

Roddenberry v Roddenberry: The Ongoing Voyage of the Parol Evidence Rule in California

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No first-year contracts course is complete without an exploration of the parol evidence rule. Students learn that under this substantive rule of contract law the terms of a final written agreement cannot be altered by prior or contemporaneous oral agreements. While the rule is easily stated, a perusal of most casebooks promptly illustrates that it is not so easily applied. A review of California case law is no exception. Indeed, after examining several leading precedents in California, now retired Justice Winslow Christian, quoting Justice Mosk's wry remark, noted that several opinions of the California Supreme Court—beginning most notably with *Pacific Gas & Elec. Co. v G.W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 69 CR 561—had reduced the parol evidence rule “to a shambles in this state.” *Blumenfeld v R.H. Macy & Co.* (1979) 92 CA3d 38, 44, 154 CR 652.

Justice Mosk's wry observation paled, however, in comparison to the comments subsequently made by Ninth Circuit Judge Alex Kozinski. When forced to apply *PG&E* and its progeny in a diversity case, Judge Kozinski lamented that the confusion wrought by these opinions “casts a long shadow of uncertainty over all transactions negotiated and executed under the law” of California. *Trident Ctr. v Connecticut Gen. Life Ins. Co.* (9th Cir 1988) 847 F2d 564, 569. See also *Wilson Arlington Co. v Prudential Ins. Co.* (9th Cir 1990) 912 F2d 366, 367, 371 (Kozinski, J.) (“[Y]es, Virginia, there is a parol evidence rule”; “Unlike California . . . the Virginia courts will find an ambiguity only when contractual language can reasonably be understood in more than one way . . . Virginia . . . expressly reject[s] California's practice of permitting parties to a contract to introduce extrinsic evidence to show an ambiguity.”). Even the leading commentators concede that the parol evidence rule poses significant analytical complexities:

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“Few things are darker than this, or fuller of subtle difficulties.” Calamari & Perillo, *The Law of Contracts* §3-1 (2d ed 1977) (quoting Thayer, *A Preliminary Treatise on Evidence at Common Law* 390 (1898)) (noting also that even “Williston and Corbin are often poles apart,” when it comes to parol evidence issues); see also 2 Witkin, *California Evidence, Documentary Evidence* §960 (3d ed 1986) (“The application of the rule and its exceptions has given rise to many difficult distinctions and much debate.”).

In a series of more recent cases, however, several intermediate appellate courts have begun to lend some definition to the application of the parol evidence rule. These cases bear examination because—when read together—they provide some workable guidelines for the treatment of parol evidence in the context of written agreements governed by California law. They also show that California law may no longer be quite so susceptible to the commentators' rueful opinions.

The Parol Evidence Rule Before 1968: What's Plain Is Plain

Before 1968, California cases applied a traditional “plain meaning” rule: If no ambiguity or uncertainty was asserted and a writing was clear on its face, parol evidence was inadmissible to interpret contract language. *J.F. Hall-Martin Co. v Hughes* (1912) 18 CA 513, 517 (if contract is clear on its face, evidence to explain parties' intent is inadmissible); *Barnhart Aircraft, Inc. v Preston* (1931) 212 C 19, 22 (extrinsic evidence admissible only when contract language itself is ambiguous “and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said”); see 2 Witkin, *California Evidence, Documentary Evidence* §981 (3d ed 1986) (citing cases from approximately 1930-1960).

In a “plain meaning” rule case, a court would examine the contract language and determine for itself—as a matter of law—whether it was ambiguous or not. In *J.F. Hall-Martin Co. v Hughes*, *supra*, for example, the written agreement provided for payment “for street improvements” and parenthetically listed an amount of \$8200. 18 CA at 514. The question arose concerning whether the contract required payment of the actual improvement cost (slightly less than \$6000) or the parenthetical cost included in the contract itself. The trial court held that the numerical amount specified in writing was the controlling factor. The court of appeal affirmed, holding that “[t]he contract being, in our opinion, susceptible of construction upon its face, evidence tending to explain the intention was not admissible.” 18 CA at 517.

1968: PG&E Is Decided and What's Plain Is Not So Plain

Courts gradually became uncomfortable with a rote invocation of the plain meaning rule, prompted by a general impression that even the plainest of contractual language was not immutable in its meaning. A series of exceptions to the plain meaning rule thus developed, and it became more and more difficult to determine when the general rule barring the introduction of parol evidence might apply. See 2 Witkin, California Evidence, *Documentary Evidence* §§982-983 (3d ed 1986).

The first significant inroad appeared in *Masterson v Sine* (1968) 68 C2d 222, 226, 65 CR 545. In *Masterson*, the supreme court observed that it is "impossible" for a writing to be "wholly and intrinsically self-determinative of the parties' intent." In considering the policies underlying the parol evidence rule—*i.e.*, written evidence is more accurate than human memory and fear of fraud by interested witnesses—the court found that "[e]vidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled." 68 C2d at 227.

Having addressed this underlying concern of the parol evidence rule, *Masterson* then departed from existing law by enlarging the scope of admissible extrinsic evidence used to interpret a written instrument. *Masterson* held that an oral collateral agreement may be proved—even when contrary to a term implied by law—if it might naturally have been made as a separate agreement by the parties. 68 C2d at 228. This was an unequivocal repudiation of the "plain meaning" approach that focused solely on the contract language. Now instead of merely looking at the face of a document, a court could consider what other side agreements might naturally have been made in conjunction with the written agreement in interpreting what was meant in the written contract.

The radical nature of this transformation did not escape the attention of the dissenting justice. As Justice Burke put it, "[t]he majority opinion . . . [u]ndermines the parol evidence rule as we have known it in this state since at least 1872" and "[m]aterially lessens the reliance which may be placed upon written instruments." 68 C2d at 231. Justice Burke reasoned that the majority created a "new rule, not hitherto recognized in California," that "opens the door to uncertainty and confusion." 68 C2d at 238. This warning proved prophetic.

While the reasoning in *Masterson* appeared narrowly confined to options contracts, its "liberalization" reached a new dimension when extended to contracts generally in *Pacific Gas & Elec. Co. v G.W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 69 CR 561. Here, Chief Justice Traynor wrote that human language is *per se* ambiguous, precluding the possibility of perfect verbal expression, because words "do not have absolute

and constant referents." 69 C2d at 38. Consequently, because contractual obligations flow not from words, but from intentions, courts must consider any extrinsic evidence that assists in determining the parties' intentions. Any evidence offered to show that contract language has a meaning other than its plain meaning, when the language is "reasonably susceptible" to such meaning, must be admitted. Thus, parties could always introduce extrinsic evidence to show that the plain meaning associated with contract language is not necessarily the intended meaning. 69 C2d at 39.

PG&E was followed in short order by *Delta Dynamics, Inc. v Arioto* (1968) 69 C2d 525, 72 CR 785. In *Delta Dynamics*, the issue was whether the parties intended termination of the contract to be the only remedy for a breach. Pixey Distributing had contracted with Delta to purchase 50,000 trigger locks within a year. The contract provided that "[s]hould Pixey fail to distribute in any one year the minimum number of devices to be distributed . . . [the] agreement shall be subject to termination," and that "[i]n the event of breach . . . the party prevailing in any action for damages . . . shall be entitled to reasonable attorneys' fees." 69 C2d at 526. When Pixey purchased only 10,000 locks, Delta sued and the trial court rejected Pixey's defense—and accompanying extrinsic evidence—that the exclusive remedy was termination of the contract. 69 C2d at 527. Citing *PG&E*, the supreme court reversed, allowing admission of extrinsic evidence that the sole remedy contemplated by the parties was contract termination because the contract language was "reasonably susceptible" to Pixey's interpretation. 69 C2d at 528.

This ruling again provoked a strong dissent. Justice Mosk warned that the "trend" started by *Masterson* and *PG&E* was "ominous" because "[g]iven two experienced businessmen dealing at arm's length, both represented by competent counsel, it has become virtually impossible . . . to draft a written contract that will produce predictable results in court. The written word, heretofore deemed immutable, is now at all times subject to alteration by self-serving recitals based upon fading memories of antecedent events." 69 C2d at 532. Mosk criticizes the "emasculat[i]on of the parol evidence rule," which has impeded certainty in commercial transactions. 69 C2d at 531. See also *City of Manhattan Beach v Superior Court* (1996) 13 C4th 232, 261, 52 CR2d 82 (Mosk, J., concurring and dissenting). See generally 2 Witkin, California Evidence, *Documentary Evidence* §985 (3d ed 1986).

In *Trident Ctr. v Connecticut Gen. Life Ins. Co.* (9th Cir 1988) 847 F2d 564, Judge Kozinski put the matter more bluntly. He framed the issue as "whether parties in California can ever draft a contract that is proof to parol evidence." The answer, "[s]omewhat surprisingly," was "no," because, *Trident* argued, "under California law, even seemingly unambiguous contracts are subject to

modification by parol or extrinsic evidence." 847 F2d at 565, 566. According to Judge Kozinski, this was so because "the California Supreme Court in [PG&E] turned its back on the notion that a contract can ever have a plain meaning discernible by a court without resort to extrinsic evidence. The court reasoned that contractual obligations flow not from the words of the contract, but from the intention of the parties." 847 F2d at 568.

A Turn for the Better: Respect for the Plain Meaning of Contractual Terms Creeps Back

It has been nearly ten years since Judge Kozinski voiced his criticisms of California's seemingly unrestrained approach to the admission of parol evidence and it is worth asking if his criticisms are still valid. Does PG&E continue to confound contract interpretation? A canvass of cases from the early and mid-1990s demonstrates that the red alert sounded by the critics has not been ignored, and that the more extreme consequences of PG&E may be a dead letter. See *FPI Dev., Inc. v Nakashima* (1991) 231 CA3d 367, 389, 282 CR2d 508 (directly responding to Judge Kozinski's observations in *Trident Ctr.*).

Banco Do Brasil, S.A. v Latian, Inc. (1991) 234 CA3d 973, 285 CR 870, is one of the most significant of these cases. In that case, the borrowers from the bank argued that, in addition to their written loan agreement, the bank had collaterally and orally promised to extend them a \$2 million credit line. The trial judge allowed parol evidence of this alleged oral agreement. The court of appeal reversed, holding that the parol evidence rule barred the proffered evidence. In this instance, the loan agreement "was intended by the parties to be a complete expression of their understanding. On its face, it purports to fully describe the entire restructured debt relationship among the parties. Most importantly . . . it contains an express 'integration' clause," stating that the loan agreement "embodies the *entire agreement* and understanding among the parties . . ." 234 CA3d at 1003. Thus, the alleged oral promise for a line of credit would be "entirely and directly inconsistent" with the express terms of the written agreement. 234 CA3d at 1005.

In reaching this result, the court of appeal outlined a four-question test to be applied when analyzing the admissibility of proffered parol evidence:

- (1) Does the written agreement appear to be complete on its face, or is there an integration clause?
- (2) Does the alleged oral agreement or proposed interpretation directly contradict the written instrument?
- (3) Would the oral agreement naturally have been included in the written instrument? and
- (4) Would evidence of the oral agreement be likely to mislead the trier of fact?

234 CA3d at 1002.

An affirmative answer to any one of these questions bars consideration of the offered parol evidence. Depending on the response, each one of these questions provides a vehicle to shield the plain meaning of a contract from being "reinterpreted" using some form of extrinsic evidence.

One year after *Banco Do Brasil*, the court of appeal in *Winet v Price* (1992) 4 CA4th 1159, 6 CR2d 554, offered its own guidelines for dealing with the admissibility of parol evidence and in doing so again signaled a desire to accord greater respect for the plain meaning of contractual terms. Under the *Winet* court's approach, "[f]irst, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract." 4 CA4th at 1165. See also *WYDA Assocs. v Merner* (1996) 42 CA4th 1702, 1710, 50 CR2d 323 (following these two steps); *Appleton v Waessil* (1994) 27 CA4th 551, 554, 32 CR2d 676 (same). Thus, again "parol evidence is admissible only to prove a meaning to which the language is 'reasonably susceptible,' [citing PG&E], not to flatly contradict the express terms of the agreement." 4 CA4th at 1167.

In *Winet*, the parties had executed a release of "any and all . . . claims . . . [for] damages and causes of action whatsoever, of whatever kind or nature, *whether known or unknown, or suspect or unsuspected* . . . against any other Party." 4 CA4th at 1162. Fifteen years later, claiming this release provision was ambiguous, *Winet* sued another party to the release. The trial judge was not amused and entered summary judgment. The court of appeal affirmed, noting that "[i]t is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." 4 CA4th at 1166. In seeking to introduce evidence "that a release of unknown or unsuspected claims was *not* intended to include unknown or unsuspected claims," the plaintiff attempted to violate the prerequisite that parol evidence is admissible only to prove a meaning to which it is reasonably susceptible, not to flatly contradict the terms of the written agreement. Thus, his proposed parol evidence was inadmissible because it sought to contradict the plain meaning of the contract. See also *Southern Cal. Edison Co. v Superior Court* (1995) 37 CA4th 839, 44 CR2d 227 (employing *Winet* two-step analysis, first deciding whether language was reasonably susceptible to proposed interpretation, which could be determined by contract language itself or by extrinsic evidence of parties' intent; second, determining which interpretation was intended one).

Further constraints on the unfettered admission of parol evidence are illustrated by *Consolidated World Invs., Inc. v Lido Preferred Ltd.* (1992) 9 CA4th 373, 11 CR2d 524. *Consolidated* also held that parol evidence is inadmissible when the written meaning is not reasonably susceptible to the interpretation urged. 9 CA4th at 379. Like *Banco Do Brasil*, and *Winet*, the panel in *Consolidated* offered its own standard governing the admission of parol evidence:

First, evidence can be admitted to show that the written language of the contract is reasonably susceptible to the proposed interpretation;

Second, if the language is so susceptible, then evidence may be admitted to show that the urged interpretation was the intended interpretation.

9 CA4th at 379.

The specific issue in *Consolidated* was whether parol evidence could explain the parties' intent as to when a 60-day escrow period would start. 9 CA4th at 378. The court held that appellant's interpretation flatly contradicted the terms of the agreement, and accordingly, no parol evidence was admissible. 9 CA4th at 380. Though not stated explicitly, *Consolidated* is a marked departure from *PG&E*. *PG&E* was premised on a rejection of "a primitive faith in the inherent potency and inherent meaning of words," and a denial of the belief that words have "absolute and constant referents." *Pacific Gas & Elec. Co. v G.N. Thomas Drayage & Rigging Co., Inc.* (1968) 69 C2d 33, 37, 69 CR 561. *Consolidated*, however, makes it quite clear that when contracting parties use a word—"pencil," for instance—the word's plain meaning will govern—*i.e.*, "pencil" means "pencil" and only "pencil," and evidence of any other purported meaning will not be admissible. 9 CA4th at 379. See also *Scrubby v Vintage Grapevine, Inc.* (1995) 37 CA4th 697, 702, 43 CR2d 810 (if language conveying easement is clear, then extrinsic evidence is inadmissible; but if language is ambiguous, then extrinsic evidence is proper to aid in any interpretation for which language is reasonably susceptible).

Roddenberry v Roddenberry: Not Quite the Final Frontier

The more restrained and deliberate approach to the admission of parol evidence reflected in the trilogy of cases just noted also influenced the reasoning of the court in *Roddenberry v Roddenberry* (1996) 44 CA4th 634, 51 CR2d 907; see also *Court Boldly Goes Where No One Has Gone Before*, Cal Law Business, Apr. 29, 1996, p 2, and *Enterprising Court Backs Creator's Estate*, Nat'l L J at A23 (May 6, 1996). This case involved a dispute between two former wives of the late Gene Roddenberry, the creator of the popular science

fiction universe of Star Trek. The question in the case was: what exactly is "Star Trek?"

As part of a 1969 divorce settlement agreement, Mr. Roddenberry's first wife was allocated a "one-half interest in all future profit participation income from 'Star Trek.'" 44 CA4th at 641. At the time this profit-sharing provision was written, "Star Trek" was clearly understood to mean the original Star Trek television series that aired from 1966 to 1969 as a poorly rated, debt-ridden show. 44 CA4th at 646. However, years later, after a unique resurgence "unprecedented in entertainment industry history," Star Trek became incredibly profitable and a dispute arose about whether the term "Star Trek" in the agreement also included the six subsequent motion pictures, the several subsequent Star Trek television series (*e.g.*, the animated "Star Trek," "Star Trek the Next Generation," "Star Trek: Deep Space Nine"), and other Star Trek-related merchandising.

The first Mrs. Roddenberry sued, contending that "Star Trek" included all Star Trek-related profit enterprises. The second Mrs. Roddenberry maintained that "Star Trek," as used in the divorce settlement, confined her predecessor's recovery of profit-sharing to the original Star Trek television series. The trial court, noting that the term "Star Trek" was undefined, allowed extrinsic evidence. The trial court then entered what the court of appeal called "a split and inconsistent decision," finding that there was no contractual intent that the first Mrs. Roddenberry receive any profit-sharing in the Star Trek animations, movies, or merchandising. 44 CA4th at 643. But the trial court then found that the Star Trek television series ("The Next Generation" and "Deep Space Nine") were merely continuations of the original series, entitling the first Mrs. Roddenberry to profit-sharing from these postdivorce television productions. 44 CA4th at 644.

The court of appeal noted that "[i]n the abstract," the term "Star Trek" in the settlement agreement was reasonably susceptible to different meanings and therefore ambiguous. Thus, parol evidence was properly received. 44 CA4th at 645 (citing *PG&E*). However, determination of contractual intent depends on "evidence bearing directly on what the parties actually intended," not merely theoretical linguistic possibilities. 44 CA4th at 646. "Semantical theories may justify the admission of parol evidence, but the ultimate judgment cannot be based on arbitrary acceptance of a theoretical meaning which has no evidentiary support while an alternative meaning supported by evidence is arbitrarily rejected." 44 CA4th at 664.

When the 1969 contract terms were being negotiated, the only Star Trek property in existence was the recently canceled original series and a debt of \$3 million; there was no evidence that the parties ever discussed any subsequent Star Trek projects. 44 CA4th at 646. Nor was

there any other evidence that would justify profit-sharing in postdivorce Star Trek projects. 44 CA4th at 647. The issue was entirely one of contractual intent and absolutely no evidence pointed to any intent to allow profit-sharing for any postdivorce Star Trek projects. This analysis applied to all projects, whether or not they could be considered continuations of the original series, because there was no evidence that profit-sharing was ever intended for continuations.

Roddenberry is an example of the middle ground between the stringency of the plain meaning rule and the perplexing excesses of *PG&E*'s free-for-all. *Roddenberry* admitted extrinsic evidence only after recognizing that the contract language was per se ambiguous—extrinsic evidence was not admitted to create an alternative meaning or contradict the written word. But *Roddenberry* was not a complete return to the earlier plain meaning rule. Had it been so, the analysis would simply have been to note that when the contract was drafted in 1969 “Star Trek” had only one plain meaning and thus that meaning would have been controlling. See *Palm Springs-La Quinta Dev. Co. v Palm Springs Land & Irrig. Co.* (1940) 36 CA2d 730, 98 P2d 530 (contract for vendor to sell his land did not extend to land later purchased by vendor because ownership is not ambiguous—contract described only vendor’s property at time it was executed and to allow evidence to show that contract was intended to apply to land owned or later owned by vendor would alter terms of writing and add term to contract).

Conclusion: The Developing Case Law on Parol Evidence Is a Long Way From *PG&E*

As the foregoing discussion shows, parol evidence issues generally arise in two slightly different situations: (1) when there allegedly is a need to interpret a word or term of a written instrument (*i.e.*, what does “deliver a dozen of widgets on the first of each month” mean), or

(2) when there is a purported understanding about the terms of a contract not embodied in the writing itself (*i.e.*, terms agreed to orally only).

In analyzing the first situation, the contemporary approach is for the court to preliminarily consider the interpretation offered by the extrinsic evidence to determine if the language of the contract is reasonably susceptible to the interpretation offered by the extrinsic evidence. If so, then extrinsic evidence may be admitted and used as an aid in contract interpretation. If not, then the contract is construed according to the express meaning of its terms. This two-step approach falls between the poles of a rote invocation of the plain meaning rule (no extrinsic evidence allowed if the court decides the contract is unambiguous) and the *PG&E* approach (all extrinsic evidence admitted because words have no immutable meaning).

In the second situation, the parol evidence analysis revolves around the factors identified in *Banco Do Brasil*: (1) Is the written contract integrated? (2) Does the alleged interpretation directly contradict the writing? (3) Would this alleged agreement naturally have been included in the writing? and (4) Would admitting extrinsic evidence mislead the trier of fact? Negative answers to all four of these questions opens the door for extrinsic evidence. An affirmative answer to any one of them should bring about the rejection of the proffered extrinsic evidence.

In this fashion, the recent cases from the early and mid-90s show a swing away from the criticized *PG&E* rule and back toward an approach that accords more respect for the actual terms of the writing itself. Greater respect for those terms, in turn, enhances the certainty of contractual relationships because the agreements more often will be read to mean what they say. This more restrained approach should avoid some of the criticisms leveled against *PG&E*. It also provides a more predictable backdrop from which to determine whether proffered parol evidence will be admissible.