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## Admissibility of Evidence of Course of Dealing and Usage of Trade Under Uniform Commercial Code § 2-202(a)

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within the meaning of § 2036(a)(2) if the settlor must exercise the power in a general fiduciary capacity. It is apparently irrelevant that the fiduciary duty is owed to parties other than the beneficiaries and remaindermen of the trust.

The impact of *United States v. Byrum* on estate planning and taxation will ultimately depend upon the reading and interpretation given the decision by the lower courts as they apply § 2036(a) in future cases. The likelihood of misinterpretation and inconsistent interpretation is high. Congress may or may not choose to amend § 2036(a) to encompass situations such as that in *Byrum*, but in any event amendment to the statute is needed to bring clarity to the law.

T. N. McJUNKIN

### ADMISSIBILITY OF EVIDENCE OF COURSE OF DEALING AND USAGE OF TRADE UNDER UNIFORM COMMERCIAL CODE § 2-202(a)

A businessman generally contracts without conscious reference to the customs and usages of his trade and to his prior course of dealing. Consequently, he rarely includes these commercial understandings expressly in his writings.<sup>1</sup> Therefore, in attempting to construe a contract to conform to the intentions and expectations of the parties at the time the agreement was drafted,<sup>2</sup> some courts have been cognizant of the reality of the market place and have permitted course of dealing and usage of trade to be utilized in interpretation.<sup>3</sup> Since virtually all jurisdictions have adopted

<sup>1</sup>Nicoll v. Pittsvein Coal Co., 269 F. 968, 971 (2d Cir. 1920).

<sup>2</sup>See 3A CORBIN, CONTRACTS § 538 (1960); S. WILLISTON, CONTRACTS § 600 (3d ed. 1961).

<sup>3</sup>E.g., McAfee v. City of Garnett, 205 Kan. 269, 469 P.2d 295, 299 (1970).

<sup>4</sup>The following are the state statutes containing the language of Uniform Commercial Code § 1-205: ALA. CODE tit. 7A, § 1-205 (1966); ALASKA STAT. § 45.05.028 (1962); ARIZ. REV. STAT. § 44-2212 (1967); ARK. STAT. ANN. § 85-1-205 (1961); CAL. COMM. CODE § 1205 (West 1964); COLO. REV. STAT. ANN. § 155-1-205 (1963); CONN. GEN. STAT. REV. § 42a-1-205 (1960); DEL. CODE ANN. tit. 5A, § 1-205 (Spec. UCC Pamphlet 1967); D.C. CODE ANN. § 28:1-205 (1967); FLA. STAT. ANN. § 671.1-205 (1966); GA. CODE ANN. § 109A-1-205 (1962); HAWAII REV. LAWS § 490:1-205 (1968); IDAHO CODE ANN. § 28-1-205 (1967); ILL. ANN. STAT. ch. 26, § 1-205 (Smith-Hurt 1963); IND. ANN. STAT. § 19-1-1-205 (repl. vol. 1964); IOWA CODE ANN. § 554.1205 (1967); KAN. STAT. ANN. § 84-1-205 (1965); KY. REV. STAT. ANN. § 355.1-205 (1969); ME. REV. STAT. ANN. tit. 11, § 1-205 (1964); MD. ANN. CODE art. 95 B, § 1-205 (1963); MASS. GEN. LAWS ch. 106, § 1-205 (1963); MICH. STAT. ANN. § 19.1205 (rev. vol. 1964); MINN. STAT. ANN. § 336.1-205 (1966); MISS. CODE ANN. § 41A:1-205 (Spec. UCC Supp. 1967); MO. ANN. STAT. § 400.1-205 (1965); MONT. REV. CODES ANN. § 87A-1-205 (1964); NEB. REV. STAT. UCC § 1-205 (1964); NEV. REV. STAT. § 104.1205 (1967); N.H. REV. STAT.

the Uniform Commercial Code<sup>4</sup> (hereinafter UCC) with its accommodation of law to commercial convention,<sup>5</sup> courts may now refer to UCC §§ 1-205<sup>6</sup> and 2-202;<sup>7</sup> these sections permit the written terms of a

ANN. § 382A:1-205 (1961); N.J. REV. STAT. § 12A:1-205 (1962); N.M. STAT. ANN. § 50A-1-205 (1962); N.Y. UCC § 2-202 (McKinney 1964); N.C. GEN. STAT. § 25-1-205 (repl. vol. 1965); N.D. CENT. CODE § 41-01-205 (1965); OHIO REV. CODE ANN. § 1301.11 (Baldwin 1964); OKLA. STAT. ANN. tit. 12A, § 1-205 (1963); ORE. REV. STAT. § 71.2050 (1963); PA. STAT. ANN. tit. 12A, § 1-205 (1970); R.I. GEN. LAWS ANN. § 6A-1-205 (1961); S.C. CODE ANN. § 10.1-205 (1966); S.D. CODE § 57-1-15-57-1-20 (1969); TENN. CODE ANN. § 47-1-205 (repl. vol. 1964); TEX. BUS. & COMM. CODE § 1-205 (1968); UTAH CODE ANN. § 70A-1-205 (repl. vol. 1968); VT. STAT. ANN. tit. 9A, § 1-205 (1966); VA. CODE ANN. § 8.1-205 (1965); WASH. REV. CODE ANN. § 62A.1-205 (Supp. 1970); W. VA. CODE ANN. § 46-1-205 (1966); WIS. STAT. ANN. § 401.205 (1964); WYO. STAT. ANN. § 34-1-205 (Supp. 1969). None of the jurisdictions listed above has enacted UCC § 1-205 in a form different than the official code. Louisiana has not adopted the UCC.

The following are the state statutes containing the language of Uniform Commercial Code § 2-202: ALA. CODE tit. 7A, § 2-202 (1966); ALASKA STAT. § 45.05.052 (1962); ARIZ. REV. STAT. § 44-2309 (1967); ARK. STAT. ANN. § 85-2-202 (1961); CAL. COMM. CODE § 2202 (West 1964); COLO. REV. STAT. ANN. § 155-2-202 (1963); CONN. GEN. STAT. REV. § 42a-2-202 (1960); DEL. CODE ANN. tit. 5A, § 2-202 (Spec. UCC Pamphlet 1967); D.C. CODE ANN. § 28:2-202 (1967); FLA. STAT. ANN. § 671.2-202 (1966); GA. CODE ANN. § 109A-2-202 (1962); HAWAII REV. LAWS § 490:2-202 (1968); IDAHO CODE ANN. § 28-2-202 (1967); ILL. ANN. STAT. ch. 26, § 2-202 (Smith-Hurd 1963); IND. ANN. STAT. § 19-1-2-205 (repl. vol. 1964); IOWA CODE ANN. § 554.2202 (1967); KAN. STAT. ANN. § 84-2-202 (1965); KY. REV. STAT. ANN. § 355.2-202 (1969); ME. REV. STAT. ANN. tit. 11, § 2-202 (1964); MD. ANN. CODE art. 95B, § 2-202 (1963); MASS. GEN. LAWS ANN. ch. 106, § 2-202 (1963); MICH. STAT. ANN. § 19.2202 (rev. vol. 1964); MINN. STAT. ANN. § 336.2-202 (1966); MISS. CODE ANN. § 41A:2-202 (Spec. UCC Supp. 1967); MO. ANN. STAT. § 400.2-202 (1965); MONT. REV. CODES ANN. § 87A-2-202 (1964); NEB. REV. STAT. UCC § 2-202 (1964); NEV. REV. STAT. § 104.2202 (1967); N.H. REV. STAT. ANN. § 382A:2-202 (1961); N.J. REV. STAT. § 12A:2-202 (1962); N.M. STAT. ANN. § 50A-2-202 (1962); N.Y. UCC § 2-202 (McKinney 1964); N.C. GEN. STAT. § 25.2-202 (repl. vol. 1965); N.D. CENT. CODE § 41-02-202 (1965); OHIO REV. CODE ANN. § 1302.05 (Baldwin 1964); OKLA. STAT. ANN. tit. 12A, § 2-202 (1963); ORE. REV. STAT. § 72.2020 (1963); PA. STAT. ANN. tit. 12A, § 2-202 (1970); R.I. GEN. LAWS ANN. § 6A-2-202 (1961); S.C. CODE ANN. § 10.2-202 (1966); S.D. CODE § 57-3-4 (1969); TENN. CODE ANN. § 47-2-202 (repl. vol. 1964); TEX. BUS. & COMM. CODE § 2-202 (1968); UTAH CODE ANN. § 70A-2-202 (repl. vol. 1968); VT. STAT. ANN. tit. 9A, § 2-202 (1966); VA. CODE ANN. § 8.2-202 (1965); WASH. REV. CODE ANN. § 62A.2-202 (Supp. 1970); W. VA. CODE ANN. § 46-2.202 (1966); WIS. STAT. ANN. § 402.202 (1964); WYO. STAT. ANN. § 34-2-202 (Supp. 1969). None of the jurisdictions listed above has enacted UCC § 2-202 in a form different than the official code.

<sup>5</sup>See UNIFORM COMMERCIAL CODE (hereinafter UCC) § 1-102(2)(b).

<sup>6</sup>UCC § 1-205 states:

Course of Dealing and Usage of Trade

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having

contract to be explained and supplemented by course of dealing<sup>8</sup> and usage of trade<sup>9</sup> as well as by evidence of consistent additional terms. While § 2-202 makes course of dealing and usage of trade freely admissible when offered to explain and supplement the express terms of the written agreement,<sup>10</sup> this section limits the admissibility of evidence offered to prove consistent additional terms.<sup>11</sup> Section 1-205<sup>12</sup> then states the UCC's definitions of usage of trade and course of dealing as well as the criteria to be used by the trier of fact in determining the effect of such

such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

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<sup>7</sup>UCC § 2-202 states:

Final Written Expression: Parol or Extrinsic Evidence

Terms with respect to which the conformatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

<sup>8</sup>"Course of dealing" is defined in UCC § 1-205(1). Generally "course of dealing" refers to conduct between the parties prior to the agreement as distinguished from "course of performance" which refers to activity made in recognition of the agreement. See Note, *An Anatomy of Sections 2-201 and 2-202 of the Uniform Commercial Code (The Statute of Frauds and the Parol Evidence Rule)*, 4 B.C. IND. & COM. L. REV. 381 (1963).

<sup>9</sup>Usage of trade is defined in UCC § 1-205(2). See generally *Levie, Trade Usage and Custom under the Common Law and the Uniform Commercial Code*, 40 N.Y.U.L. REV. 1101 (1965).

<sup>10</sup>UCC § 2-202(a).

<sup>11</sup>UCC § 2-202(b).

<sup>12</sup>UCC § 1-205.

evidence upon the written terms.<sup>13</sup>

Since the businessman is concerned with the degree of certainty with which his intentions will be fulfilled through his contracts, he must be aware of what the courts in fact will do in light of the UCC in interpreting his writings. Parties desiring to deviate from their prior course of dealing and the usages of their trade must take into account the UCC's liberal treatment of this extrinsic evidence and draft their contracts accordingly. *Columbia Nitrogen Corp. v. Royster Co.*,<sup>14</sup> a case providing the first construction of UCC §§ 1-205 and 2-202 in Virginia, amply illustrates the roles played by course of dealing and usage of trade as tools for contractual interpretation as well as the difficulties encountered in properly determining their admissibility.

In 1966, the Columbia Nitrogen Corporation and the Royster Company, after extensive negotiations, formulated a contract<sup>15</sup> for Royster's sale of a minimum quantity of phosphate at a stated price per ton each year for three years to Columbia.<sup>16</sup> In the fall of 1967, there was a drastic drop in phosphate prices which resulted in the contract price being substantially above that of the depressed market.<sup>17</sup> Consequently, Columbia ordered only a fraction of the scheduled yearly tonnage and refused to accept delivery on the remainder.<sup>18</sup>

In Royster's suit for breach of contract,<sup>19</sup> Columbia defended by asserting that the contract terms, when explained and supplemented by course of dealing and usage of trade, imposed no obligation upon it to accept the minimum quantities at the prices stated in the contract.<sup>20</sup> In support of this contention, Columbia sought to introduce evidence to show that "express price and quantity terms in contracts for materials in the mixed fertilizer industry are mere projections to be adjusted according

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<sup>13</sup>This function was originally a matter for the judge. *See generally* Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987, 991 (S.D.N.Y. 1968). Under the UCC it becomes a matter for the trier of fact. *See generally* F. James, Civil Procedure § 7-10 (1965). Of course, the judge still retains the power to decide what quantity and quality of evidence is required to support the verdict. Calamari & Perillo, *Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 331, 345 (1967).

<sup>14</sup>451 F.2d 3 (4th Cir. 1971). The opinion of the district court is not reported.

<sup>15</sup>Pertinent parts of the agreement are set out in the opinion. *See* 451 F.2d at 6 n.2.

<sup>16</sup>451 F.2d at 6.

<sup>17</sup>*Id.* at 7.

<sup>18</sup>*Id.*; *see* UCC § 2-606.

<sup>19</sup>The suit was brought in the U.S. District Court for the Eastern District of Virginia. Royster alleged diversity jurisdiction under 28 U.S.C. § 1332 (1970). Royster brought suit under VA. CODE ANN. § 8.2-706 (1965) [UCC § 2-706] for the difference between the contract price and the market price received on the sale of the refused scheduled phosphate as well as damages for the remaining term of the contract. *See* 451 F.2d at 6, 12.

<sup>20</sup>451 F.2d at 6. Columbia also asserted an antitrust defense and a counterclaim based on Royster's reciprocal trade practices. *Id.*

to market forces."<sup>21</sup> Additionally, Columbia offered evidence of the prior course of dealing between the parties to show that in previous transactions, when Royster had purchased materials from Columbia, Royster's requests for price adjustments had been routinely granted and major tonnage deficiencies in Royster's orders had been ignored.<sup>22</sup> The district court excluded all of Columbia's proffered evidence on the grounds that the contract was not ambiguous and that the evidence, if admitted, would contradict the written terms.<sup>23</sup> The jury then found that Columbia had breached the contract and awarded damages to Royster.<sup>24</sup>

In its appeal, Columbia urged that the district court erred in granting Royster's pre-trial motion to exclude evidence of course of dealing and usage of trade.<sup>25</sup> The issue presented to the Court of Appeals for the Fourth Circuit was whether § 2-202 of the UCC permitted Columbia to introduce evidence of course of dealing and usage of trade, which, in explaining and supplementing the express language of the contract, might adjust the fixed price and quantity terms to market conditions. The circuit court concluded that the district court misconstrued the admissibility test in that the UCC's liberal approach to the introduction of parol evidence does not require a threshold finding of ambiguity<sup>26</sup> and that Columbia's proffered evidence could be reasonably construed as consistent with the express terms of the contract.<sup>27</sup> Therefore, Columbia's evidence should have been admitted, and its exclusion required that the judgment against Columbia be set aside and the case retried.<sup>28</sup>

<sup>21</sup>*Id.* at 7.

<sup>22</sup>*Id.* at 8.

<sup>23</sup>*Id.* By memorandum order date April 16, 1970 the district court excluded all evidence of trade usage and course of dealing. The court ruled it would not accept evidence "which is contradictory to the express terms of the contract." Brief for Appellant at 9, *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971). Such a factual finding by the judge for the purpose of admitting evidence is of course not binding upon the ultimate finder of fact. See J. WIGMORE, EVIDENCE § 2430 (3d ed. 1940).

<sup>24</sup>451 F.2d at 6.

<sup>25</sup>*Id.* at 7.

<sup>26</sup>*Id.* at 9. VA. CODE ANN. § 8.2-202 (1965) [UCC § 2-202]; see UCC § 2-202, Comment 1. Comment 1 provides:

This section definitely rejects:

. . . .

(c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) [Course of dealing or usage of trade] is an original determination by the court that the language used is ambiguous.

The VA. CODE ANN. § 8.2-202, Va. Comment states that the adoption of the UCC rejects the Virginia rule that a finding of ambiguity is a condition precedent to admissibility. The UCC as adopted in Virginia was intended to bring about a more liberal approach to the introduction of parol evidence to explain or supplement a writing. *Portsmouth Gas Co. v. Shebar*, 209 Va. 250, 253 n.1, 163 S.E.2d 205, 208 n.1 (1968).

<sup>27</sup>451 F.2d at 9.

<sup>28</sup>*Id.* at 6.

The circuit court, relying upon the "admissibility of evidence introduced under § 2-202(a)" test constructed by an intermediate New York court in *Division of Triple T Service, Inc. v. Mobil Oil Corp.*,<sup>29</sup> stated:

There can be no doubt that the [UCC] restates the well established rule that evidence of usage of trade and course of dealing should be excluded whenever it cannot be reasonably construed as consistent with the terms of the contract.<sup>30</sup>

Both the Fourth Circuit and the New York court read §§ 2-202(a) and 1-205(4) together to formulate this test of admissibility.<sup>31</sup> They reasoned that while § 2-202(a) authorizes the free admissibility of usage of trade and course of dealing,<sup>32</sup> § 1-205(4) imposes the limitation that "express terms . . . and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control . . . ."<sup>33</sup> The Fourth Circuit ruled that Columbia's evidence was admissible under the "construed as reasonably consistent" test because the contract was "silent" as to adjusting price and quantity to a declining market.<sup>34</sup> The court seemed to reason that since the contract itself did not deal with such adjustment, there was nothing in the express terms with which the proffered evidence could be inconsistent.

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<sup>29</sup>60 Misc. 2d 720, 304 N.Y.S.2d 191 (1969), *aff'd mem.*, 37 App. Div. 169, 311 N.Y.S.2d 961 (1970). Express terms in a retail contract between plaintiff service station lessee and defendant oil company, providing for termination of lease at the end of a current three year contract on 90 days advanced notice by either party, covered the entire matter of the termination. The plaintiff was precluded from introducing evidence that it was the custom in the gasoline service industry to renew franchise agreements unless the franchisee had failed in a material respect to adhere to the terms of the contract. To permit the introduction would have the effect of implicitly inserting the words "with cause" in the termination clause and thus contradict the express terms.

<sup>30</sup>451 F.2d at 9. UCC § 2-202, Comment 2 states:

2. Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. *Unless carefully negated they have become an element of the meaning of the words used.* Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean (emphasis added).

The official comments are persuasive authority as to the meaning of the UCC. *Fruehauf Corp. v. Yale Express System*, 370 F.2d 433 (2d Cir. 1966).

<sup>31</sup>451 F.2d at 9; 304 N.Y.S.2d at 203.

<sup>32</sup>See UCC § 2-202, Comment 2.

<sup>33</sup>UCC § 1-205(4).

<sup>34</sup>451 F.2d at 9-10.

In order to evaluate the reasoning of the circuit court and the validity of the admission of Columbia's evidence, it will be necessary to examine closely the language of UCC §§ 2-202 and 1-205. Such an examination seems to reveal that admission under § 2-202(a) is not restricted either by a "noncontradiction" limitation derived from § 2-202 or by a "construed as reasonably consistent" test constructed by reading §§ 2-202 and 1-205 together. However, there does appear to be an implied test of characterization of evidence between §§ 2-202(a) and 2-202(b) which in certain circumstances may serve to limit admissibility. Even if it is assumed that evidence offered under § 2-202(a) must meet a "construed as reasonably consistent" admissibility test, the circuit court's finding that "silence" was determinative of consistency without reference to the characterization test is subject to criticism. Additionally, if an application of the characterization test reveals that the contract was not really "silent," then in order to employ properly the "construed as reasonably consistent" test it will be necessary to ascertain to what reasonable degree evidence of course of dealing and usage of trade may vary the literal meaning of the express terms that are being explained and supplemented.

Although the language of § 2-202 does provide a "noncontradiction" test for admissibility, it appears to be inappropriate to evidence offered under § 2-202(a). Section 2-202 taken alone contains two separate ideas:

Terms . . . [in a final writing] may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but [terms] may be explained or supplemented (a) by course of dealing or usage of trade . . . .<sup>35</sup>

Both predicates are directed toward the same subject, "terms," but they express independent ideas (*i.e.*, different criteria are applied to the admissibility of different kinds of extrinsic evidence). Furthermore, Comment 2 to § 2-202(a) states that "[u]nless carefully negated . . . [course of dealing and usage of trade] have become an element of the meaning of the words used."<sup>36</sup> This comment indicates, save for the expressed exception, that there is free admissibility.<sup>37</sup> Consequently, it would appear that there is no express obligation that the court find "noncontradiction" prior to admission of evidence of usage of trade and course of dealing under § 2-202(a); the obligation of noncontradiction exists only with respect to evidence of a prior agreement or a contemporaneous oral agreement.

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<sup>35</sup>UCC § 2-202. It has been contended that this language is surplusage, having been included to point out the kind of evidence that is admissible. See R. NORDSTROM, LAW OF SALES § 53, at 166 (1970).

<sup>36</sup>UCC § 2-202, Comment 2.

<sup>37</sup>See, e.g., *Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc.*, 120 Ga. App. 578, 171 S.E.2d 643, 645 (1969) (where usage of trade and course of dealing were held admissible by reason of UCC § 2-202(a) alone).



It may be suggested that usage of trade and course of dealing are either "prior agreements" or "contemporaneous oral agreements" and, therefore, that the requirement imposed by § 2-202 of finding "noncontradiction" must be met prior to admission under § 2-202(a). While the UCC defines an agreement as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing and usage of trade . . . ,"<sup>38</sup> § 2-202 qualifies the scope of "agreement," limiting it to those that are prior or contemporaneous and oral.<sup>39</sup> Since the UCC characterizes a course of dealing as a "sequence of previous conduct"<sup>40</sup> and a usage of trade as a "practice or method"<sup>41</sup> of trade, the "prior" or "contemporaneous oral" limitation placed on "agreement" renders the "noncontradiction" test inappropriate to a consideration of admissibility under § 2-202(a). These characterizations suggest something more dynamic and ongoing than temporal prior or contemporaneous oral agreements which have yet to be realized through activity. They suggest repeated activity between the parties and institutionalized activity between members of the trade. Therefore, those events that provide a commercial context for prior or contemporaneous oral agreements are not material to consideration of an ongoing usage of trade or course of dealing regarding an instant agreement.<sup>42</sup> Indeed, one leading commentator has flatly asserted that a trade usage, and presumably a course of dealing as well, is not an "agreement," and that such evidence is not rendered inadmissible by the "noncontradiction" provision of § 2-202. He supports his position by relying upon Comment 1 to § 1-205, which states that the meaning of the agreement is to be read in light of commercial practices.<sup>43</sup>

Although § 2-202 itself does not seem to impose a requirement of "noncontradiction," the court in *Triple T Service* found that type of limitation when it stated that "[o]nly language consistent with the tenor of the otherwise complete agreement is admissible under the guise of 'custom or usage' and the [UCC] effects no change in that doctrine."<sup>44</sup> The rationale seems to be that because § 2-202(a) refers specifically to § 1-205,<sup>45</sup> the "construed as reasonably consistent" directive of § 1-205(4) is incorporated by reference.<sup>46</sup> The difficulty, however, with draw-

<sup>38</sup>UCC § 1-201(3).

<sup>39</sup>UCC § 1-201 states that general definitions are subject to modification if the context so requires.

<sup>40</sup>UCC § 1-205(1).

<sup>41</sup>UCC § 1-205(2).

<sup>42</sup>See R. NORDSTROM, *LAW OF SALES* § 53, at 166 (1970).

<sup>43</sup>Levie, *Trade Usage and Custom under the Common Law and the Uniform Commercial Code*, 40 N.Y.U.L. REV. 1101 (1965).

<sup>44</sup>304 N.Y.S.2d at 203.

<sup>45</sup>UCC § 1-205.

<sup>46</sup>See text accompanying note 31 *supra*.

ing upon § 1-205 for substantive rules of admissibility is that § 1-205, as a provision applicable generally throughout the UCC, is more reasonably viewed in light of its language as a principle of interpretation.<sup>47</sup> For example, although subsection (3) to § 1-205 substantially restates the language of § 2-202(a), it does not state or imply any prerequisite for admissibility, but instead goes to the role of usage of trade and course of dealing in interpretation. Similarly, § 1-205(4),<sup>48</sup> the source of *Triple T. Service's* test, deals not with admissibility but with the significance and use of admitted evidence; it is more reasonable to view it, in light of its language and placement within the UCC, as essentially an instruction to the trier of fact.<sup>49</sup> The *Triple T. Service* limitation on admissibility is further weakened simply by the way in which the language of the subsections in § 2-202 is arranged. "Consistent" is used in § 2-202(b) as clearly a prerequisite to admissibility of evidence offered to supplement or explain express terms by "additional terms." Significantly, "consistent" does not appear directly in § 2-202(a) to limit admissibility of usage of trade and course of dealing offered for the same purpose.<sup>50</sup>

Apparently the circuit court in *Columbia* did not question the validity of the *Triple T Service* test and consequently applied a "construed as reasonably consistent" restriction, under which it determined that it was reasonable to construe the proffered evidence as consistent with the express terms of the contract.<sup>51</sup> However, since the evidence was admitted, the result reached was the same as if this test had not been utilized.

Although evidence offered under § 2-202(a) does not seem to be subject to a "construed as reasonably consistent" admissibility test, there

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<sup>47</sup>UCC art. 1, pt. 2. UCC § 1-109 states "[s]ection captions are parts of this Act."

<sup>48</sup>UCC § 1-205, Comment 1 states:

This Act rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and *interpreted* in the light of commercial practices and other surrounding circumstances. The measure and background for *interpretation* are set by the commercial context, which may explain and supplement even the language of a formal or final writing (emphasis added).

<sup>49</sup>UCC § 2-202(a) provides that terms may also be explained or supplemented "by course of performance (Section 2-208) . . ." Section 2-208(2) substantially restates the language of § 1-205(4) in terms of course of performance. Much of the same reasoning which is persuasive that § 1-205(4) should be viewed as a principle of interpretation for the trier of fact rather than as an admissibility requirement, applies to § 2-208(2) as well. Comment 1 to § 2-208 states that course of performance is the best indication of the meaning of the agreement. Comment 2 states that "a course of performance is always relevant to determine the meaning of the agreement." Therefore, it would seem that *all* evidence offered under UCC § 2-202(a) is freely admissible.

<sup>50</sup>UCC § 2-202.

<sup>51</sup>451 F.2d at 9.

does appear to be found in § 2-202 an alternative test, not mentioned by the circuit court, which relates to the nature of the evidence offered for admission and which may serve to exclude Columbia's evidence. The purpose of evidence offered under § 2-202 is to explain and supplement *terms*,<sup>52</sup> but § 2-202 and its subdivisions may be read to impose different requirements of admissibility upon different types of evidence. Evidence offered under § 2-202 to explain or supplement a term will fall into either of two categories: § 2-202(a) course of dealing and usage of trade or § 2-202(b) consistent additional terms.

While categorization between the two subsections of § 2-202 is often difficult, the UCC's definition of "term" may furnish an important guideline to facilitate this task. The UCC defines a "term" as "that portion of the agreement which relates to a particular matter."<sup>54</sup> The incorporation of the word "particular" denotes a meaning more precise than merely the general subject matter of the writing.<sup>55</sup> For example, the portion of a writing relating to mode of performance would be a different matter than that relating to time of performance, and the portion relating to the quality of goods would be different from that relating to the quantity of goods, even though in the former both relate to the general matter of performance and in the latter both relate to goods.<sup>56</sup> The result of this classification of evidence between §§ 2-202(a) and 2-202(b) rests, of course, upon the court's conception of "particular matter." If the proffered evidence relates to a matter sufficiently distinguishable from any express term in the writing, then it is not admissible under § 2-202(a); instead it should be construed as evidence of an additional term and must meet the tests of admissibility applicable to § 2-202(b).<sup>57</sup> The significance of this classification is that while evidence introduced under § 2-202(a) is freely admissible,<sup>58</sup> evidence introduced under § 2-202(b) will not be

<sup>52</sup>UCC § 2-202.

<sup>53</sup>*Id.*

<sup>54</sup>UCC § 1-201 (42).

<sup>55</sup>See R. NORDSTROM, LAW OF SALES § 53, at 163-65 (1970).

<sup>56</sup>But see *Valley Nat'l Bank v. Babylon Chrysler-Plymouth, Inc.*, 53 Misc. 2d 1029, 280 N.Y.S.2d 786, *aff'd mem.*, 28 App. Div. 1092, 284 N.Y.S.2d 849 (1967).

<sup>57</sup>The problem is that § 2-202 and its subsections draw a dichotomy between usage of trade and course of dealing when used to explain and supplement and when used to add consistent additional terms. The former is freely admissible, but the latter must meet the test of consistency. "[U]nfortunately the two subdivisions of § 2-202 are not antithetical but overlap . . ." Levie, *The Interpretation of Contracts in New York under the Uniform Commercial Code*, 10 N.Y.L.F. 350, 370 (1964). If parties intend for usage of trade or course of dealing to prove an additional term, the policies behind finding that the parties did not intend the written agreement to be complete and exclusive are as relevant as those concerning simple additional terms. UCC § 2-202, Comment 3. See 4 S. WILLISTON, CONTRACTS §§ 631-38 (3d ed. 1961). Therefore, the admissibility tests of § 2-202(b) should apply to course of dealing and usage of trade introduced to prove additional terms.

<sup>58</sup>Note 37 *supra*. See text accompanying notes 47-49 *supra*.

admitted if the court finds either that it is inconsistent with the express terms or that “. . . the writing [was] intended also as a complete and exclusive statement of the terms of the agreement.”<sup>59</sup>

If the “particular matter” guideline to the classification of evidence between the subsections of § 2-202 is applied to *Columbia* and if within the circuit court’s finding that the “contract was silent about adjusting price and quantities to reflect a declining market,”<sup>60</sup> such “adjustment” is considered a particular matter to which the contract is really “silent,” then the proffered evidence of usage of trade and course of dealing is not admissible under § 2-202(a) but must be introduced under § 2-202(b):<sup>61</sup>

[i]f a writing is silent with respect to a particular matter its legal effect is that it imposes no obligation with respect to the matter as to which it is silent. If a course of dealing or usage of trade adds a term to the transaction it imposes an obligation which did not exist. It is true that it supplements the agreement but it also contradicts the agreement’s failure to make provision as to the particular matter.<sup>62</sup>

In fact, Royster contended that *Columbia*’s extrinsic evidence should have been excluded under the contract clause which stated:

No verbal understanding will be recognized by either party hereto; this contract expresses all the terms and conditions of the agreement . . . .<sup>63</sup>

In rejecting this contention the circuit court ruled that “course of dealing and trade usage are not synonymous with verbal understandings, terms and conditions.”<sup>64</sup> While this statement may be true in regard to admission under § 2-202(a), it is questionable if evidence is advanced to prove additional *terms* under § 2-202(b).<sup>65</sup>

The quoted contract clause has incorporated within it the language of “merger,” *i.e.*, that the writing is the complete expression of the parties’ entire agreement.<sup>66</sup> Comment 3 to UCC § 2-202(b) provides for the ex-

<sup>59</sup>UCC § 2-202.

<sup>60</sup>451 F.2d at 9. The circuit court also suggested that the proffered evidence was consistent with the title, “Products Supplied Under Contract Clause,” and the default clause of the contract. *Id.* at 10. However, these findings are immaterial since these are not the terms being supplemented.

<sup>61</sup>See text accompanying note 56 *supra*.

<sup>62</sup>R. ANDERSON, UNIFORM COMMERCIAL CODE, Vol. 1 § 2-202:21 (1970).

<sup>63</sup>451 F.2d at 10.

<sup>64</sup>*Id.*

<sup>65</sup>UCC § 2-202(b) provides for proof of consistent additional *terms*.

<sup>66</sup>UCC § 2-202(b). W. WILLIER & F. HART, FORMS AND PROCEDURES UNDER THE UNIFORM COMMERCIAL CODE ¶ 21.06(2), Form 2-1, clause 2 (1971):

(1) This writing is intended by the parties as a final expression of their

clusion of evidence of consistent additional terms when the court finds that the "writing was intended by both parties as a complete and exclusive statement of all terms . . . ." <sup>67</sup> Thus, the incorporation of a merger clause in the writing would prove such an intent by the parties and would exclude evidence offered to prove additional terms under § 2-202(b), even though consistent with the express terms of the contract. <sup>68</sup> Therefore, the circuit court's finding that the "contract was silent about adjusting price and quantities to reflect a declining market," <sup>69</sup> although made in the context of its "construed as reasonably consistent" test, <sup>70</sup> is especially significant because the court's conclusion may be viewed as suggesting that Columbia's course of dealing and usage of trade evidence should be considered as evidence of an additional term to be dealt with under § 2-202(b). <sup>71</sup>

However, it should be argued that to consider adjusting price and quantity to reflect a declining market as a "term" would require too narrow a view of "particular matter" as expressed in the UCC's definition of "term" and would contradict the liberality of § 1-205(3). <sup>72</sup> Thus, Columbia's evidence should not be viewed as seeking to "explain and supplement" the express terms by evidence of additional terms, since the evidence introduced would adjust price and quantity to market conditions while the express terms relate to a fixed price and quantity. Both the evidence and the express terms relate to the same "particular matters," price and quantity. Under the foregoing contention, Columbia could introduce its evidence under § 2-202(a), free from the exclusionary effect of § 2-202(b)'s response to the merger language in the contract.

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agreement and is intended also as a complete and exclusive statement of the terms of their agreement.

<sup>67</sup>UCC § 2-202, Comment 3 states:

(3) Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

In the case of *Michael Schiavone & Sons, Inc. v. Securalloy Co., Inc.*, 312 F. Supp. 801 (D. Conn. 1970), the contract contained no merger clause, and, therefore, evidence that defendant orally understood the quantity term to mean "up to 500 tons" could not be inconsistent with the terms of the written contract which specified the quantity as "500 tons," and was admissible under § 2-202(b) as evidence of a consistent additional term. See also *Pacific Indem. Co. v. McDermott Bros.*, 336 F. Supp. 963 (M.D. Pa. 1971); *McDown v. Wilson*, 426 S.W.2d 112 (Mo. Ct. App. 1968); *Connor v. May*, 444 S.W.2d 948 (Tex. Civ. App. 1969).

<sup>68</sup>See text accompanying note 58 *supra*.

<sup>69</sup>451 F.2d at 9.

<sup>70</sup>*Id.*

<sup>71</sup>See text accompanying note 56 *supra*.

<sup>72</sup>UCC § 1-205(3).

However, if the *Triple T Service* “construed as reasonably consistent” test of admissibility is *assumed* to be valid, the circuit court’s failure to recognize the “particular matter” guideline renders its conclusion that “silence” equals consistency inappropriate. Silence regarding price and quantity adjustment may be a relevant consideration<sup>73</sup> in determining consistency, but it is by no means conclusive. Section 1-205(3),<sup>74</sup> relating to the purpose for which the evidence is offered, and § 1-205(4),<sup>75</sup> imposing the requirement of consistency, read together, indicate that the test of admissibility would be whether the usage of trade and course of dealing supplement or qualify an express *term* in a consistent manner. “Silence” alone does not adequately explain a finding of consistency because, as discussed previously, there must be a prior characterization of “particular matter” which would classify evidence between §§ 2-202(a) and 2-202(b).<sup>76</sup> Therefore, a finding of “silence” alone begs the question as to whether the explanation and supplementation contradict the express terms.

In *Columbia* there may appear to be an inconsistency between the express terms and the proffered evidence. The contract expressly provides definite price and quantity terms,<sup>77</sup> but *Columbia* contended that these were “mere projections to be adjusted according to market forces.”<sup>78</sup> Section 1-205(3) of the UCC makes usage of trade and course of dealing admissible to “supplement or qualify” the agreement which “presumably means to ‘cut down’ express terms although not to negate them entirely.”<sup>79</sup> The relationship between §§ 1-205(3) and (4) indicates that *Columbia*’s evidence could be viewed as consistent if one accepts the proposition that it qualifies<sup>80</sup> the meaning of the expressed terms without rendering them nugatory. While the UCC itself does not attempt to provide an answer to the problem of how many degrees separate an explanation from a contradiction,<sup>81</sup> some courts have been willing to permit evidence of

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<sup>73</sup>See *United States v. Copeland Milnes Wool Co.*, 242 F.2d 659, 663 (7th Cir. 1957).

<sup>74</sup>Note 6 *supra*.

<sup>75</sup>*Id.*

<sup>76</sup>See text accompanying note 56 *supra*.

<sup>77</sup>451 F.2d at 6 n.2.

<sup>78</sup>*Id.* at 7.

<sup>79</sup>See generally Note, *An Anatomy of Sections 2-201 and 2-202 of the Uniform Commercial Code (The Statute of Frauds and the Parol Evidence Rule)*, 4 B.C. IND. & COM. L. REV. 381 (1963).

<sup>80</sup>451 F.2d at 7.

<sup>81</sup>Note, *An Anatomy of Sections 2-201 and 2-202 of the Uniform Commercial Code (The Statute of Frauds and the Parol Evidence Rule)*, 4 B.C. IND. & COM. L. REV. 381, 383 (1963). There would seem to be a limit to qualification through consistent supplementation. In cases involving express quantity terms, courts have been willing to permit usage of trade to establish adjustment according to market factors where the usage varied the obligation to a definable extent to accept or deliver goods rather than render it nugatory.

Two pre-code cases furnish an illustration of this principle. In *Nicoll v. Pittsvein Coal*

course of dealing and usage of trade to qualify the written terms, short of negating them entirely, in order to find consistency.<sup>82</sup>

In view of this liberal treatment of "consistency," the facts in *Columbia* do support a conclusion that there is consistent supplementation. The contract provides that Columbia "agrees to purchase and accept . . . [and Royster] agrees to furnish quantities of [raw materials] . . . on the following terms and conditions . . . Minimum Tonnage Per Year . . . Price [per ton]."<sup>83</sup> Columbia did not seek to render its express contractual obligation to purchase and to accept a complete nullity; instead, Columbia merely contended that the contract's price and quantity terms should be adjusted to conform to market conditions. Consequently, even if this contention were given effect,<sup>84</sup> Columbia would still be obligated to pay a price, the market price, for the adjusted quantity.

*Triple T Service* presents the contrasting situation. In that case, an express termination clause was held to be inconsistent with a proffered trade usage which required a showing of cause before exercising termination. While both the express term and the trade usage related to the same matter, *i.e.*, termination, and to that extent fell within the scope of § 2-202(a), it would not be reasonable to say that they did not impose contrary obligations.<sup>85</sup> Thus, the usage evidence could not meet the "construed as reasonably consistent" test ingrafted onto § 2-202(a) by the New York court.

The treatment of admissibility by the Fourth Circuit in *Columbia* and the criticism of the court's reasoning raise the question of whether the contract could have been drafted to exclude the admission of evidence under § 2-202(a). If the *Triple T Service* test of admissibility is valid,

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Co., 269 F. 968 (2d Cir. 1920), the seller of a quantity of coal was relieved of his obligation to deliver the contract amount where he proved a usage of trade to the effect that if there were a shortage of railroad cars available for shipment, shipments of coal to buyers could be pro-rated. In *Pickards, Mather & Co. v. Kuhn & Co.*, 8 F.2d 704 (6th Cir. 1925), the buyer was not permitted to show that by a usage of trade his obligation to receive and pay for coal supplied under the contract was discharged because his plants were shut down and no longer needed coal. This suggests that variance along a quantity scale will only contradict an expressed term at zero.

<sup>82</sup>See, *e.g.*, *Michael Schiavone & Sons, Inc. v. Securalloy Co., Inc.*, 312 F. Supp. 801 (D. Conn. 1970).

<sup>83</sup>451 F.2d at 6 n.2.

<sup>84</sup>See, *e.g.*, *Plyant, Inc. v. Escambia Treating Co.*, 276 F.2d 919 (5th Cir. 1960). *Columbia's* proffered evidence meets the limitations of consistency as being acceptable until the obligation imposed by the express term is negated. Even though a qualification of the contract's price and quantity terms will reduce, *i.e.*, "qualify," the price that *Columbia* is obligated to pay and the amount it is obligated to accept to meet the conditions of the depressed market, *Columbia* is still required to accept a quantity greater than zero and to pay a price greater than zero despite the finding by the circuit court that *Columbia* has no obligation to accept. See text accompanying note 83 *supra*.

<sup>85</sup>304 N.Y.S.2d at 202-03.

then § 1-205(4) impliedly recognizes the propriety of excluding evidence of usage of trade and course of dealing when the express terms of the agreement and an applicable course of dealing and usage of trade cannot be reasonably construed as consistent with each other.<sup>86</sup> If, however, UCC § 1-205(4) is not a test for admissibility but instead a principle of interpretation, the practical result should be the same, since a binding instruction should be given to the trier of fact to view the express term as controlling if it cannot be reasonably construed as consistent with the proffered evidence.

While extrinsic evidence of course of dealing and usage of trade will normally be read into their agreement through a reasonable construction, the parties may agree to the contrary and such agreement will be given effect. Comment 2 to § 2-202 indicates that a carefully drafted clause may exclude evidence of course of dealing and usage of trade if it does so expressly.<sup>87</sup> When usages are to be negated or past practice changed, the apparent means to effectuate a departure from trade practice or prior conduct is an express term in the contract.<sup>88</sup> Consequently, Royster should have incorporated a clause in the writing negating the applicability of the very course of dealing and usage of trade proffered by Columbia to interpret either the express price and quantity terms or any provision in the contract. Alternatively, Royster could have negated the use of any course of dealing or usage of trade to explain or supplement either the contract's price and quantity terms or any portion of the writing. Since the test of admissibility of parol evidence to explain or supplement the

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<sup>86</sup>UCC § 1-205(4).

<sup>87</sup>UCC § 2-202, Comment 2; *see* note 30 *supra*.

<sup>88</sup>R. ANDERSON, UNIFORM COMMERCIAL CODE, LEGAL FORMS, at 33 (1963) provides an example of a merger clause. Form 1.49 states:

This contract contains all the terms thereof and shall not be modified, controlled, or affected in any way by any usage of trade [or course of dealing] not expressly included in a term of this contract.

*See Provident Tradesmen's Bank & Trust Co. v. Pemberton*, 24 Pa. D. & C.2d 720 (1960), *aff'd per curiam*, 196 Pa. Super. 180, 173 A.2d 780 (1961). This case demonstrates the specificity necessary in such a provision. The plaintiff bank, which financed a car sale for the defendant automobile dealer, failed to notify the defendant before the car was wrecked that insurance coverage had lapsed. The court held that the bank's prior practice of always notifying the defendant upon lapse in insurance coverage, according to the trade custom, had justified defendant's expectation of notice in this case, despite defendant's waiver in the security agreement. Since parties generally take their course of dealing and the usages of their trade for granted, the UCC interprets all contract provisions with reference to that conduct unless the agreement specifically provides otherwise. Thus the bank erred by relying on a printed, general waiver-of-notice clause, which clause might be reasonably construed as consistent with the settled practice of notification of lapses in insurance coverage by applying the clause only to notices stipulated in the written agreement. The clause should have expressly declared its usurpation of this trade usage and of the parties' prior pattern of dealing so that no reasonable construction could give this practice effect. For a contrary view, see the dissent of Flood, J., in 173 A.2d 780.



terms of the writing is one of determining the intent of the parties, the affirmative presumption being that they contracted in accordance with course of dealing and usage of trade, a clause negating their use generally rather than negating specific courses of dealing and usages of trade will, if nothing more, show their general inapplicability in determining intent.<sup>89</sup> However, since few, if any, contracts are sufficiently detailed to operate without some supplementation with trade usage, a negation of all would be commercially unacceptable.<sup>90</sup>

Furthermore, to inject into a delicate negotiating process a debate over the inclusion of a negation clause might well increase the difficulty of reaching an agreement as to the express content of the writing. While Royster, by incorporating such a clause, either specific or general, would probably have avoided the introduction of Columbia's evidence, it must be also borne in mind that it would be unlikely that Columbia would have subscribed to such a term.<sup>91</sup> Thus, in order to avoid the effect of prior course of dealing and usage of trade in explaining the contract, Royster would have had to notify Columbia clearly of a negation through the writing and this notification could well have gone to the heart of the agreement. Due to the significance of this evidence in contractual interpretation, it follows that if course of dealing or usage of trade are to be bargained away, such waiver should be done intelligently.

It is apparent that the incorporation of the UCC into the statutory framework of almost every state and the construction placed upon it by judicial decision will have a significant impact upon the sources available to the trier of fact in the interpretation of sales contracts. In accord with the UCC's policy of free admissibility under § 2-202(a), Columbia's evidence was admitted despite the problems encountered by the Fourth Circuit in making that determination through an application of the questionable *Triple T Service* "construed as reasonably consistent" test. Nevertheless, the significance of the proffered course of dealing and usage of trade will not be determined until the trier of fact views both Columbia's evidence and rebutting evidence offered by Royster and determines the effect of all evidence upon the written terms. The trier of fact will be guided in this process by the principles of interpretation contained in § 1-205. Despite the fact that businessmen generally order their writings in

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<sup>89</sup>UCC § 2-202, Comment 2; see note 30 *supra*.

<sup>90</sup>See Note, *An Anatomy of Sections 2-201 and 2-202 of the Uniform Commercial Code (the Statute of Frauds and the Parol Evidence Rule)*, 4 B.C. IND. & COM. L. REV. 381 (1963).

<sup>91</sup>During the contract negotiations, Columbia rejected a Royster proposal for liquidated damages of ten dollars for each ton Columbia declined to accept. On the other hand, Royster rejected a Columbia proposal for a clause that tied the price to the market by obligating Royster to conform its price to offers Columbia received from other phosphate producers. 451 F.2d at 10.