

# The Parol Evidence Rule

## Forget Blue State/Red State, New Jersey is an Egg State

by James J. Ferrelli and Eric D. Frank

**W**hich came first, the chicken or the egg? This age-old causality dilemma dates back to ancient philosophers, but can also be viewed as a metaphor for the debate over the breadth of the parol evidence rule.

Ah, the parol evidence rule. Its mere mention plagues many lawyers with nightmares from the first year of law school. As Professor John Henry Wigmore has observed, while the parol evidence rule is easily framed, it “is attended with confusion and obscurity which makes it the most discouraging subject in the whole field of evidence.”<sup>1</sup>

The ‘chicken’ approach to contract interpretation would suggest a restrictive application of the parol evidence rule that focuses upon the final, written agreement. A clear and unambiguous writing is the best identifier of the intentions of parties who agreed to be bound by the terms of that writing, right?

The ‘egg’ approach, on the other hand, would suggest a more expansive view of the parol evidence rule incorporating all of the circumstances that resulted in the final, written agreement. How can one determine what is clear and what is unambiguous without first understanding what exactly each party’s intent was when entering into the agreement, as well as the surrounding circumstances that place the terms of that written document into their proper context?

Ironically, the parol evidence rule’s name itself is not free from ambiguity. First, the parol evidence rule applies to all forms of extrinsic evidence, and is not limited to oral, or parol, evidence. Second, a “rule” is defined as “[o]ne of a set of explicit or understood regulations or principles governing conduct within a particular activity or sphere.”<sup>2</sup> On the contrary, the parol evidence rule is not explicit and has resulted in various competing interpretations.

Although a universal answer to the question—should

extrinsic evidence be barred because a writing provides the best indicator of the intentions of the parties or is extrinsic evidence necessary to determine whether a writing provides a clear indicator of the intentions of the parties—may never come, it is clear that New Jersey has chosen the latter.

### The Chicken Argument

If a writing appears to be a complete expression of the parties’ agreement, it is a complete integration, and extrinsic evidence should be barred to explain any such terms that are clear and unambiguous. Professor Samuel Williston’s approach is often referred to as the four corners rule or the plain meaning rule. This approach suggests that the written memorialization is the best interpretation of the intent of the parties. Thus, if terms can be deciphered by reviewing the writing without ambiguity, no further investigation is necessary and extrinsic evidence should be barred.<sup>3</sup>

This limited view of the parol evidence rule does allow for the introduction of parol evidence only if it would be natural to enter into a separate agreement regarding additional terms. Such a writing is considered a partial integration, and parol evidence is therefore necessary to understand the entire agreement between the parties.

### The Egg Argument

At the other end of the spectrum sits Professor Arthur L. Corbin’s view, which provides that any evidence that sheds light upon the meaning of a contract should be considered admissible evidence. Under Corbin’s view, determining whether the language contained in a writing is ambiguous or not first requires a look at extrinsic evidence surrounding that writing.<sup>4</sup>

### New Jersey is an Egg State

New Jersey has long been an egg state, following Professor

Corbin's approach. Plainly stated, New Jersey's expansive view of the parol evidence rule is "[e]vidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement," even when the contract on its face is free from ambiguity.<sup>5</sup>

In *Atl. Ne. Airlines v. Schwimmer*, the Supreme Court set forth its reasoning with a correlation to the chicken and egg dilemma. "What [a document] was intended to cover cannot be known till we know what there was to cover."<sup>6</sup> In direct contrast to the Williston approach, the Court explained:

The writing is not wholly and intrinsically self-determinative of the parties' intent to make it the sole memorial of the subject of negotiation; this intent must be sought...in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice...The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered.<sup>7</sup>

Under New Jersey's approach, "the parol evidence rule does not even come into play until it is first determined what the true agreement of the parties is—i.e., what they meant by what they wrote down."<sup>8</sup> In *Garden State Plaza Corp. v. S. S. Kresge Co.*, the defendant lessee sought to introduce extrinsic evidence regarding negotiations surrounding a commercial lease to bar the plaintiff's demand that the defendant pay a maintenance fee.<sup>9</sup> The trial court barred the evidence, finding it inadmissible under the parol evidence rule.<sup>10</sup>

On appeal, the court found that "all relevant evidence pointing to meaning is admissible because experience teaches that language is so poor an instrument for communication or expression of

intent that ordinarily all surrounding circumstances and conditions must be examined before there is any trustworthy assurance of derivation of contractual intent."<sup>11</sup>

### **Conway v. 287 Corporate Center Associates**

The New Jersey Supreme Court's most recent definitive statement of its expansive view of the parol evidence rule came in 2006 in *Conway v. 287 Corporate Center Associates*.<sup>12</sup> In *Conway*, the plaintiff attorney sought a declaration of his contractual rights related to a bonus provision of a retainer agreement with his client.<sup>13</sup> The defendant client wished to offer extrinsic evidence to show that certain triggering events negotiated in connection with the bonus provision were not met.<sup>14</sup>

The Court, following its *Schwimmer* precedent, held that extrinsic evidence may always be examined to achieve the ultimate goal of discovering the intent of the parties, noting that "the words of the contract alone will not always control."<sup>15</sup> The Court stated that the broad use of extrinsic evidence is permitted "to achieve the ultimate goal of discovering the intent of the parties," and that extrinsic evidence was admissible "to uncover the true meaning of contractual terms."<sup>16</sup>

In *Conway*, the Supreme Court enumerated several types of extrinsic evidence helpful to determine the true intentions of the parties. This includes evidence of: 1) contemporaneous actions of the parties; 2) the bargaining history between the parties; 3) custom usage of certain terms; and 4) the interpretation placed on the disputed provision by the parties' own conduct.<sup>17</sup>

### **Limitations Under New Jersey's Approach**

While New Jersey takes a broad approach to extrinsic evidence, the law is not entirely without limitation. New

Jersey recognizes that extrinsic evidence is "adducible only for the purpose of interpreting the writing—not for the purpose of modifying or enlarging or curtailing its terms."<sup>18</sup> The parol evidence rule comes into play to prohibit the introduction of extrinsic evidence to vary the terms of the contract.<sup>19</sup>

Furthermore, under the cases, the courts will also not allow the introduction of extrinsic evidence where the evidence is offered to show an outrageous interpretation of a contract provision. As one court explained, the extrinsic evidence "must be one which the written words will bear."<sup>20</sup>

### **Merger Clauses under New Jersey Law**

Merger clauses, also referred to as integration clauses, are often used as a contractual tool to limit New Jersey's expansive view on extrinsic evidence. They are used to expressly state that a written document sets forth the final embodiment of the parties' agreement, and to exclude any evidence of prior negotiations regarding the agreement in the event of a dispute.

However, under New Jersey law, even the best written merger clause may not be enough to bar extrinsic evidence of the terms of a writing. As one court explained: "[a]lthough a contract with a merger clause is strong evidence that the parties intended the writing to be the complete and exclusive agreement between them, it is not dispositive."<sup>21</sup>

In *S. Megga Telecommunications*, a foreign corporation brought an action against a Delaware corporation, in part, for alleged breaches of two separate purchase agreements.<sup>22</sup> In its motion to dismiss, the defendant argued that the merger clauses of the purchase agreements established the clear relationship between the parties, and that prior or contemporaneous oral agreements between the parties should be barred under the parol evidence rule.<sup>23</sup>

Denying the motion to dismiss, the

court sided with the plaintiffs and held that *Schwimmer* was controlling, and the intent of the parties should not be determined solely by reference to the four corners of the written agreement, even when the contract on its face is free from ambiguity (*i.e.*, where the contract included an express merger clause).<sup>24</sup> The court added that “although a contract with a merger clause is strong evidence that the parties intended the writing to be the complete and exclusive agreement between them, it is not dispositive.”<sup>25</sup>

From a practical standpoint, New Jersey’s status as an ‘egg’ state has an important ramifications in both transactional and litigation matters.

In transactions, the nature of New Jersey’s parol evidence rule means that contracting parties and their counsel need to take greater care to include specific, detailed contractual provisions in their final written agreements. The greater the specificity in the written contract, the better the argument in the event of a dispute that oral testimony on the specific issue is contradictory of the written terms of the document, not explanatory.

In litigated contract cases, New Jersey’s parol evidence rule opens up a broader scope of relevant evidence pertaining to the interpretation of the contract, the circumstances surrounding the parties’ contract, and the parties’ understanding and intention at the time the contract was entered. Further, the relevance of such topics to the interpretation of the contract at issue under New Jersey law makes obtaining summary judgment based upon the plain language of the contract even more challenging. The contract might not mean exactly what the plain language appears to say, depending upon the surrounding circumstances and other *indicia* of the parties’ intent, which are a proper subject of oral testimony.

While New Jersey may waffle from

time to time between a red state and blue state, what is clear is that when it comes to the parol evidence rule, New Jersey consistently remains an egg state. ⚖

### Endnotes

1. 9 Wigmore on Evidence § 2400, at 4 (Chadbourn rev. 1981).
2. *Oxford Dictionary of English*, 2010.
3. See *Conway v. 287 Corporate Center Associates*, 187 N.J. 259, 268 (2006).
4. See *Id.* at 268-269.
5. *Atl. Ne. Airlines v. Schwimmer*, 12 N.J. 293, 301 (1953).
6. *Id.* at 304.
7. *Id.*
8. *Garden State Plaza Corp. v. S. S. Kresge Co.*, 78 N.J. Super. 485, (App. Div. 1963).
9. *Id.* at 489.
10. *Id.* at 491.
11. *Id.* at 496.
12. 187 N.J. 259 (2006).
13. *Id.* at 265-266.
14. *Id.* at 267.
15. *Id.* at 270.
16. *Id.*
17. *Id.* at 269.
18. *Atl. Ne. Airlines v. Schwimmer*, 12 N.J. at 302.
19. *Conway v. 287 Corp. Ctr. Assocs.*, 187 N.J. at 270.
20. *Garden State Plaza Corp. v. S. S. Kresge Co.*, 78 N.J. Super. at 497.
21. *S. Megga Telecommc’s Ltd. v. Lucent Techs., Inc.*, No. 96-357-SLR, 1997 U.S. Dist. LEXIS 2312 (D.N.J. Feb. 14, 1997).
22. *Id.* at \*5.
23. *Id.*
24. *Id.* at \*22.
25. *Id.* at \*22-23.

**James J. Ferrelli**, a partner in the trial department of Duane Morris LLP, is resident in its Cherry Hill office, and concentrates his practice primarily in the areas of complex business and commercial litigation, products liability, and class actions. He is the chair of the New Jersey Lawyer

Magazine Editorial Board and a past trustee of the New Jersey State Bar Association. **Eric D. Frank**, an associate in the trial department of Duane Morris LLP, is resident in its Cherry Hill office, and concentrates his practice in complex business and commercial litigation, gaming and regulatory matters.