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COMMENTS

SALES-MERGER CLAUSES IN CONTRACTS FOR THE SALE OF GOODS

The following hypothetical case will illustrate the problem to be discussed. P Company sends its salesman, A, into the field to sell trucks. A contacts T, with whom he negotiates for the sale of a truck. During the negotiations, A makes a reckless statement that his company will back everything he says about their trucks. He represents that a truck designed to carry eight tons will safely carry ten; or that X company has used its trucks for years and has always been satisfied; or that he thinks each truck is good for 150,000 miles, while the average mileage of that type of truck is around 100,000 miles; or that the P Company guarantees 50,000 miles without a breakdown, while it actually guarantees six months or 10,000 miles, whichever occurs first; or that P Company will not sell the same type of truck with special equipment to any of T's competitors.

When T signs the order or contract, there is a merger clause therein, plainly visible, which states that P Company is not bound by any prior or contemporaneous statements made by its agent and that no promises, warranties or guarantees have been relied upon by T that are not included in the written contract or order.

The problem presented concerns the binding power of the merger clause, and which of the several types of statements outlined above will constitute sufficient ground for an action in the nature of deceit for damages; which type will permit rescission and preclude any action by P Company on the contract; and which type will not affect the validity of the contract as written because of the merger clause.

Of the several relations between P, A and T which may lead to a contract, this discussion will be limited to one, namely, where there are no direct dealings between P and T, and A acts without authority or knowledge of P. The question of validity of the contract normally arises as a defense or counterclaim to the suit for the purchase price. Generally, when a written contract is alleged to be invalid for fraud in its procurement, or any other reason, oral testimony is admissible to show the circumstances of the execution. This is not varying the terms of the contract so much as it is throwing light upon its character. It is showing that legally there is no such contract in existence as is alleged by P,¹ and it is, therefore, no exception to the parol evidence rule.²

¹ *J. C. Smith & Co. v. W. M. Hurlburt Co.*, 93 Conn. 391, 106 A. 319 (1919); *McJunkin v. Richfield Oil Corp.*, (D. C. Cal.), 33 F. Supp. 466 (1940).

² *Southern St. Ry. Adv. Co. v. Metropole Shoe Mfg. Co.*, 91 Md. 61, 46 A. 513 (1900).

As a general rule, a salesman does not have the power to bind the principal to sales contracts. The written instrument usually assumes the form of an order to be signed by the purchaser and the salesman, and, in some cases, by the purchaser only. Such an instrument does not effect a sale until accepted by the principal, and usually that is stated in the instrument.

The addition of a merger clause in a contract for the sale of goods presents the question as to whether such a clause will estop or in any way prevent T from introducing evidence that would be admissible under the general rule as to written instruments stated above. Some courts have excluded evidence on the basis of the parol evidence rule. Other courts base the exclusion on the ground of estoppel, which would make it a rule of substantive law. The better rule, if one of exclusion is to be applied, seems to be that such evidence is irrelevant and to be rejected because of the rule of substantive law which binds parties to the contract as written notwithstanding any inconsistent, enlarging, or collateral agreements. The inclination of the courts though is to receive parol evidence whenever the interests of justice require.

It is the presumed intention of parties who reduce their contract to writing that all prior negotiations pertaining to the subject matter of the contract are integrated therein.³ When, however, fraud is alleged, evidence is generally admissible to show that the instrument sued on is not the contract of the parties. However, where the contract contains a merger clause, the instrument being in the form of an order for goods and not binding until accepted by P, courts following the line of reasoning based on the Massachusetts rule⁴ have held that the fraud is that of T, who has submitted a false offer to P. A's representations only induced the negotiations leading to the offer, but T's misrepresentations induced the sale. The purchaser states in the writing that he does not rely on any promises, warranties or guarantees other than those contained in the instrument. To allow T to refute this statement is to allow him to assert a purely subjective and unilateral misunderstanding against P. P has no way of knowing what unauthorized statements the agent has made and has a right to rely on the word of the purchaser that none have been

³ Williston on Contracts, vol. 3, sec. 811 A; *Stram-Johnson Const. Co. v. River-view Furniture Co.*, 227 Mich. 55, 198 N.W. 714 (1924); *Haglin v. Ashley*, 212 Minn. 445, 4 N.W. (2d) 109 (1942); *Chicago, M. & St. P. Ry. Co. v. Jewett*, 169 Wis. 102, 171 N.W. 757 (1919); *Derbeck v. Albright*, 186 Wis. 515, 203 N.W. 337 (1925); presumption is conclusive in absence of fraud or mistake; *Starry v. Starry & Lynch*, 212 Iowa 274, 234 N.W. 281 (1931); *Stone v. Steil*, 230 Mich. 249, 202 N.W. 982 (1925); *Victor Products Corp. v. Yates-Amer. Mach. Co.* (1932; CCA 4th), 54 F (2d) 1062.

⁴ *Colonial Development Corp. v. Bragdon*, 219 Mass. 170, 106 N.E. 633 (1914); *Noack v. Standard Stores, Inc.*, 281 Mass. 53, 183 N.E. 54 (1932).

made. On the other hand, the New York rule⁵ stresses fraud, overlooking negligence, at the expense of the sanctity of the writing, stating that the courts dislike negligence but abhor fraud.

The negotiations relied upon by the buyer may be of several kinds. The salesman may have made a collateral agreement that P Company would sell to T and to no others within a given area. The salesman may have stated falsely that no others marketed the particular product in that area. He may have made warranties as to the quality or capabilities of the product. Under the Massachusetts rule, if strictly applied, none of these could be introduced into evidence since the merger clause denies the existence of any representations other than those which are in the written contract. Actually the rule is not strictly applied in any state.

The New York rule throws out the merger clause when fraud is alleged and lowers the written instrument to the level of oral agreements.⁶ In practical application, each court has set up one of the extremes as the general rule and makes exceptions liberally as the cases arise. Such a course of action puts the admission of such evidence largely within the discretion of the trial judge. This in turn places business practices and contracts on a very insecure footing. The better policy is to follow the principle that a man should know what he signs, and, in order to add to or to contradict the writing, he should show a clear case of injustice, in addition to proving fraud by clear and satisfactory evidence. That, in most cases, appears to be the unstated rule. Some courts also require that a consideration be shown for alleged unwritten collateral agreements.⁷ Courts following the New York rule are more inclined to allow extraneous proof of fraud. This inclination is based on the principle that fraud vitiates every contract and, in any case, overbalances negligence.

The merger clause is effective to exclude several types of evidence. A mere expression of opinion by the agent is not considered sufficient to deceive or misrepresent, no one having a right to rely thereon where he should know that it is but an opinion.⁸ If the statement made is on a subject peculiarly within the knowledge of the agent,⁹

⁵ *Angerosa v. The White Company*, 248 App. Div. 425, 290 N.Y.S. 204 (1936). See also: Note, 56 ALR 13. Cf. *Ernest Iron Works, Inc. v. Duralith Corp.* 270 N.Y. 165, 200 N.E. 683 (1936); An express agreement made in a contract that it shall be uncontestable for fraud is against public policy and void, *Malas v. Lounsbury*, 193 Wis. 531, 214 N.W. 332 (1927).

⁶ See *Distributors Investment Co. v. Batton*, 130 Tex. 449, 110 S. W. (2d) 47 (1937).

⁷ *Adams v. Gillig*, 199 N.Y. 314, 92 N.E. 670, 32 LRA (NS) 127, 20 Ann. Cas. 910 (1910).

⁸ Precluding rescission: *Dotson v. Kirk*, 103 C.C.A. 368, 180 F. 14, 23 (1910); precluding damages: *Watkins v. West Wytheville Land & Improvement Co.*, 91 Va. 1, 22 S.E. 554, 556 (1895).

⁹ *White Sewing Machine Co. v. Bullock*, 161 N.C. 1, 76 S.E. 634 (1912); *Bixler v. Wright*, 116 Me. 133, 100 ATL. 467 (1917); see also: *Ohrmundt v. Spiegelhoff*, 175 Wis. 214, 184 N.W. 692 (1921).

one on which the buyer could base no opinion of his own, two rules are applied. The statement made must be to a material part of the subject matter of the contract, such that, if the buyer had known its falsity, he would not have made the contract.¹⁰ The jury must find that he had a reasonable right to rely thereon.¹¹ Thus, general statements of facts per se cannot be regarded any more favorably than statements of opinion.¹² For the same reason, it has been held that the buyer had no right to rely on representations where falsity was readily discoverable by an examination of the contract.¹³

A misrepresentation by A to T as to the contents of the order or writing would amount to fraud in the inception of the contract. It is normally a jury question as to whether T was negligent in not reading the instrument and as to whether his reliance on such statements was reasonable. Other courts have held that, if he has been given sufficient time to read the contract, he had no right as a matter of law to rely on such statements.¹⁴ Thus, where T has knowledge of the clause, he should not be allowed to plead fraud as a defense.

The merger clause is considered by some courts as a notice to T of a limitation of A's authority.¹⁵ Such notice is constructed upon the presumption that the negligent purchaser has read the contract. Should this presumption be conclusive or rebuttable? If there is no merger clause, there is the implied understanding in every such transaction that T's offer contains the whole agreement. With the merger clause in the contract, there is a positive statement to that effect. If T had read the order, he would have knowledge of A's limited authority and would thus be estopped from asserting prior or collateral agreements, warranties, or guarantees. Since he has not read the order he does not know of the merger clause, and, to allow proof of misrepresentations is to put a premium on negligence.

In many courts T would be allowed to rescind if the clause were not present, and in some cases, he would be allowed positive relief in the form of damages. In many of the same courts, if a merger clause is shown, T will either not be allowed to introduce evidence attacking the contract, or will be denied relief because of the clause. Thus, it can be seen that a showing of negligence on the part of T

¹⁰ *Greenawalt v. Rogers*, 151 Cal. 630, 91 P. 526, 528 (1907), citing *Calton v. Stanford*, 82 Cal. 351, 399, 23 P. 16, 28; 16 Am.St.Rep. 137 (1890); Cf. *Not necessary that there be a fraudulent intent; Blydenburgh v. Welsh*, 3 Fed. Cas. 771, 774 (1831).

¹¹ *Supra*, fn. 5.

¹² *Pate v. J.S. McWilliams Auto Co.*, 193 Ark. 620, 101 S.W. (2d) 794, 127 ALR 139 (1937).

¹³ *Weaver v. Roberson*, 134 Ga. 149, 67 S.E. 662 (1910); *Green v. Cox Machinery Co.*, 116 Okl. 255, 244 P. 414 (1926).

¹⁴ *Trujillo v. Wichita Farm Lighting Co.*, 91 Colo. 307, 14 P. (2d) 1009 (1932); *Angerosa v. The White Co.*, *supra*, note 5.; See Note 75 ALR 1032 et seq.

¹⁵ *Trujillo v. Wichita Farm Lighting Co.*, *supra*, fn. 14.

in not reading what he signed is of importance. This emphasizes the necessity of placing the clause in a conspicuous place, preferably directly over the place for signature, in bold type.

The merger clause, in addition to excluding opinions, general statements, and acting as a notice of limitation of authority of A, may be used by the proponent to show the intent of the parties that the writing was to contain the full agreement to the exclusion of prior or collateral agreements.¹⁶ P may further safeguard his rights by a stipulation in the merger clause that the contract contains the agreement in full and cannot be added to except by another signed agreement.¹⁷

Some courts have applied the rule that P cannot adopt the beneficial parts of a contract and at the same time reject the representations that have been made by A in procuring the contract.¹⁸ This doctrine is an almost insuperable bar to any affirmative action by P on the contract. As to T's adoption of the merger clause, courts generally require a sufficient opportunity for assent to the clause.¹⁹ The latter rule allows evidence pertaining to the actual signing of the order by T, and presents a jury question to be considered with negligence of T.

In the course of negotiations between A and T, many so-called "agreements" or "understandings" may arise. Oftentimes no meeting of the minds takes place on pertinent or collateral issues. On the trial, these most probably will be the very facts in issue. If the rules pertaining to the admission of evidence and those giving great weight to written instruments are relaxed, it naturally follows that the parties making those instruments will be more lax in their execution. The contrary also follows — that if proof of injustice along with a high degree of proof of fraud or mistake are required, contracts will be more complete, the amount of litigation on minor points will decline.

The rules applied in cases where actual fraud and injustice have been proved recognize two distinct types of actions based on the status of the parties to the contract at the time of commencement of the action. Where the contract is executory, the courts have granted rescission more readily; neither party will be injured. Where the purchaser has acted because of the contract and would be injured by a simple rescission, the court will sometimes allow an action or

¹⁶ *Johns-Manville Corp. v. Heckart*, 129 Or. 505, 277 P. 821 (1929). Where fraud involved: *Pratt v. Darling*, 125 Wis. 93, 103 N.W. 229 (1905); *James v. Brandt*, 173 Wis. 539, 181 N.W. 813 (1921). In the absence of fraud, see note: 127 ALR 132 (denying relief).

¹⁷ *Hauer v. Martin*, 284 Pa. 407, 131 A. 187 (1925) citing *Gross v. Exeter Machine Works, Inc.*, 277 Pa. 363, 367, 121 A. 195, 196 (1923).

¹⁸ *Supra*, fn. 5.

¹⁹ *Bridger v. Goldsmith*, 143 N.Y. 424, 38 N.E. 458 (1894); *Noack v. Standard Stores, Inc.*, *supra*, fn. 4.

counterclaim for damages. Where P is innocent of the fraud, it appears that rescission alone should be granted.

The merger clause effects a difference between the right to rescind and the right to damages for deceit. Without the clause, P would be liable in tort for fraud of his agent acting in the apparent scope of his authority, but by stipulating in the contract that the agent has no such authority, P has done all that is reasonably possible to give notice of such limitation to T. The innocent principal in such circumstances should be relieved of liability when he has placed it within the power of T to obtain actual notice. Where P sues to recover on the contract, he is seeking to benefit through his agent's fraud. This he cannot do. His personal liability may be avoided, but the fraudulently procured contract is subject to rescission.²⁰

How may the principal protect himself? First the agent should be equipped with a sufficient knowledge of the product he is selling, its proven advantages over other products and its capabilities, to minimize the possibility of A resorting to false promises and representations. Second, the agent should be given clear instructions as to the manner of presenting and executing the written instrument. He should point out the merger clause to T at the time of execution, giving T sufficient time to read the clause and the contract. It is particularly essential that no collateral agreements or representations be made at the time of execution. A should make it clear that he has no power to execute the contract — that the writing consists of an offer on the part of T and does not become a contract until accepted by P. A policy should be adopted and made known to T that on acceptance P will send a letter of acknowledgement and confirmation of the contract. After the execution it is advisable to leave a duplicate copy of the order with T.

The contract itself should contain all the conditions of the agreement. If P wishes to protect himself against any contingencies the clauses pertaining thereto should not be hidden. It is essential that the merger clause be printed in bold face type, preferably directly over the signature. It should "stand out." The clause should be concise and composed to refer as closely as possible to the particular article being sold. It should be remembered that if it can be at all inferred from the complexity of the instrument that P is attempting to protect himself without T's knowledge of that fact, the clause will be of no effect.

ALBERT J. HAUER

²⁰ *Harnischfeger Sales Corp. v. Coats*, 4 Cal. (2d) 319, 48 P. (2d) 662 (1935).
See also: *Duralith Corp. v. Van Houten*, 133 N.J.L. 374, 174 A. 484 (1934).