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The “Entire Agreement” may not mean the entire agreement

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(This is the 23rd in a series of articles about issues that sellers and buyers face when negotiating a purchase-offer contract.)

A standard feature in real-estate contracts is a section called, Entire Agreement. Also referred to as the merger clause, it provides something like the following:

This Contract, including any attached exhibits and addenda, signed by the parties, constitutes the entire agreement between Seller and Buyer. This Contract supersedes any other written or oral agreement between the parties.

All of us should know by now that real-estate contracts should be in writing for them to bind the parties. Some states, however, have carved out special circumstances where an oral contract will bind buyer and seller on real-estate matters. The merger clause may not rule out all oral agreements all the time in all places.

An example is an oral contract where one party performs and the other party does not. Parents who have promised to deed their farm to a child who agrees to and completely fulfills his promise to work the farm and split the profits with his parents for 10 years are not likely to be allowed to back out of their promise. The child will have to prove the existence of the oral contract with his parents and demonstrate his full performance for the oral promise to bind them.

A written contract can be either partially or completely integrated.

A partially integrated written contract includes some but not all of the agreed terms. The written contract between the parties, in other words, contains a final agreement between them on those terms that are in writing, but not the other agreed terms that are still out there in oral land. Circumstances will determine how the merger clause is applied. If the oral terms were never agreed to, they will not bind the parties.

A merger clause between the parties should mean that both parties agree that the written contract between them is completely integrated—all terms of agreement are written and no other agreements of any kind are present between them. But situations arise when buyer and seller disagree as to whether their written agreement with a merger clause is partially or completely integrated.

Where a court determines that a partially integrated written contract exists, it appears that outside terms, such as an oral agreement that adds to the contract but doesn't contradict it, will generally be enforced even when a merger clause exists.

Courts have also held that a merger clause in some situations is to be taken as a rebuttable presumption, not an iron-clad, universal exclusion of other terms being agreed to and affecting the contract.

Evidence outside a partially integrated contract, including oral agreements, may be admitted to help in interpreting the written terms, resolve an ambiguity or prove a mistake or fraud, among other reasons. In those situations where an oral agreement is incorporated into a written agreement, the oral contract must have been agreed to either before or contemporaneous with the written one.

Having said all that, the party holding a completely integrated written contract with a merger clause is in a far stronger position than the party claiming an oral agreement that modifies a written contract.

Both buyer and seller benefit from a merger clause, which forces them to work out all the sale details in writing when everyone is on best behavior. And both parties should understand before signing a contract what the merger clause means.

It's not uncommon for a new owner to be informed after closing that the seller had agreed to give or sell some item -- timber, machinery, fixtures, hunting rights -- to a third party when the third party shows up seeking to cut some trees, take home the machinery and fixtures or hunt rabbits.

When the third party appears claiming a right in your newly purchased property that is not in the written contract, show him your purchase contract with the merger clause and insist that he refrain until the matter is worked out legally. Call the sheriff if necessary and report a theft in progress when no other choice is available. At the very least, you, the new owner, have tried to establish and enforce the legal principle that usually prevails. But your contract also needs a survivor clause, which allows agreed terms in the contract to stay in effect beyond closing.

For that reason, it's important for both parties to be in agreement that their written contract is the entire (complete integration) agreement between them and to state that explicitly in writing. I would add a sentence like this to the boilerplate:

The Parties agree that no other term, understanding or agreement exists between them regarding the purchase and sale of the real property described above, and no other Party holds a right in this property except those of record.