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Philip C. Sorenson

University of Nebraska College of Law

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Contracts—Effect of Merger Clause on Fraud by Agent

Action for purchase price of furnace which defendant had contracted to buy. Petitioner's agent had induced defendant to enter into a contract which was subject to acceptance by the home office and which contract contained a merger clause.¹ Buyer, in his answer, alleged fraudulent statements made by agent concerning the condition of buyer's old furnace. On appeal *Held*: Plaintiff's motion for judgment on the pleadings sustained in that answer did not set up a defense to the petition since defendant was precluded from repudiating the merger clause.²

The same court, in a decision handed down the same day, held tract by fraudulent material misrepresentations of an agent.³ Thus, the court, in the present case, recognized the power of the merger clause to prevent actions of rescission or defenses based on fraud of an agent.

The merger clause involved in the subject case extended only to understandings, agreements, and warranties. Other clauses are broader, encompassing representations and inducements.⁴ The courts of this country have given varying effect to these clauses as a result of differing interpretations and not due to the substantive differences in the provisions of the clauses. A minority of courts, as in the principal case here, have held the clause prevents any action or defense based on any representations or agreements not in the written contract.⁵ Other courts have held that the clause is no more than a stipulation of the parol evidence rule,⁶ and have treated the defenses in light of that rule only. The majority of courts have felt that to give full effect to the clause is too harsh, but have afforded some consequence to it. Distinctions have been drawn

¹ "This Contract Contains the Entire Agreement Between the Parties. Verbal Understandings and Agreements with Representatives Shall Not Bind the Seller Unless Set Forth Herein. There are No Warranties, Express or Implied, Other Than Those Herein Stated."

² *Holland Furnace Co. v. Williams*, 179 Kan. 321, 295 P.2d 672 (1956).

³ *George v. Kohlasch*, 179 Kan. 337, 295 P.2d 655 (1956).

⁴ "It is understood and agreed that this contract contains all the covenants . . . ; that the same [property] is and has been purchased by the purchaser as a result of said inspection and not upon representations made by . . . selling agent . . . and the sellers will not be responsible for or liable on account of any inducements, promises, representation, or agreements not set forth herein." *Speck v. Wylie*, 1 Cal.2d 625, 36 P.2d 618 (1934).

⁵ *Colt Co. v. Odom*, 136 Miss. 651, 101 So. 853 (1924); see *Annot.*, 75 A.L.R. 1046 (1931), 133 A.L.R. 1349 (1941); notes 22 *Corn. L.Q.* 102 (1936-37), 35 *Ia. L. Rev.* 105 (1949).

between fraud as to the terms of the contract and fraud in the inducement,⁷ evidence being held inadmissible as to the former and admissible as to the latter. Another view holds that the clause relieves the principal of liability for deceit, but permits the buyer the option to revoke.⁸ A situation similar to the principal case has not arisen in Nebraska, but it has been held that the merger clause gives notice of the scope of the authority of the agent and evidence showing fraud within that scope has been held admissible.⁹

The variety of holdings have resulted from a variety of valid policy reasons. But an examination of these reasons reveals that they are not contradictory.

A consideration of the principal's purpose in using the merger clause throws light on the problem and offers a possible solution. The purpose may be considered two-fold; (1) to ascertain the obligation and to limit the agent in adding to or varying such, and (2) to protect the principal from unauthorized acts of his agents. The first purpose is met by the parol evidence rule, but in addition the clause shows the intent of the parties to integrate their agreements in writing and gives notice of the agent's lack of authority to add to or vary a proposed contract.¹⁰ The second can be met without loss to the buyer by permitting to him the option to revoke while relieving the principal of liability for deceit.¹¹ The principal should be allowed to protect himself against unauthorized acts, yet he should not be allowed to benefit from them.¹²

This above interpretation provides a warning to the buyer of the limited authority of the agent and the limited obligation of the principal. To refuse rescission would allow a multitude of frauds to be protected by some exculpatory clause. In the principal case,

⁶ *Johns-Manvill Corp. v. Heckart*, 129 Or. 505, 277 P. 821 (1921); see *Vold, Sales*, § 151 (1931); 9 *Wigmore, Evidence*, § 2439 (3d ed. 1940); 3 *Williston, Contracts*, § 811-A (Rev. ed. 1936).

⁷ *Rock Island Implement Co. v. Wally*, 268 S.W. 904 (Mo. App. 1925); *Plate v. Detroit Fidelity & S. Co.*, 229 Mich 482, 201 N.W. 457 (1924); Cf. *Colonial Development Corp. v. Bragdon*, 219 Mass. 170, 106 N.E. 633 (1914); see *Annot.*, 127 A.L.R. 132 (1940), 133 A.L.R. 1349 (1941).

⁸ *Speck v. Wylie*, note 4, *supra*; *Chapin v. Kreps*, 106 N.J.L. 424, 147 Atl. 398 (1929). See *Annot.*, 95 A.L.R. 760 (1935), 127 A.L.R. 132 (1940). But see, *Hall v. Crow*, 240 Ia. 81 34 N.W.2d 195 (1948) allowing damages; *Annot.*, 127 A.L.R. 143 (1940).

⁹ *Schuster v. North American Hotel Co.*, 106 Neb. 672, 186 N.W. 87 (1921).

¹⁰ 3 *Williston, Contracts*, § 811-A (Rev. ed. 1936); and see *Schuster v. North American Hotel Co.*, 106 Neb. 672, 186 N.W. 87 (1921).

¹¹ *Restatement, Agency*, § 260 (1), (2) (1933); and see cases note 8.

¹² *J.I. Case Co. v. Bird*, 51 Idaho 725, 11 P2d 966 (1932).

the clause did not restrict representations, but only "Understandings and Agreements." Thus, the alleged fraudulent representations of the agent should not have been protected by the stated clause, and rescission should have been permitted.

Philip C. Sorensen, '59