273]](#footnote-274)273 Paragraph 12 provided:

Unless specific indebtedness is described in the space below, the express "guaranteed indebtedness," as used herein shall have the meaning stated in paragraph one, but if the space below is filled in, such expression shall mean the indebtedness described below, together with all renewals or extensions of such indebtedness, or any part thereof:

**[\*715]** The space following this colon remained blank on the guaranty executed by Walker. [[274]](#footnote-275)274

Noting that

careful examination of the written guaranty agreement fails to reveal the existence of a merger clause or any other statement which would indicate the intention of the parties that any and all statements and agreements made prior to the execution of the instrument should be merged into the instrument itself,

the court of civil appeals held that the trial court did not err in permitting Walker to offer parol evidence to establish the oral agreement regarding the extent of his liability. [[275]](#footnote-276)275

The court further explained:

The bank argues that even if the amount of the guaranty was blank when the instrument was signed and delivered, the document was nevertheless complete because it expressly provides that the guaranty is unlimited if no amount is inserted. Thus, the bank insists that parol evidence was not admissible to show that the parties agreed otherwise. We do not accept that argument because, according to the undisputed evidence, neither of the parties treated the instrument as complete in this form. The document sued on shows on its face that the figure "$ 30,000" was inserted, and since there is evidence tending to show that the insertion was made after delivery, we must hold that parol evidence was admissible to show that the document was not completed in accordance with the agreement of the parties. [[276]](#footnote-277)276

**[\*716]**

b. Collateral Agreements

Similarly, where the written agreement does not include the entire agreement of the parties, parol evidence is admissible to show collateral agreements that are not inconsistent with and do not vary or contradict the integrated, unambiguous terms of the writing. [[277]](#footnote-278)277 A collateral agreement "may and must be such as the parties might naturally make separately and would not ordinarily be expected to embody in the writing; and it must not be so clearly connected with the principal transaction to be part and parcel thereof." [[278]](#footnote-279)278

In Bob Robertson, Inc. v. Webster, for example, the court of appeals found that a written new car sales contract was not fully integrated, despite the inclusion of an integration clause, because the written contract referred repeatedly to "delivery," but made no provision for the date of delivery. [[279]](#footnote-280)279 In light of the omission of the delivery date from the contract, the court concluded that "it cannot be said that an oral agreement regarding time of delivery is inconsistent with the terms of the written agreement . . . ." [[280]](#footnote-281)280

In Weinacht v. Phillips Coal Co., appellant alleged that appellee had orally promised to increase appellant's royalty if appellee paid a higher royalty than that provided for in the written contract to any other landowner in appellant's county. [[281]](#footnote-282)281 Appellant argued that this oral agreement was "collateral" to the written royalty agreement because the merger clause in the written agreement addressed only agreements with respect to "the surface of the Premises or the coal situated in on or under the premises." [[282]](#footnote-283)282 Appellant argued that his royalty payments had nothing to do with the parties' written agreement and, therefore, the merger clause did not reach the alleged oral agreement. [[283]](#footnote-284)283 The court of appeals disagreed, holding that, because the subject matter of the alleged oral agreement was encompassed by the written agreement, and because the alleged oral agree- **[\*717]** ment contained terms inconsistent with those of the written contract, the alleged oral agreement could not be collateral to the written agreement. [[284]](#footnote-285)284

5. The Consequences of Partial Integration

A finding that a written agreement is incomplete does not necessarily warrant wholesale introduction of parol evidence.

An agreement might be incomplete in some respects but perfectly clear and complete in others. Extrinsic evidence necessary to . . . give meaning to an agreement cannot be admitted to vary or contradict those portions of the agreement that are complete and unambiguous. Therefore, we must look to the particular parol evidence at issue and the purpose for which it was offered to see if it falls within an exception to the parol evidence rule. [[285]](#footnote-286)285

Nonetheless, extrinsic evidence may not supply essential terms of an otherwise incomplete written agreement. In Texas Builders v. Keller, the Texas Supreme Court considered a dispute over the fee owed to a commercial real estate broker under a solicitation to assist the defendant, Texas Builders, in leasing part of a tract of commercial property. [[286]](#footnote-287)286 Holding that the description of the property in the solicitation letter was not sufficiently specific to require Texas Builders to pay Keller a commission, the court, per curiam, wrote:

A writing need not contain a metes and bounds property description to be enforceable; however, it must furnish the data to identify the property with reasonable certainty. Parol evidence may be used to explain or clarify the written agreement, but not to supply the essential terms. For example, a contract that provides for sale of "my ranch of 2200 acres" is sufficient, where extrinsic evidence shows that the grantor owned one ranch, which indeed contained 2200 acres. **[\*718]**

But we have long held that a contract providing for the sale or lease of an unidentified portion of a larger, identifiable tract is not sufficient. [[287]](#footnote-288)287

6. A Note on Parol Evidence and the Statute of Frauds

The statute of frauds may prevent the enforcement of parol agreements that might otherwise supplement or modify an ambiguous or partially integrated contract or contractual provision. For contracts covered by the statute of frauds, "the general rule is that the required memorandum must contain all the essential terms of the agreement, so that parol evidence is not required to supply any substantive feature which has been omitted." [[288]](#footnote-289)288

The statute is not satisfied where essential details of the promise or agreement . . . are established by parol evidence and by documents not signed by the party to be charged, nor authenticated by his signature. It has also been held that parol evidence is not admissible to show that even signed writings relate to the same transaction; the connection between such instruments must be evident from the writing itself. Oral evidence can only bring together the different writings. It cannot connect them for the purpose of satisfying the Statute of Frauds. [[289]](#footnote-290)289

C. Exceptions to the Parol Evidence Rule

There are, in the words of one commentator, "a number of ways in which litigants can avoid the application of the parol evidence rule." [[290]](#footnote-291)290 If one or more of the following exceptions applies, the parol evidence rule will not prevent the introduction of oral testimony or other extrinsic evidence to explain, expand, or modify the written provisions of an otherwise integrated and unambiguous contract. [[291]](#footnote-292)291 **[\*719]**

1. Nonexistent, or "Sham," Contracts

Parol evidence is always competent to show the nonexistence of a contract. [[292]](#footnote-293)292 That is to say, parol evidence is admissible to show that "a writing which apparently constituted a contract was never intended or understood by either party to be binding," [[293]](#footnote-294)293 or, more generally, that "a valid contract never, in fact, existed." [[294]](#footnote-295)294 Likewise, parol evidence is admissible to show that, despite the existence of a written instrument purporting on its face to be a contract, the parties never intended it to be such, or that the purported contract is a "sham" agreement. [[295]](#footnote-296)295 Oral testimony in the case of a nonexistent or sham agreement is admissible because it "does not vary the terms of the writing but shows that it was never intended to be a contract or to be of binding force between the parties." [[296]](#footnote-297)296

In King v. Fordice, Fordice indicated to King that he was interested in either selling his Cessna 340 aircraft and purchasing a Cessna 414, or alternatively, in trading the 340 and cash for a 414. [[297]](#footnote-298)297 Some time later, King indicated to Fordice that he had located a Cessna 414, but that he would require Fordice to send him an "offer" for the plane before King could convince its current owner to bring the plane to Texas for Fordice's inspection. [[298]](#footnote-299)298 At King's instructions, Fordice and King exchanged "mailgrams" whereby, on their faces, King informed Fordice that King would sell the Cessna 414 to Fordice for $ 400,000 and credit Fordice $ 150,000 for his trade-in if it was in "good condition," and Fordice indicated he would "accept" King's "offer." [[299]](#footnote-300)299 King brought the plane to Texas for Fordice's inspection. [[300]](#footnote-301)300 Following this inspection, Fordice sent **[\*720]** King a telex indicating that he was unsatisfied with the Cessna 414 and would not purchase it. [[301]](#footnote-302)301 King then sued Fordice for breach of the "contract" evidenced by the mailgram and the subsequent telex. [[302]](#footnote-303)302

At trial, and over King's objection, Fordice testified that, inter alia, there was no intention on the part of either King or himself that the mailgram and telex would constitute a binding contract to purchase the Cessna 414 for $ 400,000. [[303]](#footnote-304)303 The trial court entered a judgment in King's favor. [[304]](#footnote-305)304 King appealed, arguing that the trial court erred by permitting Fordice to testify regarding the parties' intentions regarding the "deal" set forth in the mailgram and telex. [[305]](#footnote-306)305

The court of appeals, applying both the common-law parol evidence rule and the parol evidence rule as set forth in Article 2 of the Texas Uniform Commercial Code, [[306]](#footnote-307)306 affirmed the trial court's judgment, concluding that

parol evidence is always competent to show the nonexistence of a contract, or the invalidity of a contract even if there is a writing purporting to be an integration, and that such [evidence is] outside the scope of the common law parol evidence rule and the ambit of Texas Business and Commerce Code, § 2.202, with regard to the sale of goods. [[307]](#footnote-308)307

2. Fraudulent Inducement to Contract

"Extrinsic evidence may be admissible for the purpose of vitiating [or avoiding] a written contract where there has been fraud in the inducement." [[308]](#footnote-309)308 Proving fraud in the inducement sufficient to allow the consideration of parol evidence requires pleading and proof of some type of **[\*721]** "trickery, artifice, or device." [[309]](#footnote-310)309 It is not enough simply to show that a contractual provision or its effect was misexplained, [[310]](#footnote-311)310 or even misrepresented. [[311]](#footnote-312)311 Nor is it sufficient to simply aver knowledge and intent on the part of the alleged wrongdoer. [[312]](#footnote-313)312 "A party is charged with the obligation of reading what he [or she] signs." [[313]](#footnote-314)313

In Town North National Bank v. Broaddus, the Texas Supreme Court considered the admissibility of extrinsic evidence in a dispute over the liability of two co-makers (Broaddus and Taylor) of a promissory note upon default by a third co-maker (Curtis). [[314]](#footnote-315)314 Town North sued all three co-makers and moved for summary judgment. [[315]](#footnote-316)315 Broaddus and Taylor opposed Town North's motion for summary judgment by filing sworn affidavits stating that one of Town North's officers, "as agent for the Bank, explained to them that Curtis would have sole responsibility for payment of the note, the proceeds of which were to be used to purchase two cows [presumably for Curtis's use], and that the Bank would not look to either [Broaddus or Taylor] for repayment." [[316]](#footnote-317)316 The trial court granted Town North's motion for summary judgment. [[317]](#footnote-318)317 The court of appeals reversed and remanded on the ground that Broaddus's and Taylor's affidavits raised a fact question as to fraud in their inducement to sign the note. [[318]](#footnote-319)318

The supreme court reversed the court of appeals and affirmed the trial court's summary judgment, notwithstanding the affidavits by Broaddus **[\*722]** and Taylor. [[319]](#footnote-320)319 The court explained:

"A party to a written agreement . . . is charged as a matter of law with knowledge of its provisions and as a matter of law cannot claim fraud when he is bound to the provisions unless he can demonstrate that he was tricked into its execution." . . . The mere representation by a payee to the maker that the maker will not be liable on the note does not constitute fraud in the inducement so as to be an exception to the parol evidence rule.

In reaching its decision that parol evidence [the affidavits] was admissible in this case, the court of civil appeals placed primary reliance on Berry v. Abilene Savings Association and Viracola v. Dallas International Bank. It is true that the rule to be taken from those two decisions is that when there has been a representation by the payee to the maker of a note that the maker will not be liable thereon, extrinsic evidence of fraud in the inducement is to be permitted. A careful reading of Berry and Viracola, however, reveals that some sort of trick, artifice, or device was employed by the payee in addition to his representation to the maker that he would not be liable. . . . This element of trickery or deception is common to the other Texas decisions involving promissory notes in which fraud in the inducement was recognized as an exception to the parol evidence rule.

. . . .

. . . Applying that standard to the facts before us, we find no such showing by [Broaddus and Taylor]. The affidavits offered by Broaddus and Taylor in opposition to the Bank's motion for summary judgment indicate only that the Bank made representations to Broaddus and Taylor that they would not be liable on the note, which, even if correct, would be insufficient [to create a factual issue of fraudulent inducement]. [[320]](#footnote-321)320

**[\*723]**

Berry v. Abilene Savings Ass'n, cited by the Broaddus court, involved allegations that McAden, the president of Western Savings & Loan, and Newman, Berry's employer, induced Berry to make and sign a $ 5,000 promissory note by false and fraudulent representations. [[321]](#footnote-322)321 After Berry failed to repay the note at or after maturity, Abilene Savings, Western's successor-ininterest to the note, sued Berry and moved for summary judgment. [[322]](#footnote-323)322 Berry opposed summary judgment with an affidavit alleging that: (1) McAden and Newman were neighbors; (2) Western could not lend the money to Newman directly; (3) a scheme was worked out so that Berry could borrow the money and then turn it over to Newman; (4) McAden told Berry several times that he would not be liable for repayment; (5) McAden told Berry that he would have never lent the money to Berry, given his financial situation; (6) McAden and Newman both pressured Berry to sign the note; and (7) Berry signed the note, received the money, and promptly handed it over to Newman. [[323]](#footnote-324)323 Based on these alleged facts, the court of civil appeals found that Berry had raised a fact issue concerning fraudulent inducement. [[324]](#footnote-325)324

Viracola v. Dallas International Bank, also cited by the Broaddus court, concerned the liability of Viracola, the president of American Panel, on a note taken out by American Panel to provide operating funds during negotiations for the sale of the business. [[325]](#footnote-326)325 In opposition to the bank's motion for summary judgment, Viracola offered an affidavit averring, inter alia, that the note was originally signed only by Viracola in his representative capacity, and that

soon thereafter, the Bank requested Viracola to co-sign the note individually and to pledge his American Panel Corporation stock with the Bank "only to assure the Bank that the note would be paid in full first from the proceeds of the sale before any distribution of funds was made to other creditors and stockholders." Viracola was also assured by the bank that "if the sale was not final- **[\*724]** ized" the stock would be returned to him and his individual liability on the note would end. [[326]](#footnote-327)326

Notwithstanding these assurances, the bank looked to Viracola individually for repayment of the note when the sale fell through. [[327]](#footnote-328)327 As in Berry, the trial court granted summary judgment in the bank's favor and the court of civil appeals reversed and remanded, holding that Viracola had raised a genuine issue of material fact regarding whether "the Bank" had fraudulently induced him to co-sign the note and pledge his stock. [[328]](#footnote-329)328

Despite the Texas Supreme Court's efforts to distinguish Broaddus from Berry and Viracola, the distinction appears to be no more than a matter of degree. All three cases involved alleged oral representations by the lender that the defendant would not have to repay the note. Berry and Viracola may be distinguishable from Broaddus due to a third party's alleged involvement in the "scheme." But the "third party" in Viracola was American Panel, on whose behalf Viracola had acted. [[329]](#footnote-330)329 Berry may differ from Broaddus and Viracola because the court may have viewed the defendant's actions as duress, which could truly distinguish it from either Broaddus or Viracola. Unfortunately, the Broaddus court did not explain why the situation before it was distinguishable from Berry and Viracola; the court simply said that it was so. [[330]](#footnote-331)330

3. Mutual Mistake

The parol evidence rule does not bar extrinsic proof of mutual mistake. [[331]](#footnote-332)331 Mutual mistake occurs when both (or all) "parties to an agreement have contracted under a misconception about or ignorance of a material fact . . . ." [[332]](#footnote-333)332 To qualify as an exception to the parol evidence rule, the mistake must be mutual. [[333]](#footnote-334)333 One party cannot complain that it was ignorant of, or mistaken about, the contents of an agreement, nor can a party com- **[\*725]** plain that it failed to read the agreement before accepting it when the agreement clearly states that it was agreed to and understood by the party. [[334]](#footnote-335)334 Mutual mistake must be pleaded in order to allow a party to present parol evidence supporting its claim to reform or avoid the contract. [[335]](#footnote-336)335

An interesting case of mutual mistake is presented by Josten's, Inc. v. Gilcrease. [[336]](#footnote-337)336 The court of appeals considered whether a facially unambiguous termination agreement permitting appellee Buffington to retain Josten's merchandise in his possession included certain Dallas Cowboys Super Bowl rings. [[337]](#footnote-338)337

The parties concede that a binding contract was made. They differ, however, as to whether the terms of the contract include the Super Bowl Rings. Josten's alleged the Super Bowl Rings were excluded from the scope of the contract because Buffington represented before the contract was made, and Josten's believed his representation, that the rings were lost or stolen; and, Josten's alleged, it learned thereafter that Buffington knew his representation was false when he made it. Buffington concedes the representation but contends it was true when made. [[338]](#footnote-339)338

In response to Josten's argument that the agreement did not include the Super Bowl rings because of Buffington's allegedly false pre-agreement representation,

Buffington responds that the parties' pre-contract understanding is immaterial because the contract is unambiguous in awarding Buffington all articles he had in his possession or that he acquired during his association with the company. The parol-evidence rule therefore precludes Josten's from varying the contract description by extrinsic evidence of the pre-contract representation and understanding . . . even though both parties thought at the time **[\*726]** of contracting that the Super Bowl Rings were lost or stolen . [[339]](#footnote-340)339

The court of appeals, considering the propriety of the district court's summary judgment in favor of Buffington, remarked:

We assume the contract was unambiguous relative to the articles Buffington "acquired during his association with Josten's." This does not mean, however, that the trial court was bound by the parol-evidence rule to deny legal effect to the undisputed fact that both contracting parties (Josten's and Buffington) thought the rings were lost or stolen when they made the contract . . . . [[340]](#footnote-341)340

The court of appeals reversed the summary judgment. [[341]](#footnote-342)341 Citing to, inter alia, Stewart v. Selder [[342]](#footnote-343)342 and City of Pinehurst v. Spooner Addition Water Co. [[343]](#footnote-344)343 for the proposition that a court should construe even a facially unambiguous contract in light of the circumstances surrounding its execution, the Josten's court concluded that the parties' "mutual belief at the time of contracting that the Super Bowl Rings were lost or stolen . . . was an operative fact essential to arrive at the meaning they intended in the contract language they chose to describe the articles that should belong thereafter to Buffington." [[344]](#footnote-345)344 Therefore, Josten's was entitled to present evidence of the mutual mistake, notwithstanding the fact that the agreement was facially unambiguous. [[345]](#footnote-346)345

4. Collateral Agreements

A contemporaneous collateral agreement, " 'though it refer to the same subject matter, and may affect the rights of the parties under the written contract,' may be proven only if not inconsistent with the integrated contract." [[346]](#footnote-347)346 To be collateral, the parties must agree for separate consideration, or the agreement "must be such as the parties might naturally **[\*727]** make separately and would not ordinarily be expected to embody in the writing; and it must not be so clearly connected with the principal transaction as to be part and parcel thereof." [[347]](#footnote-348)347

In Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., appellant ABC asserted two separate oral agreements that it claimed altered its written payment agreement with appellee MMB. [[348]](#footnote-349)348 "First, ABC asserted that MMB conceded that ABC was entitled to an offset of roughly $ 400,000 for defective and nonconforming goods." [[349]](#footnote-350)349 The Fifth Circuit found that this alleged oral agreement directly contradicted the payment provision of the written agreement, which recited the total amount that ABC owed to MMB as a result of the dispute giving rise to the written agreement. [[350]](#footnote-351)350 Therefore, the Fifth Circuit held that evidence regarding the first alleged oral agreement was inadmissible. [[351]](#footnote-352)351 "Second, ABC maintained that its obligation under the payment schedule was contingent upon MMB's oral agreement to resume shipment" to ABC on credit terms. [[352]](#footnote-353)352 The Fifth Circuit admitted that this second oral agreement was "not inconsistent with the payment terms stated in the written agreement, because [the latter was] silent as to future sales." [[353]](#footnote-354)353 Nonetheless, the Fifth Circuit ruled that evidence regarding this second oral agreement was inadmissible because (1) "its contingent nature is inconsistent with the unconditional language of the written agreement," and (2) "we cannot conclude that a contingency of this nature would naturally be made as a separate agreement." [[354]](#footnote-355)354 In reporting its ruling as to the second alleged oral agreement, the court recounted the following from a similar case:

It is implausible that Toys would have used explicit, unconditional release language in Markham's letter, while orally agreeing to make the release contingent on some vague guarantee of future business. Nor can we believe that the alleged oral agreement is one that would be made separately . . . . This court recognizes that even the most **[\*728]** sophisticated businessmen often deal with each other informally and verbally, but in circumstances such as these, even an unsophisticated businessman . . . would either have protested the unconditional release language or insisted on getting the alleged oral agreement in writing. [[355]](#footnote-356)355

Similarly, in N.K. Parrish, Inc. v. Southwest Beef Industries Corp., the Fifth Circuit rejected the appellants' argument that alleged oral limitation-of-liability agreements between the appellants and the appellees were "collateral agreements, or agreements which induced the written contracts, and, under Texas law, were considered exceptions to the parol evidence rule." [[356]](#footnote-357)356 The court held that "no such limitation of an investor's liability could be collateral. It would directly conflict with the unambiguous terms of both the agency agreement and the prospectus, and the trial judge erred in considering such evidence." [[357]](#footnote-358)357

5. Subsequent Acts or Agreements

The parol evidence rule excludes only extrinsic evidence of prior or contemporaneous agreements. [[358]](#footnote-359)358 What about dealings after the contract is executed?

a. Subsequent Agreement

The parol evidence rule does not apply to oral or written agreements made between some or all of the same parties after the parties execute the written agreement. [[359]](#footnote-360)359 In Smith v. Smith, the wife executed an Agreement Incident to Divorce (AID) on May 25, 1984, and delivered it to the husband for his execution. [[360]](#footnote-361)360 On May 31, 1984, the wife executed an Addendum. [[361]](#footnote-362)361 On June 1, 1984, both the AID and the Addendum were finalized by the parties and made enforceable pursuant to Texas Rule of Civil Pro- **[\*729]** cedure 11. [[362]](#footnote-363)362 The wife subsequently argued, inter alia, that the Addendum was inadmissible to vary the terms of the AID because of "the parol evidence rule, the merger doctrine, and an integration clause contained in the AID." [[363]](#footnote-364)363 The court of appeals rejected the wife's argument, concluding that the Addendum to the AID was exactly what it purported to be: a subsequent written agreement modifying the AID, the prior written agreement. [[364]](#footnote-365)364

A written agreement is not superseded or invalidated by a subsequent integration relating to the same subject matter if the subsequent agreement is such that it might naturally be made as a separate agreement. Parties to a contract may adjust the details of a transaction without abrogating the entire agreement. [[365]](#footnote-366)365

b. Subsequent Oral Modification

Provided that the original written agreement does not expressly require that any subsequent modifications be in writing, parol evidence regarding subsequent oral modifications of a prior written agreement may be admissible. [[366]](#footnote-367)366 However, if the written agreement does require that subsequent modifications be in writing, Texas courts will, with two exceptions discussed below, bar admission of extrinsic evidence to establish a subsequent oral agreement. [[367]](#footnote-368)367

A no-oral-modification clause may be waived by a party either by ac- **[\*730]** cepting nonwritten changes from the other party or by making nonwritten changes. [[368]](#footnote-369)368 Moreover, notwithstanding a no-oral-modification clause, Texas law permits proof of a subsequent oral agreement as long as the statute of frauds does not require that the underlying contract be in writing. [[369]](#footnote-370)369

c. Rescission

A prior written contract may be rescinded by subsequent oral agreement. [[370]](#footnote-371)370 In such a case, extrinsic evidence offered to prove the rescission may be admitted even in the face of an unambiguous, fully integrated written contract. [[371]](#footnote-372)371

d. Novation

Evidence showing an agreement to substitute a new obligation for an existing one, with the intent to extinguish the prior obligation, is admissible to show that the parties have agreed to extinguish the terms of the prior written agreement or that the prior written agreement was not integrated. [[372]](#footnote-373)372

6. Illegal Provisions or Agreements

Parol evidence is admissible to show that an otherwise integrated, unambiguous contract is or was entered into in a manner that is contrary to law, public policy, or public morals. [[373]](#footnote-374)373 **[\*731]**

7. Evidence Pertinent to Consideration

a. Lack of or Failure of Consideration

Parol evidence is admissible to show want or failure of consideration. [[374]](#footnote-375)374 As the Restatement (Second) of Contracts explains:

Where a written agreement requires consideration and none is stated in the writing, a finding that the writing is a completely integrated agreement would mean that it is not binding for want of consideration. Since only a binding integrated agreement brings the parol evidence rule into operation, evidence is admissible to show that there was consideration and what it was. [[375]](#footnote-376)375

b. True Consideration

Parol evidence is also admissible to establish the actual consideration given for a written agreement where the actual consideration is different from that recited in the agreement, [[376]](#footnote-377)376 or where the agreement fails to recite the consideration at all. [[377]](#footnote-378)377

8. Condition Precedent

It is well settled that parol evidence of a condition precedent to a con- **[\*732]** tract or contractual provision is admissible. [[378]](#footnote-379)378 The effect of such a condition "is not to vary the terms of a binding instrument, but merely . . . to postpone the effective date of the instrument until the happening of a contingency." [[379]](#footnote-380)379 Parol testimony may show "that an ordinary written instrument was executed under an agreement that it was not to become effective except upon certain conditions or contingencies." [[380]](#footnote-381)380

Note that, despite the special treatment afforded conditions precedent, "extrinsic evidence is admissible to establish an oral condition precedent only if it is consistent with the terms of the written contract." [[381]](#footnote-382)381 That is, of course, assuming that the written contract has terms with which the alleged oral agreement could be inconsistent. By the same token, according to the Restatement (Second) of Contracts, "where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition." [[382]](#footnote-383)382 The commentary to the Restatement (Second) of Contracts elaborates:

An oral requirement of a condition is never completely consistent with a signed written agreement which is complete on its face; in such cases evidence of the oral requirement bears directly on the issues of whether the writing was adopted as an integrated agreement and if so whether the agreement was completely integrated or partially integrated . . . . If the parties orally agreed that per- **[\*733]** formance of the written agreement was subject to a condition, either the writing is not an integrated agreement or the agreement is only partially integrated until the condition occurs. Even a "merger" clause in the writing, explicitly negating oral terms, does not control the question of whether there is an integrated agreement or the scope of the writing. [[383]](#footnote-384)383

Conditional language, such as "if," is indicative that a condition precedent was intended by the parties. [[384]](#footnote-385)384 For example, in Belmont Constructors, Inc. v. Lyondell Petrochemical Co., the contract contained a "mandatory arbitration" provision that read as follows: "If the parties cannot agree within 10 days on a different method of resolving the matter, the matter shall be submitted by the parties to and be decided by binding arbitration." [[385]](#footnote-386)385 The court of appeals "concluded such language created a condition precedent to mandatory arbitration. The contract provided for mandatory arbitration only in the event the parties could not first agree on an alternate method of resolving their dispute." [[386]](#footnote-387)386

In First National Bank v. Walker, the court of civil appeals addressed the admissibility of parol testimony under the following conditions:

During the trial appellee Walker testified that although he was not involved with the negotiations leading to the $ 30,000 loan from the bank to Instant Ice, Inc., he was familiar with such loan and that on August 7, 1974, he received a telephone call from First National's officer, Vaughn Pearson, who requested that he execute a guaranty of the loan. . . . Walker went to [Pearson's] office and . . . Pearson's secretary handed Walker his printed form of guaranty which was completely blank, that is no blanks were filled in with typewriting. . . . Walker discussed the matter of the blank form with Pearson. Walker **[\*734]** indicated that he would sign the blank guaranty form upon the condition that the bank secure from Ted Kreatschman a similar agreement and that the extent of Walker's guaranty would be limited to the amount of his ownership interest in Instant Ice, Inc. which was approximately fifteen percent. Walker testified that Pearson agreed to his conditions of delivery of the guaranty. Walker testified that he executed a blank form of guaranty and left it with Pearson to be completed only upon the agreed condition of delivery. . . .

Pearson denied that any parol agreements were made with respect to the guaranty . . . . [[387]](#footnote-388)387

Noting the lack of a merger provision, the court of civil appeals held that the trial court did not err in permitting Walker to offer parol evidence to establish the oral condition precedent to his guaranty. [[388]](#footnote-389)388 The court explained:

Parol testimony is admissible to show the execution of a written instrument under an agreement that it is not to become effective except upon certain conditions. It is well settled that a written contract does not become a binding obligation until delivery, and, if the delivery is conditional, the written contract does not become a binding obligation until the condition upon which delivery depends has been fulfilled.

. . . One who executes an obligation conditional upon the express representation, of which the obligee has notice, that a third party shall likewise execute an agreement and share the liability thereon, will be released from liability if the third party fails to so execute the instrument. [[389]](#footnote-390)389

9. Lost or Destroyed Contract

When a written, signed contract is lost or destroyed such that the party seeking to prove or enforce the agreement is unable to produce the written **[\*735]** agreement in court, the existence and terms of the written contract may be proved by clear and convincing parol evidence. [[390]](#footnote-391)390

10. Scrivener's Error

Extrinsic evidence may be admissible to show the existence of a clerical error in a written agreement. [[391]](#footnote-392)391 Some courts will extend the scope of this exception to include more than mere clerical errors. For example, in McCauley v. Alexander, the court of civil appeals affirmed the trial court's judgment based, at least in part, on extrinsic evidence that showed

without dispute and beyond any doubt that Mrs. Permenter intended to leave all of her estate to the Eden Home, and that the omission in question resulted from the inadvertent failure of the lawyer who prepared the will to include the words "all of my property and estate" at the end of the second paragraph. [[392]](#footnote-393)392

Other courts, however, are reluctant to permit parol evidence to correct what appear to be nothing more than clerical errors. For example, in Joseph v. Mahoney Corp., plaintiff and defendant executed a lease on April 5, 1956, that included a provision whereby "Lessee shall pay all taxes in excess of taxes assessed against said property over and above City, County and State taxes for the year 1951." [[393]](#footnote-394)393 Despite the fact that the lease term was clearly in error, the court of civil appeals affirmed the trial court's judgment against the Lessee, holding that, because "the parties to the lease agreement knew the contents of the written lease, . . . the 'scrivener's mistake' exception" to the parol evidence rule did not apply. [[394]](#footnote-395)394

11. Course of Dealing or Course of Performance

A course of dealing is "a sequence of previous conduct between the **[\*736]** parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." [[395]](#footnote-396)395 The Restatement formulation closely tracks the Uniform Commercial Code, [[396]](#footnote-397)396 as well as most of the more recent reported cases invoking usage of trade to construe contracts subject to the UCC. Nonetheless, course of dealing and course of performance are legitimate grounds for resorting, in cases not governed by the UCC, to otherwise excludable extrinsic evidence. [[397]](#footnote-398)397

In Crest Construction, Inc. v. Murray, appellant (Crest) argued that the trial court erred by refusing to admit several documents dealing with contract provisions and with subcontract terms between Crest and Murray, all of which were dated and signed by Crest, but were not signed by Murray--although there was no evidence that Murray had refused to sign any of the documents. [[398]](#footnote-399)398

The court of appeals explained further:

Because of the state of the record and because there were no fully signed sub-contracts on the three jobs, a paramount, disputed issue arose between the parties as to when Crest was obligated legally to make advanced, weekly payroll payments to Murray on the three jobs germane to this litigation.

The basic position of Murray was that there was an oral agreement which made it mandatory and legally obligatory upon Crest to make weekly payroll payments on the three jobs. Crest on the other hand asserted that it was to pay Murray only on a monthly basis in accordance with the usage, procedure, and custom that Crest and Murray had utilized for many years . . . . [[399]](#footnote-400)399

The court of appeals found that "under the course of dealing between the parties approximating about nine or ten years," the excluded documents were relevant and "had a strong tendency to prove the existence of a fact **[\*737]** of ultimate consequence" regarding Crest's obligations to Murray. [[400]](#footnote-401)400 Therefore, the court of appeals sustained Crest's point of error complaining about the trial court's exclusion of the documents and remanded the case for further proceedings. [[401]](#footnote-402)401

12. Custom and Usage

Evidence that might otherwise be excluded by operation of the parol evidence rule may be admissible to show industry custom or trade usage, which are presumed to be a "backdrop" against which all commercial contracts are drafted. [[402]](#footnote-403)402 Nonetheless, "where a contract is clear, complete and unambiguous . . . new terms cannot be added to the contract by incorporating a usage or custom which would add to the contractual obligations of one of the parties." [[403]](#footnote-404)403

In International Piping Systems, Ltd. v. M.M. White & Associates, the court of appeals addressed the admissibility of expert testimony regarding industry practice, determining whether agency agreements were standard in the industry in question. [[404]](#footnote-405)404 In that case, White and Brown discussed White's acting as an agent for Brown's employer, IPS. [[405]](#footnote-406)405 On November 14, 1983, White and Brown met and discussed a "proposed agreement" **[\*738]** regarding White's agency. [[406]](#footnote-407)406 On November 17, 1983, White received a letter from Brown authorizing White to act as IPS's sales representative. [[407]](#footnote-408)407 The November 17th letter was silent as to the duration of White's agency. [[408]](#footnote-409)408 At trial, White testified that his agreement with IPS was for one year, beginning November 17, 1983. [[409]](#footnote-410)409 White also proffered expert testimony that one-year agency agreements "were standard in the industry" and that all of IPS's agreements with other agents had one-year terms. [[410]](#footnote-411)410 The jury found that a one-year agreement existed. [[411]](#footnote-412)411 The court of appeals held that, given the testimony of White and White's expert, the evidence was legally sufficient to support the jury's finding. [[412]](#footnote-413)412

The party suggesting that a contract be construed consistently with custom and usage must provide evidence that the custom or usage was generally known or had been in use for a sufficient time to become generally known, and that the contracting parties knew or should have known of the proffered custom or usage, and therefore the court can presume that the parties contracted with reference to it. [[413]](#footnote-414)413 For example, in Monesson v. Champion International Corp., a written proposal to supply cabinets, which was subsequently accepted and became the contract pursuant to which cabinets were supplied to the appellant, contained the phrase "prices subject to change without notice." [[414]](#footnote-415)414 The court of civil appeals **[\*739]** found the contract to be ambiguous because there were at least two reasonable interpretations of the phrase "prices subject to change without notice." [[415]](#footnote-416)415 The court ruled, therefore, that extrinsic evidence of industry custom and usage regarding pricing terms was admissible. [[416]](#footnote-417)416

In Chase Manhattan Bank v. First Marion Bank, the Fifth Circuit considered the admissibility of extrinsic evidence of course of dealing and trade usage to determine the parties' respective obligations under a subordination agreement. [[417]](#footnote-418)417 The parties executed the agreement to secure a further extension of credit by Chase to the borrowers of a series of loans made by a group of lenders, including both Chase and First Marion. [[418]](#footnote-419)418 As part of the agreement, First Marion and others were obligated to compensate Chase in the event that they sold any of their shares of the stock that was the original security on the loan package. [[419]](#footnote-420)419 The issue before the Fifth Circuit was whether the district judge erred in refusing to consider extrinsic evidence of trade usage in the commercial lending industry and the prior course of dealing among the various parties to the subordination agreement. [[420]](#footnote-421)420

Finding that section 2-202 of the UCC did not apply because the agreement at issue did not involve the sale of goods, the Fifth Circuit relied on common law to determine whether the district court had erred. [[421]](#footnote-422)421 Reciting the definitions of "course of dealing" and "usage of trade" in sections 1-205(1) and 1-205(2) of the UCC, respectively, the court opined: "Certainly the [common-law] parol evidence rule does not preclude evidence of course of dealing or usage of trade, for such evidence merely delineates a commercial backdrop for intelligent interpretation of the agreement." [[422]](#footnote-423)422 The Fifth Circuit held:

Evidence of course of dealing and usage of trade is admissible to permit analysis of the written agreement in the proper commercial setting. Such evidence might disclose ambiguities within the provisions of the agreement and ostensible inconsistencies in their relationship to one another. Certainly, in the context of this case, Chase's prof- **[\*740]** fered testimony and evidence as to course of dealing and usage of trade remain subject to cross-examination, as well as First Marion's contrary testimony and evidence regarding the same matters. Ultimately, having considered all relevant course of dealing and usage evidence, the District Judge must determine whether the written agreement contains ambiguities or lacks potentially material terms.

If the trial court--after consideration of all relevant course of dealing and usage of trade evidence--determines as a matter of law that the written agreement is unambiguous and integrated, evidence of the intentions and subsequent actions of the parties is irrelevant to the decision of this case. Viewed against the proper background, clear words and provisions leave no room for factual judgments. However, if the District Judge rules that the agreement in question is ambiguous, incomplete, or uncertain in any respect, parol evidence of the intent and purposes of the parties in making the contract becomes admissible for construction. . . . [[423]](#footnote-424)423

Evidence to explain ambiguity, establish a custom, or show the meaning of technical terms, and the like, is not regarded as an exception to the [parol evidence] rule, because it does not contradict or vary the written instrument, but simply places the court in the position of the parties when they made the contract, and enables it to appreciate the force of the words they used in reducing it to writing. It is received where doubt arises upon the face of the instrument as to its meaning, not to enable the court to hear what the parties said, but to enable it to understand what they wrote, as they understood it at the time. Such evidence is explanatory, and must be consistent with the terms of the contract. [[424]](#footnote-425)424

**[\*741]**

13. Meaning of Technical Terms

Evidence that might otherwise be excluded by operation of the parol evidence rule may be admissible to explain or interpret technical terms used in a written agreement. [[425]](#footnote-426)425 "Technical terms and words of art [should be] given their technical meaning when used in a transaction within their technical field." [[426]](#footnote-427)426

In Sivert v. Continental ***Oil*** Co., the court of civil appeals considered the admissibility of extrinsic evidence regarding the meaning of the terms "secondary recovery" and "waterflood," which the parties used in a written unitization agreement. [[427]](#footnote-428)427 Noting that "Texas courts have consistently permitted this type of testimony," [[428]](#footnote-429)428 the court of civil appeals found that the trial court did not err in permitting two petroleum engineers to testify as to the meaning of the terms. [[429]](#footnote-430)429 The court explained: "The terms 'secondary recovery' and 'waterflood' are not terms of common usage, and are technical terms peculiarly applicable to the ***oil*** industry. . . . This evidence was not parol evidence tending to vary the terms of the written agreement, but was explanatory of such technical terms used in the unitization agreement." [[430]](#footnote-431)430

In Byrd v. Smith, the court of civil appeals rejected an argument that extrinsic evidence of the meaning of the term "carried interest" used in a written agreement was barred by the parol evidence rule. [[431]](#footnote-432)431 The court of civil appeals explained:

"Carried interest" . . . is a technical term adopted from the ***oil*** industry and was used in a contract concerning a speculative real estate venture. . . . As used in the ***oil*** industry, the holder of a carried interest of a working inter- **[\*742]** est has no personal obligation for operating costs while the co-owners who advance such costs are entitled to reimburse themselves first from future production. As the term was used here, it meant that the co-owners who advanced expenses were entitled to reimburse themselves first from the profits of the venture before equal distribution to all shareholders was made. This meaning was explained to the Appellant, and the testimony was that he was then in complete agreement. The trial court adopted this explanation in its interpretation of the assignment and of the Joint Venture Agreement. We are in accord with that conclusion. [[432]](#footnote-433)432

14. Meaning Peculiar to the Contracting Parties

Extrinsic evidence may also be admissible to explain terms, technical or otherwise, used in a written agreement, whose meaning is peculiar to the contracting parties. [[433]](#footnote-434)433

15. Scope of Contract

Evidence that might otherwise be excluded by operation of the parol evidence rule may be admissible to show the scope of the work or transaction contemplated by the contract. [[434]](#footnote-435)434

16. False, Misleading, or Deceptive Practices

The parol evidence rule has been held not to bar the admissibility of extrinsic proof of false, misleading, or deceptive practices under the Texas Deceptive Trade Practices Act. [[435]](#footnote-436)435 **[\*743]**

D. The Parol Evidence Rule in Action: A Simplified Checklist

To even the most courageous Pickwickian, the parol evidence rule must seem a treacherous bog in the field of contract law. Interspersed in this quagmire are quicksand-like state court decisions, which appear equitable in specific situations but remain perilous for legal precedent. Federal courts, attempting to clarify, have sometimes but confused and compounded muddled interpretation of the axiom.

Thus we tread cautiously in this morass . . . .

--Judge David W. Dyer [[436]](#footnote-437)436

While the parol evidence rule may be easy to recite, it is much more difficult to pin down in practice. As discussed previously, and as is apparent from the foregoing statements of the parol evidence rule, before a trial court reaches the question of whether evidence offered regarding a prior agreement or prior discussions will be admitted before the trier of fact, the court must make the following threshold determinations: [[437]](#footnote-438)437

(1) Is there a valid (i.e., not void or voidable, due to illegality, fraud, or mistake) written agreement covering the subject matter of the proffered extrinsic evidence?

(2) If so, does the written agreement constitute the final agreement of the parties regarding the subject matter of the proffered extrinsic evidence?

(3) If so, does the written agreement constitute the complete and exclusive agreement of the parties regarding the subject matter of the proffered extrinsic evidence?

(4) If so, are the final and complete terms of the written agreement unambiguous? [[438]](#footnote-439)438

(5) If so, does the proffered extrinsic evidence contradict, vary, or supplement any terms of the written agreement that the court has previ- **[\*744]** ously determined to be unambiguous, final, and complete?

If the answer to any of the foregoing questions is "No"--or, arguably, "Maybe" [[439]](#footnote-440)439 --then the parol evidence rule does not prevent the trier of fact from considering the proffered extrinsic evidence. If the answer to all of the foregoing questions is "Yes," then the trial court must answer the following additional question:

(6) Does the proffered extrinsic evidence, which is otherwise subject to the parol evidence rule, fit one or more of the numerous exceptions to the rule? [[440]](#footnote-441)440

If so, then, again, the parol evidence rule does not prevent the trier of fact from considering the proffered extrinsic evidence. If not, and only if not, then the parol evidence rule (common-law or statutory) applies to bar the trier of fact from considering the proffered extrinsic evidence. Moreover, in order to answer any or all of the foregoing questions, the trial court is free to consider any and all extrinsic evidence that might aid the court in making its decision. [[441]](#footnote-442)441

The foregoing questions should be raised and resolved as early in the case as possible, as they will govern the extent and types of evidence that may be submitted to the trier of fact, as well as the extent to which the **[\*745]** written agreement will be open to interpretation. [[442]](#footnote-443)442

E. Consideration of Extrinsic Evidence by the Trial Court and the Factfinder Under Texas Common Law: A Summary [[443]](#footnote-444)443

In summary, extrinsic evidence proffered to assist in the construction or interpretation of a written agreement may be considered as follows:

1. The Trial Court's Threshold Determination of Integration

In determining whether a contract term is integrated, the trial court may freely consider extrinsic evidence of surrounding circumstances, including custom and usage, course of dealing, and the like. [[444]](#footnote-445)444

2. The Trial Court's Threshold Determination of Ambiguity

In determining whether a contract term (integrated or not) is ambiguous, the trial court, likewise, may freely consider extrinsic evidence of surrounding circumstances. [[445]](#footnote-446)445

3. Construing and Interpreting Integrated Terms

If the trial court finds that a contract term is integrated, it must still decide whether the term is ambiguous (as above).

a. Integrated, Ambiguous Terms

If the court finds that an integrated term or provision is ambiguous, the factfinder should be permitted to consider evidence of alternative, but not contradictory, interpretations of the ambiguous term. [[446]](#footnote-447)446

b. Integrated, Unambiguous Terms

If the court finds that an integrated term or provision is unambiguous, the trial court should construe the term, as a matter of law, considering **[\*746]** extrinsic evidence of surrounding circumstances. [[447]](#footnote-448)447 The factfinder plays no role in the construction or interpretation of integrated, unambiguous terms. [[448]](#footnote-449)448

4. Construing and Interpreting Unintegrated Terms

If the trial court finds that a contract term is not integrated, the parol evidence rule will not bar either the trial court or the factfinder from considering extrinsic evidence of terms that contradict, alter, add to, subtract from, or otherwise modify the written, unintegrated term. [[449]](#footnote-450)449

a. Unintegrated, Ambiguous Terms

If the court finds that an unintegrated term is ambiguous, the factfinder must decide the terms of the agreement. [[450]](#footnote-451)450 In so doing, the factfinder is free to consider extrinsic evidence of terms that contradict, alter, add to, subtract from, or otherwise modify the written, unintegrated term.

b. Unintegrated, Unambiguous Terms

If the court finds that an unintegrated term is unambiguous, the trier of fact is free to consider extrinsic evidence to "fill in" the missing portion(s) of the agreement. [[451]](#footnote-452)451 However, the trier of fact may not consider extrinsic evidence that alters or contradicts any portion of the written agreement which is integrated. [[452]](#footnote-453)452 In such a case, the trial court should instruct the jury, considering extrinsic evidence of surrounding circumstances, on the meaning of the unambiguous term. [[453]](#footnote-454)453 **[\*747]**

F. The Admissibility Under the Uniform Commercial Code of Extrinsic Evidence Otherwise Subject to the Parol Evidence Rule

The Uniform Commercial Code, as adopted in Texas, [[454]](#footnote-455)454 provides a codification of the parol evidence rule as it pertains to contracts for the sale or lease of goods, [[455]](#footnote-456)455 as well as for negotiable instruments. [[456]](#footnote-457)456 These codified versions of the parol evidence rule are presumed to "trump" the "plain meaning" and other approaches to construing and interpreting contracts--even fully integrated contracts--between commercial actors. [[457]](#footnote-458)457

1. Uniform Commercial Code Sections 2.202 and 2A.202 [[458]](#footnote-459)458

Even in the case of an integrated, unambiguous contract or contractual provision for the sale or lease of goods, [[459]](#footnote-460)459 contractual terms may be explained or supplemented by evidence of course of dealing, usage of trade, course of performance, or evidence of consistent additional terms. **[\*748]**

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set for in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(1) by course of dealing or usage of trade (Section 1.205) or by course of performance (Section 2.208); and

(2) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. [[460]](#footnote-461)460

Section 2.202 dispenses with the presumption that a written contract is fully integrated, [[461]](#footnote-462)461 as well as "the requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous." [[462]](#footnote-463)462

According to the Fifth Circuit, section 2.202

adds a third level to the traditional two-level ambiguity inquiry. Instead of asking, "Were the contract terms ambiguous" and then, "If they were ambiguous what do they mean in light of extrinsic evidence," the Code poses three inquiries:

1. Were the express contract terms ambiguous?

2. If not, are they ambiguous after considering evidence of course of dealing, usage of trade, and course of performance? **[\*749]**

3. If the express contract terms by themselves are ambiguous, or if the terms are ambiguous when course of dealing, usage of trade, and course of performance are considered (that is, if the answer to either of the first two questions is yes), what is the meaning of the contract in light of all extrinsic evidence? [[463]](#footnote-464)463

The first inquiry is a question of law; the third inquiry is a question of fact. [[464]](#footnote-465)464 The "thorny problem," in the words of the Fifth Circuit, is determining whether the second inquiry is one of law, fact, or both. [[465]](#footnote-466)465 Neither the Texas courts nor the Fifth Circuit has as yet resolved this thorny question.

Section 2.202 also clarifies, for purposes of disputes over contracts subject to Article 2, that language used in a written contract should be afforded "the meaning which arises out of the commercial context in which it was used," rather than the meaning that might be attributed to it "by rules of construction existing in the common law." [[466]](#footnote-467)466 According to the official commentary to section 2.202, written contracts for the sale of goods **[\*750]**

are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean. [[467]](#footnote-468)467

As the Fifth Circuit explained more than twenty-five years ago:

Evidence of course of dealing and usage of trade is necessarily and properly admissible to explain, qualify, or supplement the provisions of the written agreement. In providing for the admission of such evidence, the UCC manifests the law's recognition of the fact that perception is conditioned by environment: unless a judge considers a contract in the proper commercial setting, his view is apt to be distorted or myopic, increasing the probability of error. [[468]](#footnote-469)468

a. Course of Dealing

"A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." [[469]](#footnote-470)469 "A course of dealing between parties . . . gives particular meaning to and supplements or qualifies terms of an agreement." [[470]](#footnote-471)470 The parties' course of dealing "may enter the agreement either by explicit provisions or the agreement or by tacit recognition" arising out of prior conduct. [[471]](#footnote-472)471

"A single transaction cannot constitute a course of dealing" as that term is defined in section 1.205. [[472]](#footnote-473)472 The parties' course of dealing "is restricted, literally, to a sequence of conduct between the parties previous to **[\*751]** the agreement." [[473]](#footnote-474)473

b. Usage of Trade

Section 1.205 of the Texas Uniform Commercial Code provides, inter alia:

(b) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. . . .

(c) . . . Any usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware gives particular meaning to and supplements or qualifies terms of an agreement.

. . . .

(e) An applicable usage of trade in the place where any performance is to occur shall be used in interpreting the agreement as to that part of the performance. [[474]](#footnote-475)474

The language of any commercial contract "is to be interpreted as meaning what it may be fairly expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade." [[475]](#footnote-476)475 Usages of trade "furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding." [[476]](#footnote-477)476 To be recognized as such, usages of trade are not required to be " 'ancient or immemorial,' 'universal,' or the like"; [[477]](#footnote-478)477 rather, section 1.205(b) encompasses "usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree." [[478]](#footnote-479)478

The existence and scope of trade usage by which the terms of a sales **[\*752]** contract may be explained are fact questions. [[479]](#footnote-480)479 Trade usage may supplement or explain, but may not contradict the express terms of a contract. [[480]](#footnote-481)480 However, if the usage of trade supplements the written agreement to the extent that it "effectively created a new contract," then the proffered evidence of trade usage has been held to violate the parol evidence rule. [[481]](#footnote-482)481

In Raney v. Uvalde Producers Wool & Mohair Co., Raney and Uvalde entered into a written contract whereby Raney would sell to Uvalde 25,000 fleeces, composed of "1973 Spring Adult and Spring Kid Mohair," at a price of $ 1.47 per pound and $ 1.75 per pound, respectively. [[482]](#footnote-483)482 Raney delivered 41,000 pounds of Mohair, which Uvalde, citing the commonly accepted meaning of "fleeces" in the mohair industry, claimed was some 46,500 pounds less than called for under the contract. As a result, Uvalde was required to purchase 46,500 pounds of mohair on the open market in order to satisfy its commitments to the buyer it had lined up for Raney's mohair. [[483]](#footnote-484)483 Uvalde sued Raney for the difference between the open market price of $ 2.07 per pound and the contract prices for the 46,500 pounds Uvalde claimed that Raney was deficient. [[484]](#footnote-485)484 The trial court, following a jury trial, entered judgment in Uvalde's favor based, inter alia, on a finding that "the word 'fleeces' had a well recognized meaning based upon the usage of trade in the mohair industry, that the weight of a Spring fleece of kid mohair was three pounds on the average and that the weight of a Spring fleece of adult mohair was four pounds on the average." [[485]](#footnote-486)485 On appeal, Raney argued that "fleece" meant "all the mohair from one goat and therefore he was contracting for 25,000 head of goats." [[486]](#footnote-487)486 Raney further argued that Uvalde's attempted conversion of 25,000 fleeces into pounds resulted in "a failure of the meeting of the minds of the contracting par- **[\*753]** ties--and, therefore, there was no contract." [[487]](#footnote-488)487

Noting that "parol evidence is admissible to explain usage of trade," the court of civil appeals found that there was ample evidence in the record to show that in the business of mohair production the word "fleeces" has the well-understood meaning attributed to it by both Uvalde and the trial court. [[488]](#footnote-489)488

Raney would be expected to contract for the sale of his mohair with full knowledge of the factors and usage of trade that are peculiar to the business of mohair production and marketing. He had been in the mohair business since 1966 and there was testimony to the effect that he was the largest producer of mohair in the area . . . . This contract is to be read on the assumption that the usage of trade was taken for granted when the contract was phrased, and unless it has been carefully negated in the contract, it [i.e., the usage of trade] has become an element of the meaning of the word "fleece." [[489]](#footnote-490)489

c. Course of Performance

Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement. [[490]](#footnote-491)490

"Course of performance is always relevant to determine the meaning of the agreement." [[491]](#footnote-492)491 A single act or omission does not constitute a course of performance. [[492]](#footnote-493)492 As with course of dealing and trade usage, extrinsic evidence of course of performance may supplement or explain, but may **[\*754]** not contradict, the express terms of a contract. [[493]](#footnote-494)493

In Krupp Organization v. Belin Communities, Inc., the court of civil appeals considered the effect of the parties' course of performance of an agreement between a printer of promotional brochures (Krupp) and a resort community (Elkins Lake). [[494]](#footnote-495)494 The written agreement called for the preparation of 250,000 brochures at a cost to Elkins Lake of $ 235 per 1,000, plus postage. [[495]](#footnote-496)495 Shortly after the execution of the written agreement, the parties appear to have modified the order so that Krupp would provide 50,000, rather than 250,000 brochures. [[496]](#footnote-497)496 The question before the court was whether the 50,000 quantity constituted a "first printing" or the entire agreement. [[497]](#footnote-498)497 The parties proffered several writings to the trial court, the cumulative effect of which was to complicate, rather than clarify, the question of quantity due as agreed by the parties. [[498]](#footnote-499)498

The court of civil appeals, reviewing the trial court record, concluded that the trial judge was entitled to conclude from the documentary evidence that the agreement for 250,000 units "was not intended by the parties as a final expression of their agreement as to the number of mailings and to admit parol evidence to clarify the parties' dealings." [[499]](#footnote-500)499 In light of the trial testimony and other evidence extrinsic to the proffered agreement, the court of civil appeals concluded that the trial court's findings were amply supported by evidence of the course of the parties' performance. [[500]](#footnote-501)500

The testimony . . . as to the number of units agreed upon is conflicting and the documentary evidence is not clear as to whether the parties had agreed to reduce the order to 50,000 units or had merely agreed to start performance of the contract by a first printing of 50,000 units. . . . Section 2.208(a) of the Code concerning course of performance . . . recognizes that the parties know best what they mean and that their actions under their agreement are the best indication of its meaning.

**[\*755]**

There was introduced into evidence a Krupp invoice for 47,240 brochures, the number actually printed and mailed. This invoice outlined the mailing schedule and was backed up by individual invoices for each of them. Heard [Elkins Lake's representative] testified that Krupp agreed to a sample mailing but cautioned Heard that a smaller printing run would cost more than the quoted price of $ 235 per thousand. According to Heard, the additional cost was $ 65 or $ 75 per thousand, and Feinstock [Krupp's representative] was to invoice Elkins Lake for the difference in price between mailing out 50,000 and 250,000 brochures. The invoices admitted into evidence reflect this additional cost of $ 66.52 per thousand. The third mailing consisted of 2000 at $ 66.52 additional charge per thousand and 7196 at $ 71.52 additional cost per thousand. The remaining invoices each reflected an additional charge of $ 71.52 per thousand. These additional charges amounted to $ 3,318.60 plus postage, etc., for a total of $ 6,210.17. This course of performance was capable of being taken to substantiate Elkins Lake's contention that the only final agreement was for a sample mailing of 50,000 brochures. [[501]](#footnote-502)501

Having determined that the parol evidence was admissible, the court of civil appeals found sufficient evidence to support the trial court's findings. [[502]](#footnote-503)502

The dispute in ***Kern*** ***Oil*** & Refining Co. v. Tenneco ***Oil*** Co. revolved around the following contract terms:

Crude ***oil*** from the above leases will be balanced against crude ***oil*** sold to Tenneco by [***Kern*** ***Oil***] up to 3,000 barrels per day. All stripper crude ***oil*** from the above leases and the Rosecrans Field . . . will be sold at the appropriate lower tier price. Each month, enough ***oil*** from the Yowlumne Field will be sold at the lower tier price to make the total stripper and Yowlumne crude ***oil*** sold at the lower tier price equal to 3,000 barrels per day. The remaining barrels produced from the Yowlumne Field will **[\*756]** be sold at the upper tier price, and the non-stripper leases will be sold at the appropriate lower or upper tier prices. [[503]](#footnote-504)503

The Ninth Circuit, applying Texas law, attempted to resolve the meaning of the contractual terms in light of evidence proffered regarding the parties' course of performance under the contract:

Contrary to Tenneco's assertions, the record reveals that the meaning of the term "upper tier price" was virtually undisputed. The "upper tier price" was the price charged for crude ***oil*** that was subject to the upper tier ceiling price. The upper tier price was less than or equal to the upper tier ceiling price, depending on market conditions. Crude ***oil*** that was not subject to the upper tier ceiling price was sold at the "lower tier price" or the "uncontrolled price," depending on the type of ***oil***. "New" crude ***oil*** that was not subject to the upper tier ceiling price was sold at the "uncontrolled price." . . .

The district court made the following finding of fact:

The term "upper-tier price," as used in the May 19, 1977 agreement, is unambiguous. Upper-tier ceiling prices are specific ceiling prices established by DOE regulations and computed by a formula set forth in those regulations. Posted upper-tier prices are prices at or below uppertier ceiling prices, published in price bulletins issued by major ***oil*** companies. The term "uppertier price" does not mean uncontrolled market prices posted for crude ***oil*** released by the government from price controls. [[504]](#footnote-505)504

The Ninth Circuit affirmed the district court's finding. [[505]](#footnote-506)505

Tenneco argued, inter alia, that the record supported a course of performance under the subject agreement contrary to the district court's findings. [[506]](#footnote-507)506 The court of appeals disposed of Tenneco's arguments as follows: **[\*757]**

To avoid the prohibition contained in section 2-208(2), Tenneco must show that the extrinsic evidence "explains" or "supplements" the express terms of the contract. The extrinsic evidence cited by Tenneco does not show that "upper tier price" has a meaning different from the meaning found by the district court. As a result, the extrinsic evidence does not "explain" that term. The remaining inquiry is whether the extrinsic evidence "supplements" the contract. To be admissible under that theory, the extrinsic evidence must tend to show that the parties intended for Tenneco to charge the highest available market price without the need to negotiate with ***Kern*** ***Oil*** in the event of deregulation. A careful review of the record reveals that Tenneco's extrinsic evidence did not meet that requirement.

. . . .

Tenneco also asserts that the record shows four occasions on which Tenneco sold crude ***oil*** to ***Kern*** ***Oil*** at prices higher than those authorized by the contract. Tenneco claims that this evidence establishes a course of performance. In fact, the record reveals that each price variation was negotiated. Accordingly, the four occasions cited by Tenneco do not establish a course of performance contrary to the district court's findings.

Finally, Tenneco argues that ***Kern*** ***Oil***'s payment of the invoices in 1980 establishes a course of performance. To the extent that ***Kern*** ***Oil*** acted under a mistake of fact, however, its payment of the invoices cannot constitute a course of performance. [[507]](#footnote-508)507

2. Construing and Interpreting Agreements Governed by the UCC

The express terms of the agreement and any . . . course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as **[\*758]** consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade . . . . [[508]](#footnote-509)508

Furthermore,

the express terms of an agreement and an applicable course of dealing or usage of trade shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade. [[509]](#footnote-510)509

In Corenswet, Inc. v. Amana Refrigeration, Inc., the Fifth Circuit considered a clear conflict between the express contract provisions, which gave Amana the right to terminate Corenswet's distributorship, and Amana's past course of performance under the same contract with Corenswet and other distributors. [[510]](#footnote-511)510 The court stated:

The Code commands that express contract terms and "an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other." In this case, however, no reasonable construction can reconcile the contract's express terms with the interpretation Corenswet seeks to glean from the conduct of the parties. The conflict could not be more complete: Amana's past conduct, with regard to both Corenswet and . . . its other distributors, may have created a reasonable expectation that Amana would not terminate a distributorship arbitrarily, yet the contract expressly gives Amana the right to do so. We can find no justification, except in cases of conduct of the sort giving rise to promissory estoppel, for holding that a contractually reserved power, however distasteful, may be lost through nonuse. The express contract term cannot be construed as Coren- **[\*759]** swet would construe it, and it therefore controls over any allegedly conflicting usage or course of dealing. [[511]](#footnote-512)511

3. Consistent Additional Terms

Under the comment to section 2.202(2) of the Texas Uniform Commercial Code,

consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact. [[512]](#footnote-513)512

Where a written agreement is determined not to be the final and complete expression of the parties' agreement, courts have permitted extrinsic evidence of additional consistent terms. For example, in Conner v. May, May and Conner entered into a written agreement for the sale and delivery of cattle three months hence. [[513]](#footnote-514)513 The trial court permitted extrinsic evidence of an oral agreement regarding how the cattle were to be fed between the date of the agreement and the date of delivery based upon the testimony of May and Bush, a disinterested third party who was present when May and Conner executed their agreement. [[514]](#footnote-515)514 The court of civil appeals recited: "May and Bush . . . testified that when the writing was signed, both May and Conner recognized that the paper did not encompass **[\*760]** the feeding agreement, which they orally reaffirmed at the time. Conner himself testified the writing 'just covered the meat of the contract' . . . ." [[515]](#footnote-516)515

The court of civil appeals affirmed the trial court's finding that the parties did not intend the written agreement to be a fully integrated contract. [[516]](#footnote-517)516 In particular, the court found that the custom and usage of those trading in livestock was to have a separate agreement regarding the feeding of cattle and that often such agreements were oral. [[517]](#footnote-518)517 Because the parties did not intend for the written contract to reflect their entire agreement or to incorporate every term thereof, the testimony concerning the alleged oral agreement regarding the feeding of the cattle was permissible as it did not contradict any of the stated terms. [[518]](#footnote-519)518

IV. Conclusion

As the foregoing discussion demonstrates, the rules of construction and interpretation will often play a dispositive role in Texas contract litigation. Because the effect of these rules can be felt even in cases where no issue of ambiguity or integration exists, attorneys must always account for the impact of these rules, whether the task is drafting an agreement that will be subject to Texas law, or planning litigation strategy in a contract dispute.

The careful lawyer will also recognize, whether drafting an agreement or litigating the meaning of one, that the parol evidence rule has become a rule more in name than in effect. The many judicially-created exceptions to the rule, and the several exceptions added by the express provisions of the Uniform Commercial Code, dramatically increase the probability that, when the scope of the parties' agreement is in dispute, extrinsic proof may be considered by the finder of fact in resolving that dispute. When ambiguity or non-integration is found to exist, the probability that the trier of fact will hear such proof becomes a certainty.

The consequence of all this need not be to render the effect of the written word unpredictable. Care and precision in the drafting of written agreements will always lend greater certainty to their interpretation. But precision in the drafting of agreements means more than simply the proper choice of words. Attorneys must also be mindful of the rules of interpre- **[\*761]** tation and integration described above, the potential for ambiguity, the effect of technical terms, relevant industry custom, and other surrounding circumstances. Many different dictionaries may be consulted when construing and interpreting the terms of a written agreement, and the careful attorney will take each of them into account when drafting agreements or litigating their effect.

The careful lawyer will also remember, perhaps above all else, that prolixity will never substitute for clarity. If there were any doubt of this, the following exchange will be sobering:

Mephistopheles: In sum--have words to lean upon,

And through that trusty gateway, lexicon,

You pass into the shrine of certainty.

Student: Yet with each word there must a concept be.

Mephistopheles: Oh, quite--no need, though, to be racking

One's brain, for just where concept's lacking

A word in time supplies the remedy.

--Johann Wolfgang von Goethe [[519]](#footnote-520)519

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1. 1 Because the rules of contract construction and interpretation and the parol evidence rule are rules of substantive law, federal courts are bound by Texas contract law when construing and interpreting contracts subject to Texas law. See Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co., 99 F.3d 695, 700 (5th Cir. 1996); Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178, 1182 n.9 (5th Cir. 1993). See generally Howard O. Hunter, Modern Law of Contracts 7.03, at 7-8 n.49 (rev. ed. 1993). [↑](#footnote-ref-2)
2. 2 Professor Corbin states:

   Before attempting to lay down any rules of interpretation, however tentative and variable they may be, we must first give some thought to the word "interpretation" itself, and also to the word "construction." Without doubt, these two words are often used in the same sense; but they are also used in different senses, the difference between them being variable. . . .

   It may be helpful to note that the word interpretation is commonly used with respect to language itself--to the symbols (the words and acts) of expression. In about the same degree, we speak of the construction of a contract. It is true that we also speak of construing language and of interpreting a contract; but by the latter phrase is certainly meant interpreting the words of a contract. The word "contract" has been variously defined; but it is seldom identified with mere symbols of expression. By "interpretation of language" we determine what ideas that language induces in other persons. By "construction of the contract" . . . we determine its legal operation--its effect upon the action of courts and administrative officials. If we make this distinction, then the construction of a contract starts with the interpretation of its language but does not end with it; while the process of interpretation stops wholly short of a determination of the legal relations of the parties.

   3 Arthur L. Corbin, Corbin on Contracts § 534, at 7-9 (1960) (citations omitted) (footnotes omitted); see also Wahlenmaier v. American Quasar Petroleum Co., 517 S.W.2d 390, 393 (Tex. Civ. App.--El Paso 1974, writ ref'd n.r.e.); Restatement (Second) of Contracts § 200 note (1981); 14 Tex. Jur. 3d Contracts § 184, at 303 (1981). See generally Robert Braucher, Interpretation and Legal Effect in the Second Restatement of Contracts, 81 Colum. L. Rev. 13 (1981); Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833 (1964). But see Restatement (Second) of Contracts ch. 9, intro. note ("Stating separately rules with respect to various aspects of the process [of interpreting and applying agreements] may convey an erroneous impression of the psychological reality of the judicial process in which many elements are typically combined in a single ruling."); Mark L. Movsesian, Severability in Statutes and Contracts, 30 Ga. L. Rev. 41, 52 n.79 (1995) (remarking that the distinction between construction and interpretation "proves difficult to maintain, and courts have largely ignored it . . . .") (citation omitted). [↑](#footnote-ref-3)
3. 3 See, e.g., KMI Continental Offshore Prod. Co. v. ACF Petroleum Co., 746 S.W.2d 238, 241 (Tex. App.--Houston [1st Dist.] 1987, writ denied) ("Both parties argue that the contract is unambiguous, and we agree with their conclusions . . . . Their disagreement is over the proper construction of the option provision."). However, a number of early decisions by Texas courts suggested that "if the provisions of a contract are clear and unambiguous, there is then nothing in the agreement that will require construction by a court." 14 Tex. Jur. 3d Contracts § 184, at 304 (1981) (footnote omitted). Since the promulgation of the second Restatement of Contracts in 1981, Texas courts have taken a position more consistent with the notion that all contracts must be construed. See KMI Continental, 746 S.W.2d at 243 (stating that "when an option provision fails to impose a time limitation, courts will construe the provision"). [↑](#footnote-ref-4)
4. 4 Robert Andrews, The Concise Columbia Dictionary of Quotations 288 (1989). [↑](#footnote-ref-5)
5. 5 See Lenape Resources Corp. v. Tennessee Gas Pipeline Co., 925 S.W.2d 565, 574 (Tex. 1996); Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 133 (Tex. 1994); Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983); Sidelnik v. American States Ins. Co., 914 S.W.2d 689, 691 (Tex. App.--Austin 1996, writ denied). [↑](#footnote-ref-6)
6. 6 See American Guar. & Liab. Ins. Co. v. Shel-Ray Underwriters, Inc., 844 F. Supp. 325, 331 (S.D. Tex. 1993) (applying Texas law); Westwind Exploration, Inc. v. Homestate Sav. Ass'n, 696 S.W.2d 378, 382 (Tex. 1985); Cherokee Water Co. v. Forderhouse, 641 S.W.2d 522, 525 (Tex. 1982).

   In City of Pinehurst v. Spooner Addition Water Co., after agreeing with the parties that the contractual provisions at issue were unambiguous, the Texas Supreme Court quoted with approval the following passage from the Restatement of Contracts:

   The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean.

   432 S.W.2d 515, 518 (Tex. 1968) (quoting Restatement of Contracts § 230 (1932)). More recently, a narrow majority of the Texas Supreme Court proclaimed further: "Even if the court could discern the actual intent [of the parties to the contract], it is not the actual intent of the parties that governs, but the actual intent of the parties as expressed in the instrument as a whole . . . ." Luckel v. White, 819 S.W.2d 459, 462 (Tex. 1991). [↑](#footnote-ref-7)
7. 7 Lenape Resources, 925 S.W.2d at 574 (citing Reilly v. Rangers Management, Inc., 727 S.W.2d 527, 530 (Tex. 1987)). [↑](#footnote-ref-8)
8. 8 Butch Cassidy and the Sundance Kid (Twentieth Century Fox 1969). [↑](#footnote-ref-9)
9. 9 Restatement (Second) of Contracts § 202 cmt. a (1981). [↑](#footnote-ref-10)
10. 10 Towne v. Eisner, 245 U.S. 418, 425 (1918) (citing Lamar v. United States, 240 U.S. 60, 65 (1916)). [↑](#footnote-ref-11)
11. 11 See Restatement (Second) of Contracts § 209 cmt. a. The Restatement explains further:

    In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position [the parties] occupied at the time the contract was made. When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances. The circumstances for this purpose include the entire situation, as it appeared to the parties, and in appropriate cases may include facts known to one party of which the other had reason to know.

    Id. § 202 cmt. b (emphasis added) (internal reference omitted). [↑](#footnote-ref-12)
12. 12 Stewart v. Selder, 473 S.W.2d 3, 7 (Tex. 1971). In Murphy v. Dilworth, the court stated:

    It is true that, even though a written contract be unambiguous on its face, parol evidence is admissible for the purpose of applying the contract to the subject with which it deals. . . . This merely permits proof of the then existing circumstances, in order to enable the court to apply the language used therein to the facts as they then existed.

    151 S.W.2d 1004, 1005 (Tex. 1941) (citations omitted); see also Fort Worth Nat'l Bank v. Red River Nat'l Bank, 19 S.W. 517, 518 (Tex. 1892) ("Written descriptions are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect--the parties and their privies."); Restatement (Second) of Contracts § 201 cmt. b ("Uncertainties in the meaning of words are ordinarily greatly reduced by the context in which they are used. . . . In general, the context relevant to interpretation of a bargain is the context common to both parties."). [↑](#footnote-ref-13)
13. 13 432 S.W.2d 515, 518 (Tex. 1968). [↑](#footnote-ref-14)
14. 14 Id. at 519 (emphasis omitted). [↑](#footnote-ref-15)
15. 15 626 S.W.2d 726, 731 (Tex. 1981) (emphasis added). [↑](#footnote-ref-16)
16. 16 Id. (footnotes omitted). [↑](#footnote-ref-17)
17. 17 See Restatement (Second) of Contracts § 202(5). [↑](#footnote-ref-18)
18. 18 See Luling ***Oil*** & Gas Co. v. Humble ***Oil*** & Ref. Co., 191 S.W.2d 716, 724 (Tex. 1945); Gulf Prod. Co. v. Cruse, 271 S.W. 886, 887 (Tex. Comm'n App. 1925); S.K.Y. Inv. Corp. v. H.E. Butt Grocery Co., 440 S.W.2d 885, 891 (Tex. Civ. App.--Corpus Christi 1969, no writ). But see Texas Gas Exploration Corp. v. Broughton Offshore Ltd. II, 790 S.W.2d 781, 785-86 (Tex. App.--Houston [14th Dist.] 1990, no writ) (holding that custom and usage are not relevant when the contract is clear and unambiguous and that custom and usage cannot "vary, control, impair, restrict or enlarge the express language of the contract"). [↑](#footnote-ref-19)
19. 19 A "course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Restatement (Second) of Contracts § 223(1). For a more thorough discussion of the role of course-of-dealing evidence in construing and interpreting contracts under Texas common law and under the Uniform Commercial Code, see infra Parts III.C.11 and III.F.1.a, respectively. [↑](#footnote-ref-20)
20. 20 A "usage of trade" can refer either to a habitual or customary practice in a particular trade or location, or to a meaning ascribed to a word or phrase that is commonly understood by those in a particular trade or location. See Restatement (Second) of Contracts § 219 cmt. a. For a more thorough discussion of the role of trade usages in construing and interpreting contracts under Texas common law and under the Uniform Commercial Code, see infra Parts III.C.12 and III.F.1.b, respectively. [↑](#footnote-ref-21)
21. 21 The parties' actions pursuant to a written agreement, after the agreement is finalized, constitutes their course of performance. See Tex. Bus. & Com. Code Ann. § 2.208 cmt. 1 (Vernon 1994) (discussing the parties' actions under the agreement); see also Krupp v. Belin Communities, Inc., 582 S.W.2d 514, 519 (Tex. Civ. App--Houston [1st Dist.] 1979, writ ref'd n.r.e.). For a more thorough discussion of the role of course of performance in construing and interpreting contracts under Texas common law and under the Uniform Commercial Code, see infra Parts III.C.11 and III.F.1.c, respectively. [↑](#footnote-ref-22)
22. 22 904 F.2d 267, 268 (5th Cir. 1990). [↑](#footnote-ref-23)
23. 23 Id. at 268-69 (emphasis added) (second alteration in original). [↑](#footnote-ref-24)
24. 24 See id. at 269. [↑](#footnote-ref-25)
25. 25 See id. [↑](#footnote-ref-26)
26. 26 See id. [↑](#footnote-ref-27)
27. 27 Id. [↑](#footnote-ref-28)
28. 28 See id. [↑](#footnote-ref-29)
29. 29 See id. [↑](#footnote-ref-30)
30. 30 See id. at 270. [↑](#footnote-ref-31)
31. 31 Id. at 271. [↑](#footnote-ref-32)
32. 32 Evidence of surrounding circumstances is sometimes said to be "simply an aid in the construction of the contract's language." Sun ***Oil*** Co. v. Madeley, 626 S.W.2d 726, 731 (Tex. 1981); accord Staff Indus. v. Hallmark Contracting, Inc., 846 S.W.2d 542, 546 (Tex. App.--Corpus Christi 1993, no writ) (paraphrasing KMI Continental Offshore Prod. Co. v. ACF Petroleum Co., 746 S.W.2d 238, 241 (Tex. App.--Houston [1st Dist.] 1987, writ denied)); Advertising & Policy Comm. of the Avis Rent A Car Sys. v. Avis Rent A Car Sys., 780 S.W.2d 391, 396 (Tex. App.--Houston [14th Dist.] 1989), vacated on other grounds, 796 S.W.2d 707 (Tex. 1990); KMI Continental Offshore, 746 S.W.2d at 241 ("The circumstances to be considered are not the parties' statements of what they intended the contract to mean, but circumstances known to the parties at the time they entered into the contract, such as what the industry considered to be the norm or reasonable and prudent."); see also Hettig & Co. v. Union Mut. Life Ins. Co., 781 F.2d 1141, 1143 (5th Cir. 1986) ("The court must examine the wording of the contract in the light of circumstances existing at the time of the contract's making, excluding statements of the parties as to what they intended.") (citing Vendig v. Traylor, 604 S.W.2d 424, 427 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.)). [↑](#footnote-ref-33)
33. 33 Hanssen, 904 F.2d at 271; see also National Union Fire Ins. Co. v. CBI Indus., 907 S.W.2d 517, 521 (Tex. 1995) (differentiating between proof of surrounding circumstances and proof of the parties' intentions and stating, inter alia, that ambiguity must become evident when the contract is read in light of surrounding circumstances, not after parol proof of intent is admitted to create ambiguity). [↑](#footnote-ref-34)
34. 34 See Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 133 (Tex. 1994); Restatement (Second) of Contracts § 202(2) (1981). [↑](#footnote-ref-35)
35. 35 See Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983); Bush v. Brunswick Corp., 783 S.W.2d 724, 728 (Tex. App.--Fort Worth 1989, writ denied). [↑](#footnote-ref-36)
36. 36 See Ogden v. Dickinson State Bank, 662 S.W.2d 330, 332 (Tex. 1983); accord KMI Continental Offshore, 746 S.W.2d at 241 (citing McMahon v. Christmann, 303 S.W.2d 341 (Tex. 1957)). [↑](#footnote-ref-37)
37. 37 Witherspoon ***Oil*** Co. v. Randolph, 298 S.W. 520, 522 (Tex. Comm'n App. 1927, judgm't adopted) (quoting United States Fidelity & Guar. Co. v. Board of Comm'rs, 145 F. 145, 148 (8th Cir. 1906)), cited with approval in KMI Continental Offshore, 746 S.W.2d at 241. [↑](#footnote-ref-38)
38. 38 40 Tex. Sup. Ct. J. 33 (Oct. 18, 1996). [↑](#footnote-ref-39)
39. 39 819 S.W.2d 459 (Tex. 1991). [↑](#footnote-ref-40)
40. 40 Concord ***Oil***, 40 Tex. Sup. Ct. J. at 37. [↑](#footnote-ref-41)
41. 41 Id. at 38. [↑](#footnote-ref-42)
42. 42 Id. [↑](#footnote-ref-43)
43. 43 See id. at 39; compare id. at 33. [↑](#footnote-ref-44)
44. 44 See Reilly v. Rangers Management, Inc., 727 S.W.2d 527, 529 (Tex. 1987); Lyons v. Montgomery, 701 S.W.2d 641, 643 (Tex. 1985); Belmont Constructors, Inc. v. Lyondell Petrochemical Co., 896 S.W.2d 352, 357 (Tex. App.--Houston [1st Dist.] 1995, no writ); Hussong v. Schwan's Sales Enters., 896 S.W.2d 320, 324 (Tex. App.--Houston [1st Dist.] 1995, no writ); GT & MC, Inc. v. Texas City Ref., Inc., 822 S.W.2d 252, 256 (Tex. App.--Houston [1st Dist.] 1991, writ denied). [↑](#footnote-ref-45)
45. 45 See Phillips v. Union Bankers Ins. Co., 812 S.W.2d 616, 618 (Tex. App.--Dallas 1991, no writ). [↑](#footnote-ref-46)
46. 46 See Stahl Petroleum Co. v. Phillips Petroleum Co., 550 S.W.2d 360, 366 (Tex. Civ. App.--Amarillo 1977), aff'd, 569 S.W.2d 480 (Tex. 1978); see also Restatement (Second) of Contracts § 202(3)(a) (1981) ("Unless a different intention is manifested, where language has a generally prevailing meaning, it is interpreted in accordance with that meaning . . . ."). [↑](#footnote-ref-47)
47. 47 See, e.g., City of Ranger v. Hagaman, 4 S.W.2d 597, 598 (Tex. Civ. App.--Eastland 1928, no writ). [↑](#footnote-ref-48)
48. 48 See, e.g., Lone Star Gas Co. v. McCarthy, 605 S.W.2d 653, 656-57 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.). [↑](#footnote-ref-49)
49. 49 See Lenape Resources Corp. v. Tennessee Gas Pipeline Co., 925 S.W.2d 565, 574 (Tex. 1996); Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983); Southland Royalty Corp. v. Pan Am. Petroleum Corp., 378 S.W.2d 50, 53 (Tex. 1964); Universal C.I.T. Credit Corp. v. Daniel, 243 S.W.2d 154, 158 (Tex. 1951); Advertising & Policy Comm. of the Avis Rent A Car Sys. v. Avis Rent A Car Sys., 780 S.W.2d 391, 395 (Tex. App.--Houston [14th Dist.] 1989), vacated on other grounds, 796 S.W.2d 707 (Tex. 1990). [↑](#footnote-ref-50)
50. 50 See Harris v. Rowe, 593 S.W.2d 303, 306 (Tex. 1979); Dahlberg v. Holden, 238 S.W.2d 699, 701 (Tex. 1951); KMI Continental Offshore Prod. Co. v. ACF Petroleum Co., 746 S.W.2d 238, 241-42 (Tex. App.--Houston [1st Dist.] 1987, writ denied); Loe v. Murphy, 611 S.W.2d 449, 452 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.); see also Restatement (Second) of Contracts § 203(a) ("An interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect . . . ."); id. § 203 cmt. b ("Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous."). For additional cases evidencing the desire of Texas courts to read meaning and purpose into all contractual provisions, see the discussions of the Daniel and Hettig & Co. cases, infra Part III.A.1. [↑](#footnote-ref-51)
51. 51 746 S.W.2d 238, 240 (Tex. App.--Houston [1st Dist.] 1987, writ denied). [↑](#footnote-ref-52)
52. 52 See id. at 241-43. [↑](#footnote-ref-53)
53. 53 See id. at 243. [↑](#footnote-ref-54)
54. 54 650 S.W.2d 391 (Tex. 1983). [↑](#footnote-ref-55)
55. 55 Id. at 392-93. [↑](#footnote-ref-56)
56. 56 Id. at 393. [↑](#footnote-ref-57)
57. 57 See id. [↑](#footnote-ref-58)
58. 58 See id. [↑](#footnote-ref-59)
59. 59 See id. at 392. [↑](#footnote-ref-60)
60. 60 See id. [↑](#footnote-ref-61)
61. 61 See id. [↑](#footnote-ref-62)
62. 62 See id. at 394-95. [↑](#footnote-ref-63)
63. 63 904 F.2d 267, 270 (5th Cir. 1990); see supra text accompanying notes 22-31. [↑](#footnote-ref-64)
64. 64 Coker, 650 S.W.2d at 394. [↑](#footnote-ref-65)
65. 65 780 S.W.2d 391, 395 (Tex. App.--Houston [14th Dist.] 1989), vacated on other grounds, 796 S.W.2d 707 (Tex. 1990). [↑](#footnote-ref-66)
66. 66 925 S.W.2d 565, 574 (Tex. 1996); see infra Part II.D. [↑](#footnote-ref-67)
67. 67 Lenape, 925 S.W.2d at 573. [↑](#footnote-ref-68)
68. 68 See id. at 573 nn.3-4 (citations omitted). [↑](#footnote-ref-69)
69. 69 See id. at 573-74 & n.4. [↑](#footnote-ref-70)
70. 70 See id. at 574. [↑](#footnote-ref-71)
71. 71 See id. [↑](#footnote-ref-72)
72. 72 Id.

    Tennessee argues that when there is a variance between unambiguous written words ("annual inflation adjustment factor") and figures ("§ 102(b)(2)"), the written words control. In addition, it argues that terms stated earlier in a contract ("annual inflation adjustment factor") are favored over subsequent terms ("§ 102(b)(2)"). Moreover, the language used by the parties ("factor," not "factors," modified by "defined in") should be accorded its plain, grammatical meaning unless it definitely appears the parties' intent would thereby be defeated.

    Id. (citations omitted). [↑](#footnote-ref-73)
73. 73 See id. [↑](#footnote-ref-74)
74. 74 See id. at 574-75. [↑](#footnote-ref-75)
75. 75 934 F. Supp. 839, 843-44 (S.D. Tex. 1996) (citing Praeger v. Wilson, 721 S.W.2d 597 (Tex. App.--Fort Worth 1986, writ ref'd n.r.e.)). [↑](#footnote-ref-76)
76. 76 See id. [↑](#footnote-ref-77)
77. 77 See Smart v. Tower Land & Inv. Co., 597 S.W.2d 333, 340 (Tex. 1980); Harris v. Rowe, 593 S.W.2d 303, 306 (Tex. 1979); Franklin v. Jackson, 847 S.W.2d 306, 309 (Tex. App.--El Paso 1992, writ denied); Conte v. Greater Houston Bank, 641 S.W.2d 411, 418 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.); Ford Motor Credit Co. v. McDaniel, 613 S.W.2d 513, 518 (Tex. Civ. App.--Corpus Christi 1981, writ ref'd n.r.e.); see also Restatement (Second) of Contracts § 203(a) & cmt. c (1981) (favoring "lawful" constructions over "unlawful" ones); id. § 207 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred."). [↑](#footnote-ref-78)
78. 78 See supra Part II.C.1. [↑](#footnote-ref-79)
79. 79 See Restatement (Second) of Contracts § 203(b) ("Express terms are given greater weight than course of performance, course of dealing, and usage of trade . . . ."). The commentary to section 203 explains:

    Just as parties to agreements often depart from general usage as to the meaning of words or other conduct, so they may depart from a usage of trade. Similarly, they may change a pattern established by their own prior course of dealing. Their meaning in such cases is ordinarily to be ascertained as a fact; no penalty is attached by the law of contracts to their failure to conform to the usages of others or to their own prior usage.

    Id. § 203 cmt. d. [↑](#footnote-ref-80)
80. 80 See Thornton v. D.F.W. Christian Television, Inc., 925 S.W.2d 17, 24 (Tex. App.--Dallas 1995), rev'd, 933 S.W.2d 488 (Tex. 1996); Sumrall v. Russell, 255 S.W. 239, 240 (Tex. Civ. App.--El Paso 1923, writ dism'd w.o.j.). [↑](#footnote-ref-81)
81. 81 See Danciger ***Oil*** & Ref. Co. v. Powell, 154 S.W.2d 632, 635 (Tex. 1941); Calvin V. Koltermann, Inc. v. Underream Piling Co., 563 S.W.2d 950, 957 (Tex. Civ. App.--San Antonio 1977, writ ref'd n.r.e.). [↑](#footnote-ref-82)
82. 82 Danciger, 154 S.W.2d at 635; Calvin, 563 S.W.2d at 957. In such a case, the Restatement suggests that the trial court supply a term "which is reasonable under the circumstances." Restatement (Second) of Contracts § 204. [↑](#footnote-ref-83)
83. 83 See Danciger, 154 S.W.2d at 635. [↑](#footnote-ref-84)
84. 84 See Praeger v. Wilson, 721 S.W.2d 597, 601 (Tex. App.--Fort Worth 1986, writ ref'd n.r.e.); see also Restatement (Second) of Contracts § 204 cmt. c (discussing the circumstances under which "omitted" terms should be impliedly read into a written agreement that does not contain them, and concluding that "interpretation may result in the conclusion that there was in fact no agreement on a particular point, and that conclusion should be accepted even though the omitted term could be supplied by giving agreed language a meaning different from the meaning or meanings given it by the parties"). [↑](#footnote-ref-85)
85. 85 Danciger, 154 S.W.2d at 635. [↑](#footnote-ref-86)
86. 86 620 S.W.2d 110 (Tex. 1981). [↑](#footnote-ref-87)
87. 87 See id. at 111. [↑](#footnote-ref-88)
88. 88 See id. at 111-12. [↑](#footnote-ref-89)
89. 89 Id. at 112 (quoting the sewage contract). [↑](#footnote-ref-90)
90. 90 See id. at 111-12. [↑](#footnote-ref-91)
91. 91 See id. [↑](#footnote-ref-92)
92. 92 See Roman Forest Consol. Mun. Util. Dist. v. East Montgomery County Mun. Util. Dist. No. 1, 619 S.W.2d 1, 2 (Tex. Civ. App.--Beaumont), rev'd, 620 S.W.2d 110 (Tex. 1981). [↑](#footnote-ref-93)
93. 93 Roman Forest, 619 S.W.2d at 2 (citations omitted). [↑](#footnote-ref-94)
94. 94 Roman Forest, 620 S.W.2d at 112. [↑](#footnote-ref-95)
95. 95 925 S.W.2d 17, 23-25 (Tex. App.--Dallas 1995), rev'd, 933 S.W.2d 488 (Tex. 1996). [↑](#footnote-ref-96)
96. 96 See D.F.W. Christian Television, Inc. v. Thornton, 933 S.W.2d 488, 489 (Tex. 1996). [↑](#footnote-ref-97)
97. 97 See id. at 488. [↑](#footnote-ref-98)
98. 98 See id. at 488-89. [↑](#footnote-ref-99)
99. 99 Id. at 489. [↑](#footnote-ref-100)
100. 100 See id. [↑](#footnote-ref-101)
101. 101 Id. [↑](#footnote-ref-102)
102. 102 See id. [↑](#footnote-ref-103)
103. 103 See id. [↑](#footnote-ref-104)
104. 104 See id. [↑](#footnote-ref-105)
105. 105 See id. [↑](#footnote-ref-106)
106. 106 Id. [↑](#footnote-ref-107)
107. 107 Id. [↑](#footnote-ref-108)
108. 108 Id. [↑](#footnote-ref-109)
109. 109 Id. [↑](#footnote-ref-110)
110. 110 Thornton v. D.F.W. Christian Television, Inc., 925 S.W.2d 17, 23-24 (Tex. App.--Dallas 1995), rev'd, 933 S.W.2d 488 (Tex. 1996) (emphasis added) (citations omitted). [↑](#footnote-ref-111)
111. 111 See D.F.W. Christian Television, 933 S.W.2d 488 (Tex. 1996). [↑](#footnote-ref-112)
112. 112 Id. at 490. [↑](#footnote-ref-113)
113. 113 See id. at 489-90. [↑](#footnote-ref-114)
114. 114 See Thornton, 925 S.W.2d at 24. [↑](#footnote-ref-115)
115. 115 See id.; see also D.F.W. Christian Television, 933 S.W.2d at 489-90. [↑](#footnote-ref-116)
116. 116 See John D. Calamari & Joseph M. Perillo, The Law of Contracts § 3-16, at 177 (3d ed. 1987) ("It would, however, be a mistake to suppose that the courts follow any of these rules blindly, literally or consistently. As often as not they choose the standard or rule that they think will give rise to a just result in the particular case.").

     Nor is Thornton even the most recent example of this phenomenon. In Heritage Resources, Inc. v. NationsBank, the trial court, the court of appeals, and the supreme court all agreed that the ***oil*** and gas leases in question were unambiguous. 939 S.W.2d 118, 121 (Tex. 1996). However, the trial court and court of appeals agreed on one interpretation of the royalty clause, and the supreme court insisted on another. See id. at 120. Even this was not the end of the controversy because, as Justice Gonzalez noted, the majority and concurrence agreed that the lease in question was unambiguous, but still reached opposite results. See id. at 132 (Gonzalez, J., dissenting). [↑](#footnote-ref-117)
117. 117 Writing about these secondary maxims of construction and interpretation, Professor Patterson has observed:

     There is some doubt whether they have reliable guidance value for judges, or are merely justifications for decisions arrived at on other grounds, which may or may not be revealed in the opinion. This rather cynical view is supported by two observations. One is that for any given maxim that would persuade a judge to a certain conclusion a contrary maxim may be found that would persuade him to the opposite (or contradictory) conclusion. . . .

     . . . .

     The second reason . . . for believing that the secondary maxims of interpretation are ceremonial rather than persuasive is that in many instances the court will set forth in its opinion the whole battery of maxims and then proceed to decide the case on the basis of an analysis of the terms of the contract and the facts of the dispute, without indicating which maxim or maxims, if any, were applied or invoked in reaching that decision.

     Patterson, supra note 2, at 852-53(emphasis added). [↑](#footnote-ref-118)
118. 118 See 9 William V. Dorsaneo, III et al., Texas Litigation Guide § 210A.28[1], at 210A-71 (1996) (citing Exxon Corp. v. Eastman Kodak Co., 589 S.W.2d 473, 478 (Tex. Civ. App.--Texarkana 1979), rev'd on other grounds, 603 S.W.2d 208 (Tex. 1980), and Hegar v. Tucker, 274 S.W.2d 752, 755 (Tex. Civ. App.--Galveston 1955, writ ref'd n.r.e.)). [↑](#footnote-ref-119)
119. 119 See Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1049 (5th Cir. 1971) ("Application of [the parol evidence rule] is especially appropriate when, as here, the complaining party has drafted the agreement in question."); Austin Co. v. Vaughn Bldg. Corp., 643 S.W.2d 113, 115 (Tex. 1982); Republic Nat'l Bank v. Northwest Nat'l Bank, 578 S.W.2d 109, 115 (Tex. 1978); Thompson v. Preston State Bank, 575 S.W.2d 312, 315 (Tex. Civ. App.--Dallas 1978, writ ref'd n.r.e.); Monesson v. Champion Int'l Corp., 546 S.W.2d 631, 637 (Tex. Civ. App.--Tyler 1976, writ ref'd n.r.e.); see also Restatement (Second) of Contracts § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words . . . .").

     For obvious reasons, the presumption against the drafter is less pronounced when the other party has taken an active role in the drafting process or is particularly knowledgeable. See Restatement (Second) of Contracts § 206 reporter's note, at 105-06 (1981), and cases cited therein. [↑](#footnote-ref-120)
120. 120 672 S.W.2d 793, 794 (Tex. 1984). [↑](#footnote-ref-121)
121. 121 Id. at 797. [↑](#footnote-ref-122)
122. 122 See id. at 798. [↑](#footnote-ref-123)
123. 123 See Addison Bank v. Temple-Eastex, Inc., 665 S.W.2d 550, 553 (Tex. App.--El Paso), rev'd, 672 S.W.2d 793 (Tex. 1984). [↑](#footnote-ref-124)
124. 124 Temple-Eastex, 672 S.W.2d at 797. [↑](#footnote-ref-125)
125. 125 Id. (quoting Travis Bank & Trust v. State, 660 S.W.2d 851, 854-55 (Tex. App.--Austin 1983, no writ)). [↑](#footnote-ref-126)
126. 126 Id. at 798 (citation omitted). [↑](#footnote-ref-127)
127. 127 833 S.W.2d 742, 744 (Tex. App.--Houston [1st Dist.] 1992, writ denied). [↑](#footnote-ref-128)
128. 128 See id. at 743-44. [↑](#footnote-ref-129)
129. 129 Id. at 743 (quoting the contract between the general contractor and the subcontractor). [↑](#footnote-ref-130)
130. 130 See id. [↑](#footnote-ref-131)
131. 131 See id. at 745-46 (citing Gonzales v. Mission Am. Ins. Co., 795 S.W.2d 734, 737 (Tex. 1990)). [↑](#footnote-ref-132)
132. 132 See Universal C.I.T. Credit Corp. v. Daniel, 150 Tex. 513, 243 S.W.2d 154, 157 (1951) ("The rule of strong construction against the author . . . . is applied only where a contract is open to two reasonable constructions." (emphasis added)). [↑](#footnote-ref-133)
133. 133 Clardy Mfg. Co. v. Marine Midland Bus. Loans, Inc., 88 F.3d 347, 355 (5th Cir. 1996) (quoting Smith v. Davis, 453 S.W.2d 340, 344 (Tex. Civ. App--Fort Worth 1920, writ ref'd n.r.e.) and Modular Tech. Corp. v. Lubbock, 529 S.W.2d 273, 276 (Tex. Civ. App.--Amarillo 1975, writ ref'd n.r.e.)); see also Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co., 99 F.3d 695, 701 (5th Cir. 1996) (noting that the rule that insurance policy exclusions are construed against the insurer, even if the insurer's proffered reading "appears to be a more reasonable or a more accurate reflection of the parties' intent," applies only when the exclusions are subject to more than one reasonable construction). [↑](#footnote-ref-134)
134. 134 See Guadalupe-Blanco River Auth. v. City of San Antonio, 145 Tex. 611, 200 S.W.2d 989, 1001 (1947); City of San Antonio v. Heath & Stich, Inc., 567 S.W.2d 56, 60 (Tex. Civ. App.--Waco 1978, writ ref'd n.r.e.); see also Restatement (Second) of Contracts § 203(c) & cmt. e (1981). [↑](#footnote-ref-135)
135. 135 See Restatement (Second) of Contracts § 203 cmt. e. [↑](#footnote-ref-136)
136. 136 Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983); see also Southland Royalty Co. v. Pan Am. Petroleum Corp., 378 S.W.2d 50, 57 (Tex. 1964); Hughes v. Aycock, 598 S.W.2d 370, 376 (Tex. Civ. App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.). But see Mid Plains Reeves, Inc. v. Farmland Indus., 768 S.W.2d 318, 321 (Tex. App.--El Paso 1989, writ denied) (holding that if the first of two irreconcilable clauses is written in general terms and the second is specific, the second controls the first). [↑](#footnote-ref-137)
137. 137 587 S.W.2d 809, 812 (Tex. Civ. App.--Corpus Christi 1979, writ ref'd n.r.e.) (omissions in original). [↑](#footnote-ref-138)
138. 138 Id. at 814-15 (citing Gulf ***Oil*** Corp. v. Southland Royalty Co., 496 S.W.2d 547 (Tex. 1973)). [↑](#footnote-ref-139)
139. 139 See id. at 815. [↑](#footnote-ref-140)
140. 140 Guthrie v. National Homes Corp., 394 S.W.2d 494, 496 (Tex. 1965). [↑](#footnote-ref-141)
141. 141 See Southland Royalty Co. v. Pan Am. Petroleum Corp., 378 S.W.2d 50, 57 (Tex. 1964); McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341, 344 (1957); Raney v. Uvalde Producers Wool & Mohair Co., 571 S.W.2d 199, 201 (Tex. Civ. App.--San Antonio 1978, writ ref'd n.r.e.). See generally Restatement (Second) of Contracts § 203 cmt. f (1981) ("It is sometimes said generally that handwritten terms control typewritten and printed terms, and typewritten control printed."). [↑](#footnote-ref-142)
142. 142 571 S.W.2d 199, 199 (Tex. Civ. App.--San Antonio 1978, writ ref'd n.r.e.). [↑](#footnote-ref-143)
143. 143 See id. at 200. [↑](#footnote-ref-144)
144. 144 For further discussion of the facts of this case and the UCC-based issues raised therein, see infra Part III.F.1.b. [↑](#footnote-ref-145)
145. 145 Raney, 571 S.W.2d at 201. [↑](#footnote-ref-146)
146. 146 Id. (citing McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341 (1957)). [↑](#footnote-ref-147)
147. 147 Coker v. Coker, 650 S.W.2d 391, 394 n.1 (Tex. 1983); see also Reece v. First State Bank, 566 S.W.2d 296, 297 (Tex. 1978). [↑](#footnote-ref-148)
148. 148 Coker, 650 S.W.2d at 394 n.1; see also Commerce Savs. Ass'n v. GGE Management Co., 539 S.W.2d 71, 78 (Tex. Civ. App.--Houston [1st Dist.]), aff'd as modified per curiam, 543 S.W.2d 862 (Tex. 1976). [↑](#footnote-ref-149)
149. 149 See Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W.2d 30, 34 (1958); Loe v. Murphy, 611 S.W.2d 449, 451 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.). [↑](#footnote-ref-150)
150. 150 See Loe, 611 S.W.2d at 451. [↑](#footnote-ref-151)
151. 151 Hubacek, 317 S.W.2d at 32; accord Loe, 611 S.W.2d at 451-52. [↑](#footnote-ref-152)
152. 152 See Kuper v. Schmidt, 161 Tex. 189, 338 S.W.2d 948, 952 (1960); Loe, 611 S.W.2d at 452. [↑](#footnote-ref-153)
153. 153 See KMI Continental Offshore Prod. Co. v. ACF Petroleum Co., 746 S.W.2d 238, 241 (Tex. App.--Houston [1st Dist.] 1987, writ denied). [↑](#footnote-ref-154)
154. 154 See Garrett v. Dils Co., 157 Tex. 92, 299 S.W.2d 904, 906 (1957); Temple-Inland Forest Prods. Co. v. Henderson Family Partnership, Ltd., 911 S.W.2d 531, 535 (Tex. App.--Beaumont 1995, no writ). Put another way, grants of real property and other property rights "are construed to confer upon the grantee the greatest interest that the terms of the granting instrument will permit." Russell v. City of Bryan, 919 S.W.2d 698, 705 (Tex. App.--Houston [14th Dist.] 1996, writ denied) (citing Lott v. Lott, 370 S.W.2d 463, 465 (Tex. 1963)). This rule of construction applies only if the grant is ambiguous. See, e.g., Luckel v. White, 792 S.W.2d 485, 488 (Tex. App.--Houston [14th Dist.] 1990), rev'd on other grounds, 819 S.W.2d 459 (Tex. 1991). [↑](#footnote-ref-155)
155. 155 See, e.g., CMS Indus. v. L.P.S. Int'l, Ltd., 643 F.2d 289, 294 (5th Cir. 1981) (holding that, when considering the scope of a reservation of patent rights, unclear language "must be resolved against the party for whose benefit the language is used"). For a specific application of this principle, see Temple-Inland Forest Products Corp. v. United States, 988 F.2d 1418, 1421-22 (5th Cir. 1993) (applying the principle to reservations of rights under Texas law: "When interpreting the terms of a reservation, courts construe the language against the grantor. . . . The need to clearly state a reservation arises from the fact that a conveyance ordinarily passes to the grantee all of the grantor's interest in [the conveyed] property.") (citations omitted). See also Craddock v. Greenhut Constr. Co., 423 F.2d 111, 114 (5th Cir. 1970) (applying the same standard in considering the scope of a grant under Florida law). [↑](#footnote-ref-156)
156. 156 See, e.g., North Point Patio Offices Venture v. United Benefit Life Ins. Co., 672 S.W.2d 35, 36-37 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.). See generally Sonny Arnold, Inc. v. Sentry Savs. Ass'n, 633 S.W.2d 811 (Tex. 1982). [↑](#footnote-ref-157)
157. 157 See Davis v. Skipper, 125 Tex. 365, 83 S.W.2d 318, 321 (1935). [↑](#footnote-ref-158)
158. 158 Under Texas law, the same rules applying to contracts in general govern the construction and interpretation of insurance policies. See Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 133 (Tex. 1994). [↑](#footnote-ref-159)
159. 159 Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co., 99 F.3d 695, 701 (5th Cir. 1996); see Kelly Assocs. v. Aetna Cas. & Sur. Co., 681 S.W.2d 593, 596 (Tex. 1984). [↑](#footnote-ref-160)
160. 160 National Union Fire Ins. Co. v. Hudson Energy Co., 811 S.W.2d 552, 555 (Tex. 1991); accord Canutillo I.S.D., 99 F.3d at 701. This rule of strict construction against an insurer applies only if the exclusion or other provision in question is susceptible to more than one reasonable construction. See Hudson Energy, 811 S.W.2d at 555. "When the terms of an insurance policy are clear and unambiguous[,] a court may not vary those terms." Canutillo I.S.D., 99 F.3d at 700 (citing Royal Indem. Co. v. Marshall, 388 S.W.2d 176, 181 (Tex. 1965)). [↑](#footnote-ref-161)
161. 161 James B. Thayer, A Preliminary Treatise on Evidence at Common Law 390 (1898), quoted in John D. Calamari & Joseph M. Perillo, Contracts § 3-1, at 133-34 (3d ed. 1987). [↑](#footnote-ref-162)
162. 162 See Lewis v. East Tex. Fin. Co., 136 Tex. 149, 146 S.W.2d 977, 980 (1941); Pan Am. Bank v. Nowland, 650 S.W.2d 879, 884 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.), disapproved of on other grounds by Crimmins v. Lowry, 691 S.W.2d 582 (Tex. 1985); McPherson v. Johnson, 436 S.W.2d 930, 932 (Tex. Civ. App.--Amarillo 1968, writ ref'd n.r.e.); see also Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178, 1182-83 (5th Cir. 1993) (citing Tripp Village Joint Venture v. MBank Lincoln Centre, N.A., 774 S.W.2d 746, 749 (Tex. App.--Dallas 1989, writ denied)); Motorola, Inc. v. Chapman, 761 F. Supp. 458, 463 (S.D. Tex. 1991) (applying Texas law).

     One commentator offers the following "working definition" of the parol evidence rule:

     When the parties to an agreement have reduced their agreement to a writing intended by them, or treated by the court, as a final and complete statement of the entire agreement, the writing may not be contradicted, varied, or even supplemented by prior oral or written understandings of the parties. If the parties intended, or the court believes, that the writing was to be merely a final expression of some of the terms of the agreement, the writing may be supplemented but not varied or contradicted by prior oral and written understandings of the parties.

     George I. Wallach, The Declining "Sanctity" of Written Contracts--Impact of the Uniform Commercial Code on the Parol Evidence Rule, 44 Mo. L. Rev. 651, 651 (1979). [↑](#footnote-ref-163)
163. 163 See First Victoria Nat'l Bank v. Briones, 788 S.W.2d 632, 635 (Tex. App.--Corpus Christi 1990, writ denied); Patterson v. Patterson, 679 S.W.2d 621, 625 (Tex. App.--San Antonio 1984, no writ); Warren Bros. Co. v. A.A.A. Pipe Cleaning Co., 601 S.W.2d 436, 438-39 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.). [↑](#footnote-ref-164)
164. 164 Historically, the common law tended to insulate written agreements from both forms of extrinsic proof. See generally 3 Corbin, supra note 2, §§ 555-80 (1960 & Supp. 1997). However, more recent case law, bolstered considerably by the Restatement (Second) of Contracts and the Uniform Commercial Code, supports a more expansive use of evidence outside the "four corners" of the written agreement to prove both the parties' intent and understanding at the time they entered into the written agreement and the existence or meaning of terms not necessarily reflected in the written agreement. See Restatement (Second) of Contracts §§ 209, 211, 212, 214, 216, 218, 220 (1981); Tex. Bus. & Com. Code Ann. § 2.202 (Vernon 1994). For commentary on the parol evidence rule under the UCC, see 2 James J. White & Robert S. Summers, Uniform Commercial Code: Practitioner Treatise Series §§ 2-9 to -11 (1995 & Supp. 1996). [↑](#footnote-ref-165)
165. 165 Andrews, supra note 4, at 288. [↑](#footnote-ref-166)
166. 166 Lenape Resources Corp. v. Tennessee Gas Pipeline Co., 925 S.W.2d 565, 574 (Tex. 1996); accord Reilly v. Rangers Management, Inc., 727 S.W.2d 527, 529 (Tex. 1987); Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983); Glover v. National Ins. Underwriters, 545 S.W.2d 755, 761 (Tex. 1977); Texas Utils. Elec. Co. v. City of Waco, 919 S.W.2d 436, 439 (Tex. App.--Waco 1995, writ denied); Cavalcade ***Oil*** Corp. v. Samuel, 746 S.W.2d 842, 844 (Tex. App.--El Paso 1988, writ denied); Skyland Developers, Inc. v. Sky Harbor Assocs., 586 S.W.2d 564, 568 (Tex. Civ. App.--Corpus Christi 1979, no writ); Walter E. Heller & Co. v. Allen, 412 S.W.2d 712, 718 (Tex. Civ. App.--Corpus Christi 1967, writ ref'd n.r.e.). See generally Hunter, supra note 1, P 7.03[2]a, at 7-13). In other words, a written instrument may be ambiguous if it is "difficult to comprehend or distinguish, or of doubtful import," San Antonio Life Ins. Co. v. Griffith, 185 S.W. 335, 337 (Tex. Civ. App.--Fort Worth 1916, no writ), or there is "doubt as to its true meaning." O'Shea v. Coronado Transmission Co., 656 S.W.2d 557, 561 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.). [↑](#footnote-ref-167)
167. 167 See Harris v. Rowe, 593 S.W.2d 303, 306 (Tex. 1979); accord American Guar. & Liab. Ins. Co. v. Shel-Ray Underwriters, Inc., 844 F. Supp. 325, 330 (S.D. Tex. 1993). [↑](#footnote-ref-168)
168. 168 Lenape Resources, 925 S.W.2d at 574 (citing Coker, 650 S.W.2d at 393); accord Westwind Exploration, Inc. v. Homestate Sav. Ass'n , 696 S.W.2d 378, 381 (Tex. 1985); Lewis v. East Tex. Fin. Co., 136 Tex. 149, 146 S.W.2d 977, 980 (1941); Sidelnik v. American States Ins. Co., 914 S.W.2d 689, 691 (Tex. App.--Austin 1996, writ denied); Texas Utils. Elec. Co., 919 S.W.2d at 439. [↑](#footnote-ref-169)
169. 169 150 Tex. 513, 243 S.W.2d 154, 157 (1951). An ambiguity in a contract may be either "patent" or "latent." A "patent" ambiguity is evident on the face of the contract. Sidelnik, 914 S.W.2d at 691 (citing Universal Home Builders, Inc. v. Farmer, 375 S.W.2d 737, 742 (Tex. Civ. App.--Tyler 1964, no writ)). A "latent" ambiguity, by comparison, is one that only arises when a facially unambiguous contract is applied to the subject matter of the contract. Id. (citing Murphy v. Dilworth, 137 Tex. 32, 151 S.W.2d 1004, 1005 (1941)); see also Vineberg v. Brunswick Corp., 391 F.2d 184, 188-89 (5th Cir. 1968) (defining a latent ambiguity as one arising "if the writing or contract in question is susceptible of either of the divergent meanings contended for by the parties"). See generally National Union Fire Ins. Co. v. CBI Indus., 907 S.W.2d 517 (Tex. 1995). [↑](#footnote-ref-170)
170. 170 Daniel, 243 S.W.2d at 156. [↑](#footnote-ref-171)
171. 171 Id. [↑](#footnote-ref-172)
172. 172 See id. at 156-57. [↑](#footnote-ref-173)
173. 173 See id. at 158. [↑](#footnote-ref-174)
174. 174 Id. [↑](#footnote-ref-175)
175. 175 Id. at 159. [↑](#footnote-ref-176)
176. 176 See id. at 159-60. [↑](#footnote-ref-177)
177. 177 781 F.2d 1141, 1143 (5th Cir. 1986) (emphasis omitted). [↑](#footnote-ref-178)
178. 178 Id. [↑](#footnote-ref-179)
179. 179 See id. at 1144-45. [↑](#footnote-ref-180)
180. 180 Id. at 1145 (citations omitted). [↑](#footnote-ref-181)
181. 181 Id. at 1145-46. [↑](#footnote-ref-182)
182. 182 Id. at 1146. [↑](#footnote-ref-183)
183. 183 See Praeger v. Wilson, 721 S.W.2d 597, 600 (Tex. App.--Fort Worth 1986, writ ref'd n.r.e.); Maxwell v. Lake, 674 S.W.2d 795, 801 (Tex. App.--Dallas 1984, no writ). [↑](#footnote-ref-184)
184. 184 See Gomez v. Hartford Co., 803 S.W.2d 438, 442 (Tex. App.--El Paso 1991, writ denied); LaBatt Co. v. Hartford Lloyd's Ins. Co., 776 S.W.2d 795, 800 (Tex. App.--Corpus Christi 1989, no writ). [↑](#footnote-ref-185)
185. 185 See Gomez, 803 S.W.2d at 442; Guthrie v. Republic Nat'l Ins. Co., 682 S.W.2d 634, 640 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). [↑](#footnote-ref-186)
186. 186 A contract is ambiguous "if its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning . . . ." Lenape Resources Corp. v. Tennessee Gas Pipeline Co., 925 S.W.2d 565, 574 (Tex. 1996) (citing Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983)); see supra note 166. However, even though a contract is of doubtful meaning in certain places, it does not necessarily follow that the entire contract is of doubtful meaning or reasonably susceptible to more than one meaning. See supra note 163 and accompanying text. [↑](#footnote-ref-187)
187. 187 940 S.W.2d 587, 588 (Tex. 1996). [↑](#footnote-ref-188)
188. 188 See id. at 589. [↑](#footnote-ref-189)
189. 189 See id. [↑](#footnote-ref-190)
190. 190 See id. [↑](#footnote-ref-191)
191. 191 See id. [↑](#footnote-ref-192)
192. 192 See id. [↑](#footnote-ref-193)
193. 193 See id. at 589, 591. [↑](#footnote-ref-194)
194. 194 Id. at 591. [↑](#footnote-ref-195)
195. 195 Id. [↑](#footnote-ref-196)
196. 196 Id. at 592. [↑](#footnote-ref-197)
197. 197 88 F.3d 347, 351-52 (5th Cir. 1996), cert. denied, 117 S. Ct. 740 (1997). [↑](#footnote-ref-198)
198. 198 See id. at 350. [↑](#footnote-ref-199)
199. 199 Id. at 353. [↑](#footnote-ref-200)
200. 200 Id. at 354 (citations omitted). The Fifth Circuit elaborated on its departure from the district court's decision:

     The district court concluded that the letter agreement was ambiguous as to "what, if anything, was Marine obligated to do if it became satisfied with Clardy Manufacturing's demonstration of creditworthiness?" This conclusion, however, flows from the faulty assumption that the letter agreement was intended to address each and every step leading up to the issuance of the commitment letter. As we have found, the proposal letter unambiguously memorializes the agreement that Marine should undertake further due diligence as part of its effort to evaluate Clardy Manufacturing's loan application. The letter agreement's failure to address what further steps Marine would undertake as part of its internal credit approval process once it had become satisfied with Clardy Manufacturing's creditworthiness does not necessarily render ambiguous the agreement to undertake due diligence. As the letter agreement did not obligate Marine to take further steps upon the successful completion of due diligence, the writing had no need to speak to this issue. While it may seem unfair to suggest that Marine was free to simply walk away following the completion of due diligence, the letter agreement's silence on this issue does not destabilize the letter's clear and unambiguous language.

     Id. (emphasis added). [↑](#footnote-ref-201)
201. 201 See Lenape Resources Corp. v. Tennessee Gas Pipeline Co., 925 S.W.2d 565, 574 (Tex. 1996); Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983); R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517, 518 (Tex. 1980); Sidelnik v. American States Ins. Co., 914 S.W.2d 689, 691 (Tex. App.--Austin 1996, writ denied). [↑](#footnote-ref-202)
202. 202 Sun ***Oil*** Co. v. Madeley, 626 S.W.2d 726, 731-32 (Tex. 1981); City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515, 518-19 (Tex. 1968). [↑](#footnote-ref-203)
203. 203 940 S.W.2d 587, 591 (Tex. 1996). [↑](#footnote-ref-204)
204. 204 Id. at 589. [↑](#footnote-ref-205)
205. 205 See id. at 591-92. [↑](#footnote-ref-206)
206. 206 See id. at 591. [↑](#footnote-ref-207)
207. 207 See supra Part II.C. [↑](#footnote-ref-208)
208. 208 See Gulf & Basco Co. v. Buchanan, 707 S.W.2d 655, 656 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.). [↑](#footnote-ref-209)
209. 209 See Phillips v. Union Bankers Ins. Co., 812 S.W.2d 616, 617 (Tex. App.--Dallas 1991, no writ); MJR Corp. v. B & B Vending Co., 760 S.W.2d 4, 10 (Tex. App.--Dallas 1988, writ denied); Praeger v. Wilson, 721 S.W.2d 597, 600 (Tex. App.--Fort Worth 1986, writ ref'd n.r.e.); see also Park Creek Assocs. v. Walker, 754 S.W.2d 426, 429 (Tex. App.--Dallas 1988, writ denied) (Kinkeade, J., concurring). However, a court may conclude that a contract is ambiguous even in the absence of such a pleading by either party. See Sage St. Assocs. v. Northdale Constr. Co., 863 S.W.2d 438, 445 (Tex. 1993) (holding that the trial court properly submitted an unpleaded ambiguity issue to the jury because the parties tried the issue by consent); Coker v. Coker, 650 S.W.2d 391, 392-94 (Tex. 1983) (holding that a contract was ambiguous despite assertions by both parties that the agreement was unambiguous). [↑](#footnote-ref-210)
210. 210 See the discussion infra Part III.F.1 regarding the admissibility of parol evidence despite the determination that the contract is facially unambiguous, pursuant to section 2.202 of the Uniform Commercial Code. [↑](#footnote-ref-211)
211. 211 See Sidelnik v. American States Ins. Co., 914 S.W.2d 689, 691 (Tex. App.--Austin 1996, writ denied). [↑](#footnote-ref-212)
212. 212 See Sidelnik, 914 S.W.2d at 691-92 (citing R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517, 518 (Tex. 1980); Birdwell v. Birdwell, 819 S.W.2d 223, 229 (Tex. App.--Fort Worth 1991, writ denied)); see also Hycarbex, Inc. v. Anglo-Suisse, Inc., 927 S.W.2d 103, 108-10 (Tex. App.--Houston [14th Dist.] 1996, no writ) (holding that where an agreement to pay commissions from sales of offshore ***oil*** and gas working interests was not ambiguous, the trial court properly refused to permit the jury to hear evidence of the parties' interpretations of the agreement).

     Of course, as discussed previously, the court most likely will have already considered some extrinsic evidence--particularly evidence of "surrounding circumstances"--in determining whether the written contract was integrated and unambiguous. See supra Parts II.C.1 and III.A.3.a. [↑](#footnote-ref-213)
213. 213 See Lenape Resources Corp. v. Tennessee Gas Pipeline Co., 925 S.W.2d 565, 574 (Tex. 1996); Sun ***Oil*** Co. v. Madeley, 626 S.W.2d 726, 732 (Tex. 1981); R & P Enters., 596 S.W.2d at 519; Sidelnik, 914 S.W.2d at 691-92. [↑](#footnote-ref-214)
214. 214 See supra Part III.A.3.a. [↑](#footnote-ref-215)
215. 215 See supra note 169 and accompanying text. [↑](#footnote-ref-216)
216. 216 Hussong v. Schwan's Sales Enters., 896 S.W.2d 320, 324 (Tex. App.--Houston [1st Dist.] 1995, no writ) (citing GT & MC, Inc. v. Texas City Ref., Inc., 822 S.W.2d 252, 255-56 (Tex. App.--Houston [1st Dist.] 1991, writ denied)). [↑](#footnote-ref-217)
217. 217 See RGS, Cardox Recovery, Inc. v. Dorchester Enhanced Recovery Co., 700 S.W.2d 635, 638 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.); see also Sharp v. State Farm Fire & Cas. Ins. Co., 938 F. Supp. 395, 396-98 (W.D. Tex. 1996) (granting summary judgment on an admittedly unambiguous insurance policy); American Stone Diamond, Inc. v. Lloyds of London, 934 F. Supp. 839, 846-47 (S.D. Tex. 1996) (granting summary judgment for insurer where policy exclusion could only reasonably be read as proffered by the insurer). [↑](#footnote-ref-218)
218. 218 See Coker v. Coker, 650 S.W.2d 391, 394-95 (Tex. 1983); Hussong, 896 S.W.2d at 324; see also Southern Natural Gas Co. v. Pursue Energy, 781 F.2d 1079, 1081 (5th Cir. 1986) (applying analogous Mississippi law) ("A district court may properly grant summary judgment when a contract is unambiguous, but may not grant summary judgment when a contract is ambiguous and the parties' intent presents a genuine issue of material fact." (citing Union Planters Nat'l Leasing, Inc. v. Woods, 687 F.2d 117, 120 (5th Cir. 1982); Freeman v. Continental Gin Co., 381 F.2d 459, 465 (5th Cir. 1967))). [↑](#footnote-ref-219)
219. 219 650 S.W.2d 391 (Tex. 1983). [↑](#footnote-ref-220)
220. 220 See id. at 392. [↑](#footnote-ref-221)
221. 221 See supra Part II.C.4. [↑](#footnote-ref-222)
222. 222 See Coker, 650 S.W.2d at 394-95. [↑](#footnote-ref-223)
223. 223 The proper allocation of responsibility as between court and jury in considering conflicting extrinsic proof, including proof of surrounding circumstances, is not without uncertainty. The Texas Supreme Court, in City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515 (1968), apparently resolved conflicting evidence of surrounding circumstances as a matter of law, and hence concluded that the contract was unambiguous as a matter of law. In Hanssen v. Qantas Airways Ltd., 904 F.2d 267 (5th Cir. 1990), the Fifth Circuit concluded that conflicting proof of surrounding circumstances created an issue to be resolved by the trier of fact, but the court also made it relatively clear that it was its finding of ambiguity that created the jury issue. The problem is compounded by such cases as Bloom v. Hearst Entertainment, Inc., 33 F.3d 518 (5th Cir. 1994), in which the Fifth Circuit alluded to three levels of inquiry in determining ambiguity under the Uniform Commercial Code. The court concluded that while the question of whether the express terms of a contract are ambiguous is a question of law, the question of whether contract terms are ambiguous after considering all extrinsic evidence, including, but not limited to, course of dealing, uses of trade, and course of performance, is clearly a question of fact. See id. at 522-23. The court did not resolve the question of whether an ambiguity inquiry that is limited to the consideration of conflicting proof of course of dealing, uses of trade, and course of performance, and no other, is a question of law or fact. No case law seems to directly address this issue under Texas common law, and it may be that under common law, as under the Uniform Commercial Code, this remains an open question. See discussion infra Part III.F.1. But no case has been found in which a court has held that the existence of conflicting proof of surrounding circumstances requires the submission of any issue to the jury, whether the question before the court is ambiguity vel non, or the interpretation of an agreement that is admittedly unambiguous. [↑](#footnote-ref-224)
224. 224 Unlike integration, which may exist in degrees, see infra Part III.B.2, a contract is either ambiguous or it is not. A finding of "partial ambiguity" is, therefore, not an acceptable result of the trial court's initial determination. [↑](#footnote-ref-225)
225. 225 See MJR Corp. v. B & B Vending Co., 760 S.W.2d 4, 10 (Tex. App.--Dallas 1988, writ denied); see also Southern Natural Gas Co. v. Pursue Energy, 781 F.2d 1079, 1081 (5th Cir. 1986) (applying analogous Mississippi law); Paragon Resources, Inc. v. National Fuel Gas Distrib. Corp., 695 F.2d 991, 995 (5th Cir. 1983) (applying analogous Louisiana law). [↑](#footnote-ref-226)
226. 226 Restatement (Second) of Contracts ch. 9, pt. 3 intro. note (1981). [↑](#footnote-ref-227)
227. 227 See id. [↑](#footnote-ref-228)
228. 228 Restatement (Second) of Contracts § 209(1), at 125 (emphasis added); see also Restatement of Contracts § 228, at 307 (1932) ("An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement." (emphasis added)). [↑](#footnote-ref-229)
229. 229 Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W.2d 30, 32 (1958). [↑](#footnote-ref-230)
230. 230 3 Corbin, supra note 2, § 573, at 357 (emphasis added), quoted with approval in Loe v. Murphy, 611 S.W.2d 449, 451 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.); see also Restatement (Second) of Contracts ch. 9, pt. 3 intro. note. The Second Restatement of Contracts states the following:

     The principal effects of a binding integrated agreement are to focus interpretation on the meaning of the terms embodied in the writing . . . , to discharge prior inconsistent agreements, and, in a case of complete integration, to discharge prior agreements within its scope regardless of consistency. . . . The admissibility of evidence to contradict an integrated agreement or to add to a completely integrated agreement is restricted, and a limit is thus placed on the power of the trier of fact . . . .

     Id. [↑](#footnote-ref-231)
231. 231 Hubacek, 317 S.W.2d at 32. [↑](#footnote-ref-232)
232. 232 See text accompanying supra note 230. Thus, in the words of the Fifth Circuit, "parol evidence allegedly elucidating intent but contradicting the express terms of a written agreement is never admissible." Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1049 (5th Cir. 1971). [↑](#footnote-ref-233)
233. 233 See infra Part III.C.5. [↑](#footnote-ref-234)
234. 234 Jack H. Brown & Co. v. Toys "R" Us, Inc., 906 F.2d 169, 176 (5th Cir. 1990). [↑](#footnote-ref-235)
235. 235 611 S.W.2d 449, 451 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.) (emphasis added). [↑](#footnote-ref-236)
236. 236 Restatement (Second) of Contracts § 209(2) (1981) (emphasis added). [↑](#footnote-ref-237)
237. 237 Id. § 209 cmt. c. [↑](#footnote-ref-238)
238. 238 See id. § 209 reporter's note to cmt. c; id. § 213 cmt. b. [↑](#footnote-ref-239)
239. 239 See Pan Am. Bank v. Nowland, 650 S.W.2d 879, 884 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.); see also Restatement (Second) of Contracts § 213 cmt. a. Because the parol evidence rule is a matter of substantive law, a federal court sitting in diversity will construe a Texas contract in accordance with Texas law, and, therefore, will apply the parol evidence rule in accordance with Texas law. See supra note 1. [↑](#footnote-ref-240)
240. 240 See Wilkins v. Bain, 615 S.W.2d 314, 315 (Tex. App.--Dallas 1981, no writ). [↑](#footnote-ref-241)
241. 241 David R. Dow, The Confused State of the Parol Evidence Rule in Texas, 355 Tex. L. Rev. 457, 459 (1994). [↑](#footnote-ref-242)
242. 242 Id. at 459-60 (emphasis added); see also Restatement (Second) of Contracts § 210(1)-(2) (defining "completely" and "partially" integrated agreements somewhat less artfully than Professor Dow). [↑](#footnote-ref-243)
243. 243 Restatement (Second) of Contracts § 216(2). The Restatement provides the following illustration:

     A and B in an integrated writing promise to sell and buy respectively a specific automobile. As part of the transaction they orally agree that B may keep the automobile in A's garage for one year, paying $ 15 a month [above and beyond the selling price of the car]. The oral agreement is not within the scope of the integration and is not superseded.

     Id. § 216 illus. 3 (emphasis added). The Restatement counsels that "this situation is especially likely to arise when the writing is in a standardized form which does not lend itself to the insertion of additional terms," such as negotiable instruments, leases and conveyances, and the like. Id. § 216 cmt. d. Also, certain terms collateral to a negotiable instrument would, if included in the terms of the instrument, destroy its negotiability; therefore, it is "natural" to leave such terms off the face of the instrument. See id. [↑](#footnote-ref-244)
244. 244 Restatement (Second) of Contracts § 210(3). Professor Adams notes:

     It is exclusively up to the trial judge, even in a jury trial, to decide whether a written contract is fully or partially integrated. This is because the parol evidence rule applies to exclude contradictory evidence only if the disputed terms are integrated. . . . "A rule allowing the jury to consider any relevant evidence in deciding whether the writing was intended to be a complete integration 'without any limitations, would emasculate, if not "repeal," the parol evidence rule.' "

     Charles F. Adams, Contract Litigation: The Roles of Judge and Jury and the Standards of Review on Appeal, 28 Willamette L. Rev. 223, 230 (1992) (citation, footnotes, and emphasis omitted). [↑](#footnote-ref-245)
245. 245 Restatement (Second) of Contracts § 210 cmt. b. [↑](#footnote-ref-246)
246. 246 Id. [↑](#footnote-ref-247)
247. 247 Id. § 210 illus. 1 (emphasis added). [↑](#footnote-ref-248)
248. 248 Thompson v. Chrysler First Bus. Credit Corp., 840 S.W.2d 25, 33 (Tex. App.--Dallas 1992, no writ); see Weinacht v. Phillips Coal Co., 673 S.W.2d 677, 679 (Tex. App.--Dallas 1984, no writ); see also Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178, 1183 (5th Cir. 1993) (citing Weinacht, 673 S.W.2d at 679). [↑](#footnote-ref-249)
249. 249 See Jack H. Brown & Co. v. Toys "R" Us, Inc., 906 F.2d 169, 173 (5th Cir. 1990) (citing Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W.2d 30, 32 (1958)); Beijing Metals, 993 F.2d at 1183 (citing Hubacek, 317 S.W.2d at 32). This presumption, still embraced by Texas common law, is at odds with both the Uniform Commercial Code and the Restatement (Second) of Contracts--both of which reject the presumption that, simply because a writing is integrated as to some terms, it is fully integrated as to all terms. See Tex. Bus. & Com. Code Ann. § 2.202 cmt. 1 (Vernon 1994); Restatement (Second) of Contracts § 210 cmt. a; see also Braucher, supra note 2, at 16 & n.23. [↑](#footnote-ref-250)
250. 250 See Tex. Bus. & Com. Code Ann. § 2.202 cmt. 1 ("This section definitely rejects: (a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon."); see also Beijing Metals, 993 F.2d at 1183 n.10; Bob Robertson, Inc. v. Webster, 679 S.W.2d 683, 688 (Tex. App.--Houston [1st Dist.] 1984, no writ) (paraphrasing Official Comment 1). Parties may vary the provisions of the UCC by explicit agreement. See, e.g., Lenape Resources Corp. v. Tennessee Gas Pipeline Co., 925 S.W.2d 565, 570 (Tex. 1996). Therefore, parties to a written agreement subject to the UCC could easily include language in the operative provision(s) or the merger or integration provisions that has the effect of creating a presumption of full integration, as well as precluding the resort to extrinsic evidence of the types that the UCC otherwise makes admissible. See infra Part III.F. [↑](#footnote-ref-251)
251. 251 See Beijing Metals, 993 F.2d at 1183; Jack H. Brown & Co., 906 F.2d at 173-74; see also Restatement (Second) of Contracts § 209 illus. 3 ("In the absence of contrary evidence, the writing is taken to be an integration; whether it is a complete integration is decided on the basis of all relevant evidence."). [↑](#footnote-ref-252)
252. 252 Jack H. Brown & Co., 906 F.2d at 173 (quoting Harville Rose Serv. v. Kellogg Co., 448 F.2d 1346, 1349 (5th Cir. 1971)). [↑](#footnote-ref-253)
253. 253 Dow, supra note 241, at 618; see also Restatement (Second) of Contracts § 216 cmt. e. [↑](#footnote-ref-254)
254. 254 Merger and integration clauses serve essentially the same purpose, have essentially the same effect, and are often used and referred to interchangeably. They do, however, have differences. An integration clause recites that the subject written contract constitutes the sole and complete agreement between or among the parties, while a merger clause recites that the subject written contract supersedes all prior oral or written agreements, leaving the subject contract the sole remaining, and therefore complete, agreement between or among the parties. [↑](#footnote-ref-255)
255. 255 Smith v. Smith, 794 S.W.2d 823, 827-28 (Tex. App.--Dallas 1990, no writ) (citations omitted). [↑](#footnote-ref-256)
256. 256 780 S.W.2d 391, 394 (Tex. App.--Houston [14th Dist.] 1989), vacated on other grounds, 796 S.W.2d 707 (Tex. 1990). [↑](#footnote-ref-257)
257. 257 See id. at 394, 396 ("Section 11 of the ELA renders the ELA an integrated contract."). [↑](#footnote-ref-258)
258. 258 673 S.W.2d 677, 679 (Tex. App.--Dallas 1984, no writ). [↑](#footnote-ref-259)
259. 259 See id. at 678, 679. [↑](#footnote-ref-260)
260. 260 See Bob Robertson, Inc. v. Webster, 679 S.W.2d 683, 688-89 (Tex. App.--Houston [1st Dist.] 1984, no writ). [↑](#footnote-ref-261)
261. 261 Id. [↑](#footnote-ref-262)
262. 262 Id. at 689; see also Restatement (Second) of Contracts § 209 cmt. b (1981) ("Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, but such a declaration may not be conclusive." (emphasis added)).

     Those responsible for revising Article 2 of the UCC considered, but then rejected, invalidating merger clauses in contracts for the sale of goods. The current proposed revisions to Article 2 "reflect the actual approach taken by courts in determining whether the parties intended an integration. . . . The courts, as before, are left to decide whether a merger clause is conclusive and when extrinsic evidence should be admitted to interpret language in the record." Henry D. Gabriel & Katherine A. Barski, Updating the UCC: Revisions in the Works Affect Consumers, 6 Bus. Law Today, Sep./Oct. 1996, at 16, 19. [↑](#footnote-ref-263)
263. 263 See Magnolia Warehouse & Storage Co. v. Davis & Blackwell, 108 Tex. 422, 195 S.W. 184, 185 (1917); M.C. Winters, Inc. v. Cope, 498 S.W.2d 484, 488-89 (Tex. Civ. App.--Texarkana 1973, no writ). [↑](#footnote-ref-264)
264. 264 See Garner v. Redeaux, 678 S.W.2d 124, 128 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (quoting 2 Charles T. McCormick & Roy R. Ray, Texas Law of Evidence, Civil and Criminal § 1611 (1st ed. 1937)); Warren Bros. Co. v. A.A.A. Pipe Cleaning Co., 601 S.W.2d 436, 438 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.). [↑](#footnote-ref-265)
265. 265 Restatement (Second) of Contracts § 210 cmt. c (emphasis added). [↑](#footnote-ref-266)
266. 266 See, e.g., City of Beaumont v. Excavators & Constructors, Inc., 870 S.W.2d 123, 146 (Tex. App.--Beaumont 1993, writ denied). [↑](#footnote-ref-267)
267. 267 See id. [↑](#footnote-ref-268)
268. 268 See, e.g., Texas Builders v. Keller, 928 S.W.2d 479, 481-82 (Tex. 1996). [↑](#footnote-ref-269)
269. 269 544 S.W.2d 778, 782-83 (Tex. Civ. App.--Dallas 1976, no writ). [↑](#footnote-ref-270)
270. 270 See id. [↑](#footnote-ref-271)
271. 271 See id. at 783. [↑](#footnote-ref-272)
272. 272 See id. [↑](#footnote-ref-273)
273. 273 Id. [↑](#footnote-ref-274)
274. 274 Id. [↑](#footnote-ref-275)
275. 275 Id. at 784-85. [↑](#footnote-ref-276)
276. 276 Id. at 785 (emphases added). As for the ramifications of the bank's failure to complete the guaranty as agreed on Walker's liability, the court of civil appeals stated:

     When a party signs an instrument containing blanks and entrusts it to another under an agreement that the blanks will be filled in a certain manner, the party to whom the instrument is entrusted has a duty to fill the blanks strictly in accordance with the agreement, and, in the absence of negotiation[] to an innocent holder, the party signing the instrument is not bound to the terms subsequently inserted in the blanks if the instrument . . . does not reflect the true agreement.

     Id. at 784; see also infra notes 387-89. [↑](#footnote-ref-277)
277. 277 See Jack H. Brown & Co. v. Toys "R" Us, Inc., 906 F.2d 169, 175 (5th Cir. 1990); see Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W.2d 30, 32 (1958); Weinacht v. Phillips Coal Co., 673 S.W.2d 677, 680 (Tex. App.--Dallas 1984, no writ). [↑](#footnote-ref-278)
278. 278 Weinacht, 673 S.W.2d at 680 (citing Leyendecker v. Strange, 204 S.W.2d 845, 847 (Tex. Civ. App.--Galveston 1947, writ ref'd n.r.e.)). [↑](#footnote-ref-279)
279. 279 679 S.W.2d 683, 688-89 (Tex. App.--Houston [1st Dist.] 1984, no writ). [↑](#footnote-ref-280)
280. 280 Id. at 689. [↑](#footnote-ref-281)
281. 281 Weinacht, 673 S.W.2d at 678. [↑](#footnote-ref-282)
282. 282 Id. at 679. [↑](#footnote-ref-283)
283. 283 See id. [↑](#footnote-ref-284)
284. 284 See id. at 679-80. [↑](#footnote-ref-285)
285. 285 Jack H. Brown & Co. v. Toys "R" Us, Inc., 906 F.2d 169, 174 (5th Cir. 1990) (citation omitted). [↑](#footnote-ref-286)
286. 286 928 S.W.2d 479, 480 (Tex. 1996). [↑](#footnote-ref-287)
287. 287 Id. at 481-82 (citations omitted). [↑](#footnote-ref-288)
288. 288 Gruss v. Cummins, 329 S.W.2d 496, 499 (Tex. Civ. App.--El Paso 1959, writ ref'd n.r.e.). [↑](#footnote-ref-289)
289. 289 Id. at 502. [↑](#footnote-ref-290)
290. 290 Hunter, supra note 1, 7.03[2], at 7-12. [↑](#footnote-ref-291)
291. 291 See id. [↑](#footnote-ref-292)
292. 292 See Baker v. Baker, 143 Tex. 191, 183 S.W.2d 724, 728 (1944); Bellaire Kirkpatrick Joint Venture v. Loots, 826 S.W.2d 205, 213 (Tex. App.--Fort Worth 1992, writ denied); Rincones v. Windberg, 705 S.W.2d 846, 847 (Tex. App.--Austin 1986, no writ); Muhm v. Davis, 580 S.W.2d 98, 101 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.). [↑](#footnote-ref-293)
293. 293 King v. Fordice, 776 S.W.2d 608, 610 (Tex. App.--Dallas 1989, writ denied). [↑](#footnote-ref-294)
294. 294 Loots, 826 S.W.2d at 213. [↑](#footnote-ref-295)
295. 295 See King, 776 S.W.2d at 610; Bell v. Mulkey, 7 S.W.2d 115, 116-17 (Tex. Civ. App.--Amarillo 1928), aff'd, 16 S.W.2d 287 (Tex. Comm'n App. 1929, judgm't adopted); see also Ross v. Stinnett, 540 S.W.2d 493, 495-96 (Tex. Civ. App.--Tyler 1976, no writ) (reciting the rule from Bell but concluding that the agreement at bar was not a "sham" and, therefore, the proffered evidence of the "real" oral agreement was barred by the parol evidence rule). [↑](#footnote-ref-296)
296. 296 King, 776 S.W.2d at 610 (citing Burke v. Dulaney, 153 U.S. 228 (1894); 29A Am. Jur. 2d Evidence § 1034 (1994)). [↑](#footnote-ref-297)
297. 297 Id. at 608. [↑](#footnote-ref-298)
298. 298 See id. at 609. [↑](#footnote-ref-299)
299. 299 Id. [↑](#footnote-ref-300)
300. 300 See id. [↑](#footnote-ref-301)
301. 301 See id. [↑](#footnote-ref-302)
302. 302 See id. [↑](#footnote-ref-303)
303. 303 See id. [↑](#footnote-ref-304)
304. 304 See id. at 609-10. [↑](#footnote-ref-305)
305. 305 See id. at 610. [↑](#footnote-ref-306)
306. 306 See Tex. Bus. & Com. Code Ann. § 2.202 (Vernon 1994). See infra Part III.F.1 for a detailed discussion of the UCC version of the parol evidence rule. [↑](#footnote-ref-307)
307. 307 King, 776 S.W.2d at 612 (emphasis added). [↑](#footnote-ref-308)
308. 308 Pan Am. Bank v. Nowland, 650 S.W.2d 879, 885 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.), disapproved of on other grounds by Crimmins v. Lowry, 691 S.W.2d 582 (Tex. 1985); see also Anderson v. Havins, 595 S.W.2d 147, 153 (Tex. Civ. App.--Amarillo 1980, writ dism'd); Beggs v. Texas Elec. Serv. Co., 396 S.W.2d 461, 463 (Tex. Civ. App.--Fort Worth 1965, writ ref'd n.r.e.). [↑](#footnote-ref-309)
309. 309 Town North Nat'l Bank v. Broaddus, 569 S.W.2d 489, 494 (Tex. 1978); accord Thompson v. Chrysler First Bus. Credit Corp., 840 S.W.2d 25, 33-34 (Tex. App.--Dallas 1992, no writ); Simpson v. MBank Dallas, N.A., 724 S.W.2d 102, 108 (Tex. App.--Dallas 1987, writ ref'd n.r.e.); Clark v. Dedina, 658 S.W.2d 293, 296 (Tex. App.--Houston [1st Dist.] 1983, writ dism'd); Nowland, 650 S.W.2d at 885; see also Motorola, Inc. v. Chapman, 761 F. Supp. 458, 462 (S.D. Tex. 1991). [↑](#footnote-ref-310)
310. 310 See Motorola, 761 F. Supp. at 462-63. [↑](#footnote-ref-311)
311. 311 See Simpson, 724 S.W.2d at 108. [↑](#footnote-ref-312)
312. 312 See Clark, 658 S.W.2d at 296. [↑](#footnote-ref-313)
313. 313 Id. at 297; Lawler v. FDIC, 538 S.W.2d 245, 247-48 (Tex. Civ. App.--Beaumont 1976, writ ref'd n.r.e.); see also Fisher Controls Int'l, Inc. v. Gibbons, 911 S.W.2d 135, 142 (Tex. App.--Houston [1st Dist.] 1995, writ requested) ("When experienced executives represented by counsel voluntarily sign a contract whose terms they know, they should not be allowed to claim fraud in any earlier oral statement inconsistent with a specific contract provision.") (citing Boggan v. Data Sys. Network Corp., 969 F.2d 149, 153-54 (5th Cir. 1992), and Airborne Freight Corp. v. C.R. Lee Enters., 847 S.W.2d 289, 297 (Tex. App.--El Paso 1992, writ denied)). [↑](#footnote-ref-314)
314. 314 569 S.W.2d 489, 490 (Tex. 1978). [↑](#footnote-ref-315)
315. 315 See id. [↑](#footnote-ref-316)
316. 316 Id. at 490-91. [↑](#footnote-ref-317)
317. 317 See id. at 491. [↑](#footnote-ref-318)
318. 318 See id. [↑](#footnote-ref-319)
319. 319 See id. at 494. [↑](#footnote-ref-320)
320. 320 Id. at 492-94 (citations omitted) (footnote omitted). [↑](#footnote-ref-321)
321. 321 513 S.W.2d 872, 872 (Tex. Civ. App.--Eastland 1974, writ ref'd n.r.e.). [↑](#footnote-ref-322)
322. 322 See id. [↑](#footnote-ref-323)
323. 323 See id. at 873-74. [↑](#footnote-ref-324)
324. 324 See id. at 875; see also Broaddus, 569 S.W.2d at 493-94 (reciting the facts of Berry, distinguishing them from the facts at bar, and intimating that the court approved the court of civil appeals's holding in Berry). [↑](#footnote-ref-325)
325. 325 508 S.W.2d 472, 473 (Tex. Civ. App.--Waco 1974, writ ref'd n.r.e.). [↑](#footnote-ref-326)
326. 326 Id. at 473. [↑](#footnote-ref-327)
327. 327 See id. at 474. [↑](#footnote-ref-328)
328. 328 See id. at 475. [↑](#footnote-ref-329)
329. 329 Id. at 473. [↑](#footnote-ref-330)
330. 330 See Broaddus, 569 S.W.2d at 494. [↑](#footnote-ref-331)
331. 331 See Santos v. Mid-Continent Refrigerator Co., 471 S.W.2d 568, 569 (Tex. 1971) (per curiam); Sweeney v. Taco Bell, Inc., 824 S.W.2d 289, 292 (Tex. App.--Fort Worth 1992, writ denied); Shenandoah Assocs. v. J & K Props., Inc., 741 S.W.2d 470, 488-89 (Tex. App.--Dallas 1987, writ denied); Alkas v. United Savs. Ass'n, 672 S.W.2d 852, 858 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.). [↑](#footnote-ref-332)
332. 332 Sweeney, 824 S.W.2d at 291. [↑](#footnote-ref-333)
333. 333 See Restatement (Second) of Contracts §§ 152, 155 (1981). [↑](#footnote-ref-334)
334. 334 See American Guar. & Liab. Ins. Co. v. Shel-Ray Underwriters, Inc., 844 F. Supp. 325, 332 (S.D. Tex. 1993) (citing Heritage Manor of Blaylock Props., Inc. v. Petersson, 677 S.W.2d 689, 691 (Tex. App.--Dallas 1984, writ ref'd n.r.e.)). [↑](#footnote-ref-335)
335. 335 See Thompson v. Chrysler First Bus. Credit Corp., 840 S.W.2d 25, 33-34 (Tex. App.--Dallas 1992, no writ); Shenandoah Assocs., 741 S.W.2d at 488. [↑](#footnote-ref-336)
336. 336 798 S.W.2d 835 (Tex. App.--Austin 1990, writ denied). [↑](#footnote-ref-337)
337. 337 See id. at 836. [↑](#footnote-ref-338)
338. 338 Id. at 837. [↑](#footnote-ref-339)
339. 339 Id. at 838. [↑](#footnote-ref-340)
340. 340 Id. [↑](#footnote-ref-341)
341. 341 See id. at 839. [↑](#footnote-ref-342)
342. 342 473 S.W.2d 3 (Tex. 1971). [↑](#footnote-ref-343)
343. 343 432 S.W.2d 515 (Tex. 1968). [↑](#footnote-ref-344)
344. 344 Josten's, 798 S.W.2d at 839. [↑](#footnote-ref-345)
345. 345 See id. [↑](#footnote-ref-346)
346. 346 Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178, 1184 (5th Cir. 1993) (quoting Conner v. May, 444 S.W.2d 948, 952 (Tex. Civ. App.--Austin 1969, writ ref'd n.r.e.)). [↑](#footnote-ref-347)
347. 347 Weinacht v. Phillips Coal Co., 673 S.W.2d 677, 680 (Tex. App.--Dallas 1984, no writ); accord Beijing Metals, 993 F.2d at 1184. [↑](#footnote-ref-348)
348. 348 Beijing Metals, 993 F.2d at 1184. [↑](#footnote-ref-349)
349. 349 Id. [↑](#footnote-ref-350)
350. 350 See id. [↑](#footnote-ref-351)
351. 351 See id. [↑](#footnote-ref-352)
352. 352 Id. [↑](#footnote-ref-353)
353. 353 Id. [↑](#footnote-ref-354)
354. 354 Id. [↑](#footnote-ref-355)
355. 355 Id. at 1184 (quoting Jack H. Brown & Co. v. Toys "R" Us, Inc., 906 F.2d 169, 176 (5th Cir. 1990)). [↑](#footnote-ref-356)
356. 356 638 F.2d 1366, 1369 (5th Cir. 1981). [↑](#footnote-ref-357)
357. 357 Id. [↑](#footnote-ref-358)
358. 358 See Restatement (Second) of Contracts § 212 (1981). [↑](#footnote-ref-359)
359. 359 See Quitta v. Fossati, 808 S.W.2d 636, 642 (Tex. App.--Corpus Christi 1991, writ denied); Robbins v. Warren, 782 S.W.2d 509, 512 (Tex. App.--Houston [1st Dist.] 1989, no writ); Oxford Dev. Co. v. Eppes, 422 S.W.2d 583, 585 (Tex. Civ. App.--Corpus Christi 1967, no writ). [↑](#footnote-ref-360)
360. 360 794 S.W.2d 823, 825 (Tex. App.--Dallas 1990, no writ). [↑](#footnote-ref-361)
361. 361 See id. [↑](#footnote-ref-362)
362. 362 See id. at 828. [↑](#footnote-ref-363)
363. 363 Id. at 827. The integration clause in "the AID provided that 'this instrument expresses the entire agreement between the parties concerning the subjects it purports to cover.' " Id. n.3. [↑](#footnote-ref-364)
364. 364 See id. at 828. [↑](#footnote-ref-365)
365. 365 Id. [↑](#footnote-ref-366)
366. 366 See Quitta v. Fossati, 808 S.W.2d 636, 642 (Tex. App.--Corpus Christi 1991, writ denied); Robbins v. Warren, 782 S.W.2d 509, 512 (Tex. App.--Houston [1st Dist.] 1989, no writ); Oxford Dev. Co. v. Eppes, 422 S.W.2d 583, 585 (Tex. Civ. App.--Corpus Christi 1967, no writ). [↑](#footnote-ref-367)
367. 367 See Uhlir v. Golden Triangle Dev. Corp., 763 S.W.2d 512, 516-17 (Tex. App.--Fort Worth 1988, writ denied); Texas Constr. Assocs. v. Balli, 558 S.W.2d 513, 521 (Tex. Civ. App.--Corpus Christi 1977, no writ); D.H. Overmyer Co. v. Harbison, 453 S.W.2d 368, 370 (Tex. Civ. App.--El Paso 1970, no writ); Chambless v. J.J. Fritch, Gen. Contractor, Inc., 336 S.W.2d 200, 203-04 (Tex. Civ. App.--Dallas 1960, writ ref'd n.r.e.); see also Tex. Bus. & Com. Code Ann. § 2.209(b) (Vernon 1994) ("A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded . . . ."); South Hampton Co. v. Stinnes Corp., 733 F.2d 1108, 1117-18 (5th Cir. 1984) (applying Texas law). [↑](#footnote-ref-368)
368. 368 See, e.g., Union Bldg. Corp. v. J & J Bldg. & Maintenance Contractors, Inc., 578 S.W.2d 519, 520-21 (Tex. Civ. App.--Houston [14th Dist.] 1979, writ ref'd n.r.e.). [↑](#footnote-ref-369)
369. 369 See Dave Summers Realtors, Inc. v. Astro Leasing, Inc., 603 S.W.2d 301, 302 (Tex. Civ. App.--Beaumont 1980, no writ); see also South Hampton, 733 F.2d at 1117 & n.13. [↑](#footnote-ref-370)
370. 370 See Restatement (Second) of Contracts § 148 (1981). [↑](#footnote-ref-371)
371. 371 See Speer v. Dalrymple, 222 S.W. 174, 176 (Tex. Comm'n App. 1920, holding approved) (holding that the trial court erred by excluding extrinsic evidence of nondelivery, fraud, and rescission because the evidence offered did not seek to alter the written contract; rather, it went to whether the written contract was binding at all); see also Farr v. Moreland, 197 S.W.2d 386, 388 (Tex. Civ. App.--Texarkana 1946, no writ) (discussing the degree of proof of parol rescission of a prior written contract for sale of land). But see Reyes v. Smith, 288 S.W.2d 822, 825 (Tex. Civ. App.--Austin 1956, writ ref'd n.r.e.) (holding that a written contract conforming to the statute of frauds could not be modified or rescinded by subsequent oral agreement and, therefore, parol evidence regarding the alleged oral rescission was inadmissible). [↑](#footnote-ref-372)
372. 372 For example: "A and B enter into an oral contract, and prepare and sign a writing to incorporate its terms. Though the writing contains substantially all the orally agreed terms, they are not fully satisfied with it, and they agree to have it redrafted. There is no integrated agreement." Restatement (Second) of Contracts § 209 cmt. b, illus. 1. [↑](#footnote-ref-373)
373. 373 See Muhm v. Davis, 580 S.W.2d 98, 101 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.); see also McFarland v. Shaw, 45 S.W.2d 193, 195 (Tex. Comm'n App. 1932, holding approved) (quoting 3 Ruling Case Law 869-70 (William M. McKinney & Burdett A. Rich eds., 1914), which states that "it may not be contended for example, that, as between the parties to an instrument parol evidence is incompetent to show . . . illegality . . . ."); Bradbury v. State ex rel. Clutter, 503 S.W.2d 619, 622 (Tex. Civ. App.--Tyler 1973, no writ) (holding that the parol evidence rule did not bar appellees from showing that "official documents declaring the City of Preston to be an incorporated town were void or voidable and of no legal effect"). [↑](#footnote-ref-374)
374. 374 See DeLuca v. Munzel, 673 S.W.2d 373, 376 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Gaines Motor Sales Co. v. Hastings Mfg. Co., 104 S.W.2d 548, 551 (Tex. Civ. App.--Fort Worth 1937, writ dism'd). [↑](#footnote-ref-375)
375. 375 Restatement (Second) of Contracts § 218 cmt. d; see also id. § 218(2) ("Extrinsic evidence is admissible to prove whether or not there is consideration for a promise, even though the parties have reduced their agreement to a writing which appears to be a completely integrated agreement."). [↑](#footnote-ref-376)
376. 376 See DeLuca, 673 S.W.2d at 376; Gaines Motor Sales, 104 S.W.2d at 551. [↑](#footnote-ref-377)
377. 377 See Restatement (Second) of Contracts § 218 cmt. e ("Where consideration is required, the requirement is not satisfied by a false recital of consideration . . . . An incorrect statement of a consideration does not prevent proof either that there was no consideration or that there was a consideration different from that stated."). [↑](#footnote-ref-378)
378. 378 See Rincones v. Windberg, 705 S.W.2d 846, 847 (Tex. App.--Austin 1986, no writ). A condition precedent is distinguished from a "condition subsequent" for purposes of the parol evidence rule. A condition subsequent is "a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition." Black's Law Dictionary 293-94 (6th ed. 1990); see also Rincones, 705 S.W.2d at 848 (quoting with approval the same definition as it appeared in an earlier edition of Black's Law Dictionary). In other words, evidence of a condition subsequent, unlike evidence of a condition precedent, is barred by the parol evidence rule. See id. at 848-49 and cases cited therein. [↑](#footnote-ref-379)
379. 379 Baker v. Baker, 143 Tex. 191, 183 S.W.2d 724, 728 (1944); accord Rincones, 705 S.W.2d at 847. [↑](#footnote-ref-380)
380. 380 Baker, 183 S.W.2d at 728; see also Holt v. Gordon, 107 Tex. 137, 174 S.W. 1097, 1097 (1915). [↑](#footnote-ref-381)
381. 381 Pan Am. Bank v. Nowland, 650 S.W.2d 879, 885 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.) (emphasis added) (citing Denman v. Hall, 144 Tex. 633, 193 S.W.2d 515, 516 (1946), and Baker, 183 S.W.2d at 728), disapproved of on other grounds by Crimmins v. Lowry, 691 S.W.2d 582 (Tex. 1985). [↑](#footnote-ref-382)
382. 382 Restatement (Second) of Contracts § 217 (emphasis added). [↑](#footnote-ref-383)
383. 383 Id. § 217 cmt. b. The Second Restatement advises further that "a major rationale expressed by the courts for the rule of this Section is that it has to do with an oral condition that must occur before the written contract comes into existence. Thus, if the oral condition is not met there is no subsequent and superseding agreement and no reason to apply the parol evidence rule." Id. § 217 reporter's note to cmt. b (emphasis added). [↑](#footnote-ref-384)
384. 384 See Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 948 (Tex. 1990); Hohenberg Bros. Co. v. George E. Gibbons & Co., 537 S.W.2d 1, 3 (Tex. 1976). [↑](#footnote-ref-385)
385. 385 896 S.W.2d 352, 357 (Tex. App.--Houston [1st Dist.] 1995, no writ) (emphasis omitted). [↑](#footnote-ref-386)
386. 386 Id. [↑](#footnote-ref-387)
387. 387 544 S.W.2d 778, 782-83 (Tex. Civ. App.--Dallas 1976, no writ). [↑](#footnote-ref-388)
388. 388 See id. at 784; see also supra note 275 and accompanying text. [↑](#footnote-ref-389)
389. 389 Id. (citations omitted). [↑](#footnote-ref-390)
390. 390 See EP Operating Co. v. MJC Energy Co., 883 S.W.2d 263, 267 n.1 (Tex. App.--Corpus Christi 1994, writ denied); Chakur v. Zena, 233 S.W.2d 200, 202 (Tex. Civ. App.--San Antonio 1950, no writ). [↑](#footnote-ref-391)
391. 391 See, e.g., Ford v. Ford, 492 S.W.2d 376, 377-78 (Tex. Civ. App.--Texarkana 1973, writ ref'd n.r.e.) (affirming the trial court's reformation of a trust instrument based on the preparer's testimony that he intended to write the instrument so that the trust was irrevocable for ten years). [↑](#footnote-ref-392)
392. 392 543 S.W.2d 699, 700-01 (Tex. Civ. App.--Waco 1976, writ ref'd n.r.e.) (emphasis added). [↑](#footnote-ref-393)
393. 393 367 S.W.2d 213, 214 (Tex. Civ. App.--Austin 1963, writ ref'd n.r.e.) (emphasis added). [↑](#footnote-ref-394)
394. 394 Id. at 215. [↑](#footnote-ref-395)
395. 395 Restatement (Second) of Contracts § 223(1) (1981). [↑](#footnote-ref-396)
396. 396 See infra Part III.F.1.a; see also Restatement (Second) of Contracts § 223 cmt. a. [↑](#footnote-ref-397)
397. 397 Recall that, inter alia, course of dealing and course of performance are "surrounding circumstances" against which backdrop contractual terms are to be construed. See supra Part II.C.1. [↑](#footnote-ref-398)
398. 398 888 S.W.2d 931, 946 (Tex. App.--Beaumont 1994), rev'd on other grounds, 900 S.W.2d 342 (Tex. 1995). [↑](#footnote-ref-399)
399. 399 Id. [↑](#footnote-ref-400)
400. 400 Id. [↑](#footnote-ref-401)
401. 401 See id. at 946-47. [↑](#footnote-ref-402)
402. 402 Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1046 (5th Cir. 1971) (observing that evidence relating to course of dealing and usage of trade "merely delineates a commercial backdrop for intelligent interpretation of the agreement"); see Royal Indem. Co. v. Marshall, 378 S.W.2d 364, 370 (Tex. Civ. App.--Austin 1964) (approving the trial court's admission of expert testimony regarding the meaning of certain terms and industry practices among automobile dealers), rev'd on other grounds, 388 S.W.2d 176 (Tex. 1965); see also In re Fuel ***Oil*** Supply & Terminaling, Inc., 72 B.R. 752, 759 (S.D. Tex. 1987) (noting that "extrinsic evidence, like the course of dealings or the practice in the industry, is admissible to establish the intent expressed in the writing . . ."), rev'd on other grounds, 837 F.2d 224 (5th Cir. 1988); ***Oil*** Ins. Ass'n v. Royal Indem. Co., 519 S.W.2d 148, 150 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ ref'd n.r.e.) (citing Marshall for the general proposition that "it is well settled in Texas law that expert testimony of industry custom is admissible to explain the meaning of technical terms used by parties in an industry," but refusing to extend that well-settled law to cover a contract to which one party was not a part of the industry in question). See generally Restatement (Second) of Contracts § 209 cmt. a (1981); id. § 202(3)(b), (4) & (5) & cmts. f & g (describing the roles of technical terms, course of performance, course of dealing, and trade usage in contract interpretation and construction). [↑](#footnote-ref-403)
403. 403 S.K.Y. Inv. Corp. v. H.E. Butt Grocery Co., 440 S.W.2d 885, 891-92 (Tex. Civ. App.--Corpus Christi 1969, no writ). [↑](#footnote-ref-404)
404. 404 831 S.W.2d 444, 448 (Tex. App.--Houston [14th Dist.] 1992, writ denied). [↑](#footnote-ref-405)
405. 405 See id. [↑](#footnote-ref-406)
406. 406 Id. [↑](#footnote-ref-407)
407. 407 See id. [↑](#footnote-ref-408)
408. 408 See id. [↑](#footnote-ref-409)
409. 409 See id. [↑](#footnote-ref-410)
410. 410 Id. [↑](#footnote-ref-411)
411. 411 See id. [↑](#footnote-ref-412)
412. 412 See id. Other Texas courts have permitted or approved expert testimony regarding standard practices with respect to written agreements. See, e.g., Schwartz v. Prairie Producing Co., 833 S.W.2d 629, 632 (Tex. App.--Houston [1st Dist.] 1992, writ dism'd) (reversing and remanding for further proceedings when the trial court permitted expert testimony regarding gas processing agreements in general, but excluded expert testimony regarding industry custom concerning the sale of hydrogen sulfide gas, and then directed a verdict against the proffering party); Liquid Energy Corp. v. Trans-Pan Gathering, Inc., 758 S.W.2d 645, 655 (Tex. App.--Amarillo) (overruling a "no evidence" point in light of expert testimony regarding whether a pricing provision in a gas purchasing agreement was reasonable and common in the industry), vacated on other grounds, 762 S.W.2d 758 (Tex. App.--Amarillo 1988, no writ). The Fifth Circuit has followed suit. See, e.g., Bernard v. Gulf ***Oil*** Corp., 890 F.2d 735, 741 (5th Cir. 1989) (affirming a judgment in favor of an employer in light of, inter alia, expert testimony that the employer's personnel policies conformed with industry practices at the time). [↑](#footnote-ref-413)
413. 413 See Texas Gas Exploration Corp. v. Broughton Offshore Ltd. II, 790 S.W.2d 781, 785 (Tex. App.--Houston [14th Dist.] 1990, no writ). [↑](#footnote-ref-414)
414. 414 546 S.W.2d 631, 637 (Tex. Civ. App.--Tyler 1976, writ ref'd n.r.e.). [↑](#footnote-ref-415)
415. 415 Id. [↑](#footnote-ref-416)
416. 416 See id. [↑](#footnote-ref-417)
417. 417 437 F.2d 1040, 1041-42 (5th Cir. 1971). [↑](#footnote-ref-418)
418. 418 See id. [↑](#footnote-ref-419)
419. 419 See id. at 1042-44. [↑](#footnote-ref-420)
420. 420 See id. at 1045. [↑](#footnote-ref-421)
421. 421 See id. [↑](#footnote-ref-422)
422. 422 Id. at 1046. [↑](#footnote-ref-423)
423. 423 Id. at 1047-48 (citations omitted). After all, "the object of rules of construction generally, and of parol evidence particularly, is to ascertain the intention of the parties." Id. at 1048. [↑](#footnote-ref-424)
424. 424 Id. (quoting Thomas v. Scutt, 27 N.E. 961, 962-64 (N.Y. 1891)). [↑](#footnote-ref-425)
425. 425 See Byrd v. Smyth, 590 S.W.2d 772, 774-75 (Tex. Civ. App.--El Paso 1979, no writ); Barrett v. Ferrell, 550 S.W.2d 138, 141-42 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.); Burdette v. Cook Indus., 544 S.W.2d 495, 497 (Tex. Civ. App.--Corpus Christi 1976, writ dism'd w.o.j.); Sivert v. Continental ***Oil*** Co., 497 S.W.2d 482, 489 (Tex. Civ. App.--San Antonio 1973, writ ref'd n.r.e.); Gruss v. Cummins, 329 S.W.2d 496, 501 (Tex. Civ. App.--El Paso 1959, writ ref'd n.r.e.); Frost v. Martin, 203 S.W. 72, 74 (Tex. Civ. App.--Fort Worth 1918, no writ). See generally 4 Walter H.E. Jaeger, Williston on Contracts § 613 (3d ed. 1961) and cases cited therein. [↑](#footnote-ref-426)
426. 426 Restatement (Second) of Contracts § 202(3)(b) (1981). [↑](#footnote-ref-427)
427. 427 Sivert, 497 S.W.2d at 489. [↑](#footnote-ref-428)
428. 428 Id. [↑](#footnote-ref-429)
429. 429 See id. [↑](#footnote-ref-430)
430. 430 Id. (emphasis added). [↑](#footnote-ref-431)
431. 431 590 S.W.2d 772, 775 (Tex. Civ. App.--El Paso 1979, no writ). [↑](#footnote-ref-432)
432. 432 Id. at 774-75 (citation omitted). [↑](#footnote-ref-433)
433. 433 See generally 4 Jaeger, supra note 425, § 613 and cases cited therein. [↑](#footnote-ref-434)
434. 434 See Moreau v. Otis Elevator Co., 531 F.2d 311, 313 (5th Cir. 1976); Chemical Constr. Corp. v. Continental Eng'g, Ltd., 407 F.2d 989, 992-93 n.3 (5th Cir. 1969) (adopting the trial court's decision which, inter alia, permitted appellant to offer extrinsic evidence of the scope of the work that appellant understood the agreement to cover). [↑](#footnote-ref-435)
435. 435 See Weitzel v. Barnes, 691 S.W.2d 598, 600 (Tex. 1985); see also Honeywell, Inc. v. Imperial Condominium Ass'n, 716 S.W.2d 75, 78-79 (Tex. App.--Dallas 1986, no writ) (permitting consumers to introduce extrinsic evidence of precontractual misrepresentations, as well as factual misrepresentations in the contract itself); Tom Benson Chevrolet, Inc. v. Alvarado, 636 S.W.2d 815, 820 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (holding that a writing not part of the sales contract was admissible to show that the seller misrepresented the price of an automobile); United Postage Corp. v. Kammeyer, 581 S.W.2d 716, 720-21 (Tex. Civ. App.--Dallas 1979, no writ) (holding that plaintiff's testimony that he relied upon oral representations made by the defendant, rather than the written representations in his contract with the seller, created a fact issue sufficient to prevent summary judgment for the seller). [↑](#footnote-ref-436)
436. 436 Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1045 (5th Cir. 1971). [↑](#footnote-ref-437)
437. 437 See generally Arthur L. Corbin, The Parol Evidence Rule, 53 Yale L.J. 603, 610 (1944); Hunter, supra note 1, P 7.03, at 7-7 to 7-9. [↑](#footnote-ref-438)
438. 438 This step of the inquiry is optional, depending upon whether ambiguity has been pleaded by one or more of the parties. See generally supra Part III.A.3. [↑](#footnote-ref-439)
439. 439Maybe" is not really a viable answer to question one--there either is or is not a written agreement regarding the subject matter at issue. Whether a "Maybe" answer to questions two, three, or four, in and of itself, will permit the introduction of extrinsic evidence depends in large part on the underlying presumptions regarding integration and ambiguity. Applying the Texas common-law presumption in favor of full integration and the burden imposed by Texas law on a party asserting ambiguity, see supra Parts III.B.3.a and III.A.1 & .3, respectively, any answer other than a clear "No" will be presumed to be a "Yes." On the other hand, applying the presumptions in the second Restatement or the UCC, any answer to questions two, three, or four other than a clear "Yes" will be presumed to be a "No." See supra Part III.B.3.b and infra Part III.F.1. [↑](#footnote-ref-440)
440. 440 See supra Part III.C. [↑](#footnote-ref-441)
441. 441 See Corbin, supra note 437, at 609-10; Restatement (Second) of Contracts § 209 cmt. c (1981) ("Whether a writing has been adopted as an integrated agreement is a question of fact to be determined [by the trial judge] in accordance with all relevant evidence." (emphasis added)); id. § 210 cmt. b ("That a writing was or was not adopted as a completely integrated agreement may be proved by any relevant evidence." (emphasis added)); id. § 212 cmt. b ("Any determination of meaning or ambiguity should only be made in the light of the relevant evidence . . . ." (emphasis added)); id. § 213 cmt. b ("To apply this [parol evidence] rule, the court must make preliminary determinations that there is an integrated agreement and that it is inconsistent with the term in question. Those determinations are made in accordance with all relevant evidence . . . ." (emphasis added)). See generally Hunter, supra note 1, P 7.03[1]a, at 7-10. [↑](#footnote-ref-442)
442. 442 See generally Hunter, supra note 1, P 7.03[1]a, at 7-10 & n.62. [↑](#footnote-ref-443)
443. 443 The structure of this summary is drawn from Adams, supra note 244, at 254-55. [↑](#footnote-ref-444)
444. 444 See Restatement (Second) of Contracts § 209 reporter's note to cmt. c; id. § 213 cmt. b. See generally supra Part II.C.1. [↑](#footnote-ref-445)
445. 445 See supra Parts III.A.3.a and III.B.3; see also supra Parts III.A.1 and III.A.2. [↑](#footnote-ref-446)
446. 446 See Lenape Resources Corp. v. Tennessee Gas Pipeline Co., 925 S.W.2d 565, 574 (Tex. 1996); Sun ***Oil*** Co. v. Madeley, 626 S.W.2d 726, 732 (Tex. 1981); R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517, 519 (Tex. 1980); Sidelnik v. American States Ins. Co., 914 S.W.2d 689, 691 (Tex. App.--Austin 1996, writ denied) (all holding that the trier of fact is free to consider extrinsic evidence to interpret an ambiguous contract or contractual provision). [↑](#footnote-ref-447)
447. 447 See, e.g., Hussong v. Schwan's Sales Enters., 896 S.W.2d 320, 324 (Tex. App.--Houston [1st Dist.] 1995, no writ); GT & MC, Inc. v. Texas City Ref., Inc., 822 S.W.2d 252, 255-56 (Tex. App.--Houston [1st Dist.] 1991, writ denied). [↑](#footnote-ref-448)
448. 448 See Hycarbex, Inc. v. Anglo-Suisse, Inc., 927 S.W.2d 103, 108-10 (Tex. App.--Houston [14th Dist.] 1996, no writ); Sidelnik, 914 S.W.2d at 692 (citing R & P Enters., 596 S.W.2d at 518, and Birdwell v. Birdwell, 819 S.W.2d 223, 229 (Tex. App.--Fort Worth 1991, writ denied)). [↑](#footnote-ref-449)
449. 449 See Matthews v. Drew Chem. Corp., 475 F.2d 146, 148-50 (5th Cir. 1973); Walley v. Bay Petroleum Corp., 312 F.2d 540, 543-44 (5th Cir. 1963) (both applying analogous Florida law). [↑](#footnote-ref-450)
450. 450 See supra note 213 and accompanying text; see also supra Part III.E.3.a. [↑](#footnote-ref-451)
451. 451 See, e.g., Morrow v. Chicago Trading Corp., 435 S.W.2d 301, 303-04 (Tex. Civ. App.--Dallas 1968, writ ref'd n.r.e.) (collecting cases). [↑](#footnote-ref-452)
452. 452 See id.; see also Matthews, 475 F.2d at 150 (applying analogous Florida law). [↑](#footnote-ref-453)
453. 453 See Adams, supra note 244, at 254. [↑](#footnote-ref-454)
454. 454 See Tex. Bus. & Com. Code Ann. §§ 1.101-11.108 (Vernon 1994 & Supp. 1996). [↑](#footnote-ref-455)
455. 455 See id. §§ 2.202 & 2A.202; see also Bob Robertson, Inc. v. Webster, 679 S.W.2d 683, 688 (Tex. App.--Houston [1st Dist.] 1984, no writ) (holding that section 2.202 applies to the sale of goods); accord King v. Fordice, 776 S.W.2d 608, 611 (Tex. App.--Dallas 1989, writ denied). [↑](#footnote-ref-456)
456. 456 See Tex. Bus. & Com. Code Ann. § 3.117 (Vernon Supp. 1996). [↑](#footnote-ref-457)
457. 457 The Texas Uniform Commercial Code

     rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context which may explain and supplement even the language of a [fully integrated] writing.

     Tex. Bus. & Com. Code Ann. § 1.205 cmt. 1 (Vernon 1994) (emphasis added). While a contract for the sale of goods may be subject to the more lenient section 2.202 of the UCC, the stricter common-law parol evidence rule has been applied to, inter alia, agreements regarding payment schedules for overdue invoices for goods purchased, see, e.g., Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctrs., Inc., 993 F.2d 1178, 1183 & n.10 (5th Cir. 1993), and agreements regarding the payment of damages incurred due to the breach of a contract for the sale of goods, see, e.g., Jack H. Brown & Co. v. Toys "R" Us, Inc., 906 F.2d 169, 170-73 (5th Cir. 1990). [↑](#footnote-ref-458)
458. 458 Section 2A.202, regarding the parol evidence rule applicable to contracts for the lease of goods, is identical to 2.202, except for the parenthetical cross-reference. See Tex. Bus. & Com. Code Ann. § 2A.202 (Vernon 1994). [↑](#footnote-ref-459)
459. 459 The Code contains other parol evidence provisions governing matters other than the sale or lease of goods. See supra Part III.B.3.b. However, for present purposes, this discussion is confined to Articles 2 and 2A. [↑](#footnote-ref-460)
460. 460 Tex. Bus. & Com. Code Ann. § 2.202 (Vernon 1994) (emphases added). See generally Franz Chem. Corp. v. Philadelphia Quartz Co., 594 F.2d 146, 149 (5th Cir. 1979) (outlining the various parol evidence provisions in section 2.202 and their effects on the issues before the court). [↑](#footnote-ref-461)
461. 461 Tex. Bus. & Com. Code Ann. § 2.202 cmt. 1(a); accord King v. Fordice, 776 S.W.2d 608, 611 (Tex. App.--Dallas 1989, writ denied). [↑](#footnote-ref-462)
462. 462 Tex. Bus. & Com. Code Ann. § 2.202 cmt. 1(c); accord Paragon Resources, Inc. v. National Fuel Gas Distrib. Corp., 695 F.2d 991, 995 (5th Cir. 1983). [↑](#footnote-ref-463)
463. 463 Paragon Resources, 695 F.2d at 996. As discussed above, the court should undertake its ambiguity inquiry only after determining that (1) there is a valid written agreement covering the subject matter of the proffered extrinsic evidence, (2) the written agreement constitutes the parties' final agreement regarding the subject matter of the proffered extrinsic evidence, and (3) the written agreement constitutes the complete agreement of the parties regarding the subject matter of the proffered evidence. See supra Part III.D. And, if the court finds the agreement lacking on one or more of the "elements" required to exclude extrinsic evidence under the parol evidence rule, it should admit the proffered extrinsic evidence and permit the trier of fact to consider it fully. See, e.g., Hideca Petroleum Corp. v. Tampimex ***Oil*** Int'l, Ltd., 740 S.W.2d 838, 845 (Tex. App.--Houston [1st Dist.] 1987, no writ) (affirming the trial court's decision to consider extrinsic evidence to determine the parties' true intent where the written agreement "was not intended by the parties to be a complete and exclusive statement of the terms of the contract." (applying Tex. Bus. & Com. Code Ann. § 2.202)). [↑](#footnote-ref-464)
464. 464 See Paragon Resources, 695 F.2d at 996. [↑](#footnote-ref-465)
465. 465 Id. Eleven years later, the Fifth Circuit again took the opportunity not to decide whether the effect of trade usage, course of dealing, and course of performance was to be determined by the court as a matter of law or by the trier of fact. See Bloom v. Hearst Entertainment, Inc., 33 F.3d 518, 522-23 (5th Cir. 1994) (quoting the passage above from Paragon Resources, observing that the Paragon Resources court did not resolve the question of who was to answer the second inquiry, and then failing to resolve the issue itself). [↑](#footnote-ref-466)
466. 466 Tex. Bus. & Com. Code Ann. § 2.202 cmt. 1(b). [↑](#footnote-ref-467)
467. 467 Id. § 2.202 cmt. 2 (emphasis added). [↑](#footnote-ref-468)
468. 468 Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1046 (5th Cir. 1971). [↑](#footnote-ref-469)
469. 469 Tex. Bus. & Com. Code Ann. § 1.205(a) (emphasis added). [↑](#footnote-ref-470)
470. 470 Id. § 1.205(c). [↑](#footnote-ref-471)
471. 471 Id. cmt. 3 (emphasis added). [↑](#footnote-ref-472)
472. 472 International Therapeutics, Inc. v. McGraw-Edison Co., 721 F.2d 488, 491 (5th Cir. 1983); see also ***Kern*** ***Oil*** & Ref. Co. v. Tenneco ***Oil*** Co., 792 F.2d 1380, 1385 (9th Cir. 1986) (applying Texas law). [↑](#footnote-ref-473)
473. 473 Tex. Bus. & Com. Code Ann. § 1.205 cmt. 2. [↑](#footnote-ref-474)
474. 474 Id. § 1.205(b), (c) & (e) (emphases added). [↑](#footnote-ref-475)
475. 475 Id. § 1.205 cmt. 4. [↑](#footnote-ref-476)
476. 476 Id. [↑](#footnote-ref-477)
477. 477 Id. cmt. 5. [↑](#footnote-ref-478)
478. 478 Id. [↑](#footnote-ref-479)
479. 479 See Pennzoil Co. v. Federal Energy Regulatory Comm'n, 789 F.2d 1128, 1143 (5th Cir. 1986); Printing Ctr., Inc. v. Supermind Pub. Co., 669 S.W.2d 779, 784 (Tex. App.--Houston [14th Dist.] 1984, no writ); MortgageAmerica Corp. v. American Nat'l Bank, 651 S.W.2d 851, 859 (Tex. App.--Austin 1983, writ ref'd n.r.e.). [↑](#footnote-ref-480)
480. 480 See Liberty Enters. v. Moore Transp. Co., 679 S.W.2d 779, 785 (Tex. App.--Fort Worth 1984), aff'd in part and rev'd in part on other grounds, 690 S.W.2d 570 (Tex. 1985); Printing Ctr., 669 S.W.2d at 784. [↑](#footnote-ref-481)
481. 481 Corso v. Carr, 634 S.W.2d 804, 809 (Tex. App.--Fort Worth 1982, writ ref'd n.r.e.); accord Liberty Enters., 679 S.W.2d at 785. [↑](#footnote-ref-482)
482. 482 571 S.W.2d 199, 199 (Tex. Civ. App.--San Antonio 1978, writ ref'd n.r.e.). [↑](#footnote-ref-483)
483. 483 See id. at 199-200. [↑](#footnote-ref-484)
484. 484 See id. at 200. [↑](#footnote-ref-485)
485. 485 Id. [↑](#footnote-ref-486)
486. 486 Id. [↑](#footnote-ref-487)
487. 487 Id. [↑](#footnote-ref-488)
488. 488 Id. (citing Burdette v. Cook Indus., 544 S.W.2d 495 (Tex. Civ. App.--Corpus Christi 1976, writ dism'd w.o.j.)). [↑](#footnote-ref-489)
489. 489 Id. at 200-01 (citation omitted) (emphasis added). [↑](#footnote-ref-490)
490. 490 Tex. Bus. & Com. Code Ann. § 2.208(a) (Vernon 1994) (emphasis added). Section 2A.207 sets forth the analogous provision regarding lease contracts. Id. § 2A.207(a). [↑](#footnote-ref-491)
491. 491 Id. § 2.208 cmt. 2 (emphasis added). [↑](#footnote-ref-492)
492. 492 See id. cmt. 4. [↑](#footnote-ref-493)
493. 493 See Liberty Enters. v. Moore Transp. Co., 679 S.W.2d 779, 785 (Tex. App.--Fort Worth 1984) (citing Texas Ill. Co. v. Gant, 251 S.W. 575, 577 (Tex. Civ. App.--Amarillo 1923, no writ)), aff'd in part and rev'd in part on other grounds, 690 S.W.2d 570 (Tex. 1985). [↑](#footnote-ref-494)
494. 494 582 S.W.2d 514, 516-19 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.). [↑](#footnote-ref-495)
495. 495 See id. at 518. [↑](#footnote-ref-496)
496. 496 See id. [↑](#footnote-ref-497)
497. 497 See id. at 519. [↑](#footnote-ref-498)
498. 498 See id. [↑](#footnote-ref-499)
499. 499 Id. [↑](#footnote-ref-500)
500. 500 See id. [↑](#footnote-ref-501)
501. 501 Id. (citation omitted). [↑](#footnote-ref-502)
502. 502 See id. [↑](#footnote-ref-503)
503. 503 792 F.2d 1380, 1381 (9th Cir. 1986) (alteration in original) (applying Texas law). [↑](#footnote-ref-504)
504. 504 Id. at 1383-84 (citations omitted). [↑](#footnote-ref-505)
505. 505 See id. at 1390. [↑](#footnote-ref-506)
506. 506 See id. [↑](#footnote-ref-507)
507. 507 Id. at 1385 (citation omitted) (footnote omitted). [↑](#footnote-ref-508)
508. 508 Tex. Bus. & Com. Code Ann. § 2.208(b) (Vernon 1994) (emphasis added). Section 2A.207(b) sets forth the analogous provision regarding lease contracts. Id. § 2A.207(b). [↑](#footnote-ref-509)
509. 509 Id. § 1.205(d) (emphasis added); see also Restatement (Second) of Contracts § 203(b) (1981) (setting forth the same priority scheme established in Tex. Bus. & Com. Code Ann. §§ 1.205(d) & 2.208(b) for all contracts, not only those governed by the UCC). [↑](#footnote-ref-510)
510. 510 594 F.2d 129 (5th Cir. 1979) (applying Iowa's version of the UCC). [↑](#footnote-ref-511)
511. 511 Id. at 136 (citations omitted) (emphasis added). [↑](#footnote-ref-512)
512. 512 Tex. Bus. & Com. Code Ann. § 2.202(2) cmt. 3. Section 216 of the Second Restatement takes a similar position as the UCC, but in some ways goes further toward allowing evidence of consistent additional terms:

     (1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

     (2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is

     (a) agreed to for separate consideration, or

     (b) such a term as in the circumstances might naturally be omitted from the writing.

     Restatement (Second) of Contracts § 216 (emphasis added). [↑](#footnote-ref-513)
513. 513 444 S.W.2d at 948, 949 (Tex. Civ. App.--Austin 1969, writ ref'd n.r.e.). [↑](#footnote-ref-514)
514. 514 See id. at 950. [↑](#footnote-ref-515)
515. 515 Id. at 953. [↑](#footnote-ref-516)
516. 516 See id. at 954. [↑](#footnote-ref-517)
517. 517 See id. at 953. [↑](#footnote-ref-518)
518. 518 See id. at 954. [↑](#footnote-ref-519)
519. 519 Johann Wolfgang von Goethe, Faust pt. I, 47 (Cyrus Hamlin ed., W.W. Norton & Co. 1976). [↑](#footnote-ref-520)