Contract Litigation Post-Berg v. Hudesman:
Did Your Black and White Contract Turn a Lighter Shade of Pale?

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How *Berg v. Hudesman* Did and Did Not Change Washington Contract Law

To the layperson, a contract means putting something down "in black and white" and "signing on the dotted line." The savvy consumer tells salespeople to "put it in writing" and knows that she has to read the "fine print." After all, laypeople know that "a contract is a contract and a deal is a deal."

Lawyers know, however, that the interpretation and construction of contracts was never that simple. *Ergo*: 500,000+ attorneys in America!

Lawyers have always known that although "a contract is a contract and a deal is a deal," many contracts are more models of murkiness than models of clarity. Moreover, no matter how thoughtfully the parties prepare their contract, there will always arise an unforeseen situation which, the parties will dispute, either was or was not intended to be covered by their agreement. To deal with the problems of *contract interpretation* and *contract construction*, the courts have devised guidelines and maxima such as: the "plain meaning rule"; the "four corners of the document rule"; and the maxim that a contract must be "plain and unambiguous on its face." In order to avoid obviously unfair results due to rigid applications of these guidelines, the Washington courts have overlaid rules of interpretation which, in certain situations, would permit a court to consider the *circumstances* surrounding the execution of an agreement or the intent of the contracting parties. In Washington, the net effect of having strict rules of interpretation overlaid with interpretative exceptions overlaid with exceptions to the exceptions was a baroque body of case law lovely as art and awful as a tool box for resolving contract disputes.

In *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), the Washington Supreme Court saw its opportunity to straighten out the confusion and inconsistencies which had crept into contract law. It adopted the analytic framework for interpreting contracts called the "context rule" and embraced the law of the *Restatement (Second) of Contracts* §§ 212 and 214(c).

Alas, the business and legal communities read *Berg* and shuddered: Did this signal the end of contract law in Washington? Could business people ever again count on written contracts as binding? Would every single I.O.U., every simple promissory note, every credit card transaction, every automobile purchase, every loan and purchase agreement become a multi-year odyssey through one fact-finding trial after another? Was *Berg* a business layer's ticket to malpractice or a commercial litigator's meal ticket?

First, it is important to distinguish between the interpretation and the construction of a contract. According to the *Restatement (Second) of Contracts* § 200 (1981): "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning." (Cited in *Berg*, 115 Wn.2d at 663). According to Patterson, *The Interpretation and Construction of Contracts*, 64 Colum.L.Rev. 833, 835 (1964): "Construction ... is a process by which *legal consequences* are

made to follow from the terms of the contract and its policies that are applicable to the situation." (Cited in *Berg*, 115 Wn.2d at 663).

Thus, when the issue is the *construction* of a contract . . . that is, the legal consequences which flow from the terms of a contract . . . *it remains an issue of law. When the issue is the interpretation* of a contract, however, then *the intent of the parties* is the touchstone. According to *Berg*: "The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties." 115 Wn.2d at 663 quoting Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161, 162 (1964-1965).

A change *Berg* made in Washington contract law was its holding that "extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." 115 Wn.2d at 667.

Berg held that extrinsic evidence is always admissible to understand the context of a contract regardless whether the contract itself is ambiguous. *Id*. at 669.

The natural outgrowth of *Berg* is that "rules of construction should not be applied except where the intent of the parties cannot be discerned from the circumstances and considerations outlined in *Berg*. To do otherwise would be to allow generalized rules of construction to frustrate the specific intent of the parties in a given situation." *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 584, 844 P.2d 428 (1993).

Despite the worst fears of the business community, the Berg case did not declare open season on contracts. Notwithstanding the liberal use of extrinsic evidence to understand the *intent* of the contracting parties, *Berg* did not abrogate the parol evidence rule or give parties free reign to rewrite their contracts after the fact.

Thus, if a contract is fully integrated, then extrinsic evidence may be admissible to *interpret* the words and terms of the contract in the context of the circumstances surrounding the contract. However, if the contract is not fully integrated, then extrinsic evidence is admissible to prove additional terms *so long as the additional terms are not inconsistent with the written terms. Id*. at 671.

The court in *Berg* cited the following language from *Emerich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986):

> "Where a contract is only partially integrated, *i.e.*, the writing is a final expression of those terms which it contains but not a complete expression of all terms agreed upon, the terms not included in the writing may be proved by extrinsic evidence *provided that the additional terms are not inconsistent with the written terms."*

Berg, 115 Wn.2d at 670 (emphasis added).

Extrinsic or parol evidence, therefore, can be used two ways to interpret contracts. First, extrinsic evidence can by used to *add terms* to a partially integrated contract, *but only to the extent the additional terms are not inconsistent with the written terms*. Second, extrinsic or parol evidence can always be used to place the *context* and interpret the *words of the contract* so that the intent

of the parties may be understood. Ambiguity is not a prerequisite to the admission of extrinsic evidence. *Berg*, 115 Wn.2d at 669, *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 743, 844 P.2d 1006 (1993).

The *Berg* court, quoting from *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973), explained how to determine the intent of the parties:

> Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Berg, 115 Wn.2d at 667.

Extrinsic evidence can be used to determine the intent of the contracting parties and the "reasonableness of respective interpretations advocated by the parties." Id . However, extrinsic evidence which *contradicts* the written terms of a contract is not admissible. As the Washington Supreme Court explained in *Nationwide Mutual Fire Ins. Co. v. Watson*:

Under *Berg*, "extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." In approving the context rule, this court also stated that such evidence is not admitted for the purpose of importing an intention not expressed in the writing, but to give meaning to the words employed. *Extrinsic evidence illuminates what was written, not what was intended to be written.* 120 Wn.2d 178, 189, 840 P.2d 851, (1992) (emphasis added).

The Appellate Court's Attempt to Bring Order Out of Chaos

Lawyers and trial judges are conservative by nature. When we, as a profession, read the *Berg* opinion, we had conniptions. Doomsayers prophesied the death of the parol evidence rule and the demise of summary proceedings to enforce simple contracts. Into the chaos wrought by *Berg* leaped the appellate courts.

One of the early post-*Berg* cases to come down the pike was *Olympia Police Build v. City of Olympia*, 60 Wn. App. 556, 805 P.2d 245 (Div. 2 1991). *Olympia Police Guild* involved grievance procedures under a collective bargaining agreement. Specifically, the Olympia Police Guild sued the City for specific performance to compel arbitration relating to the suspension of a police officer without pay. The Superior Court dismissed the Guild's action on summary judgment on the basis that the collective bargaining agreement was ambiguous. The Guild appealed.

The Court of Appeals reviewed the summary judgment record and found the agreement was plainly worded. Citing the newly adopted context rule, it then examined the record and found it devoid of any "extrinsic evidence showing any meeting of the parties' minds that is inconsistent with the plan words of their agreement." 60 Wn.2d at 559. Whatever the City may have *intended*, the court found that its professed intentions were certainly not expressed in the words of the agreement. "We believe . . . that the intent of the parties to be divined by application of the

context rule has to do with their *real meeting of the minds*, as opposed to the insufficient written expression of their intent. Unilateral and subjective beliefs about the impact of a written contract do not represent the intent of the parties." *Id*. (emphasis added).

Thus, finding nothing in the record evidencing an "intent" different from that plainly expressed in the words of the written agreement, the Court of Appeals reversed summary judgment for the City and granted judgment for the Guild. *Id*. at 560. The significance of *Police Guild* was that the court, once it found no evidence of extrinsic evidence inconsistent with the plain meaning of the agreement, *summarily enforced the agreement*. Thus, although the Superior Court initially may have entered summary judgment for the *wrong party*, there was no flaw in the summary judgment procedure itself.

Two years later, in *Minter v. Pierce Transit*, 68 Wn. App. 528, 843 P.2d 1128 (Div. 2 1993), the court held that arbitration was *not* the exclusive remedy for an alleged wrongful termination under a particular collective bargaining agreement and affirmed the Superior Court's denial of the employer's motion for summary judgment. Focusing once again on the plain meaning of the words of the agreement and the absence of any extrinsic evidence of a *mutual* intent inconsistent with the plan meaning of those words, the court wrote: "Like the declarations in *Police Guild*, [the] declaration only shows the unilateral view of the intent of the Pierce Transit negotiators and fails to show any *meeting of the minds inconsistent with the words* of the collective bargaining agreement." 68 Wn. App. at 534 (emphasis added).

In *Vacova Company v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (Div. 1 1991), the trial court had granted summary judgment on a promissory note in favor of the seller of real estate. Although the party resisting the motion for summary judgment introduced affidavits asserting that additional terms needed to be read into the contract, neither the Superior nor the Appellate Court would add those terms. Citing the parol evidence rule articulated in *Berg*, the Appellate Court reiterated that, even if the written contract was not integrated, additional terms could be proved by extrinsic evidence *only if the additional terms were not inconsistent with the written terms*. 62 Wn. App. at 396. The Appellate Court affirmed the summary judgment.

Division One of the Court of Appeals again proved the vitality of the parol evidence rule by making it one of the foundations of its decision in *Wells Trust v. Grand Central Sauna and Hot Tub of Seattle*, 62 Wn. App. 593, 815 P.2d 284 (Div. 1 1991).

> [T]he general rule is . . . that the parol (extrinsic) evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident or mistake, but is admissible to show the situation of the parties and the circumstances at the time of the execution of the written instrument for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence is not admitted for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. It is the duty of the court to declare the meaning of what is written, not what was intended to be written.

62 Wn. App. at 602.

However, as in the 1991 Division 2 *Police Guild* case before it, Division 1 of the Court of Appeals in *Wells Trust* focused once again on the "objective manifestations of the agreement rather than the less precise subjective intent of the parties not otherwise manifested." 62 Wn. App. at 602. Emphasizing one of the maxims of contract construction, the court in *Wells Trust* specifically wrote:

> Absent fraud, deceit or coercion, a voluntary signatory is bound to a signed contract *even if* ignoran t *of its terms*. Therefore, the parties are bound by the contract as signed and the parol evidence cannot change the contract, only aid in its interpretation.

Id. (citations omitted, emphasis the court's).

Although these early post-*Berg* appellate decisions sounded reassuringly like the "plain meaning rule" swathed in the "context" of *Berg*, some early cases proved the usefulness of the context rule in avoiding the occasional harsh result of the older, more hide-bound rules of contract interpretation. Thus, in *Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 810 P.2d 27 (Div. 1 1991), the Court of Appeals reversed the trial court's summary judgment regarding a restrictive covenant in a housing development. The homeowners association had sought to force a lot owner to remove twelve 30-foot-tall Douglas firs he had planted along his lot lines without approval of the association. The trial judge concluded that because the restrictive covenant pertained only to fences, walls or shrubs, and mentioned nothing about 30 foot trees, it found that the trees were literally not restricted by the covenant. The Appellate Court reversed. 61 Wn. App. at 184.

Referencing the *context* of the restrictive covenant, the Court of Appeals in this case placed less emphasis on the covenant's choice of words than its clear purpose to prevent lot owners from blocking the outlooks or views of neighbors. 61 Wn. App. at 181. Distilling *Berg* to its essence, the court wrote: "Of particular interest to this case is the *Berg* court's emphasis on rejecting interpretations that are unreasonable and imprudent and accepting those which make the contract reasonable and just." *Id*.

There are more than two dozen published appellate decisions which mention *Berg* and the context rule either directly or in passing. These cases have gone a long way to alleviate the initial consternation lawyers felt when they first read *Berg* three and a half years ago. The decisions show that the older, sensible rules of construction are still vital, but they no longer reign tyrannically over reason. Perhaps the meaning of *Berg* is best expressed in the simple language of *Homeowners Ass'n v. Witrak*: contract interpretations which are either unreasonable or imprudent yield to those which make the contract reasonable and just, notwithstanding the four corners of the document. *Id*. To the extent extrinsic evidence makes the interpretation of a contract reasonable and just, it is admissible; however, to the extent extrinsic evidence robs the written words of meaning or introduces illogic or imprudence into the contract, such extrinsic evidence is inadmissible.

Berg v. Hudesman **and Insurance Contracts**

Contracts are everywhere and insurance contracts are among those most frequently interpreted by the courts. As of this writing, there are at least four published post-*Berg* opinions dealing with

insurance contract interpretation: *McDonald v. State Farm*, 119 Wn.2d 724, 837 P.2d 1000 (1992) (homeowners coverage), *City of Everett v. American Empire Surplus Lines Ins. Co.*, 64 Wn. App. 83, 823 P.2d 1112 (Div 1 1991 (E&O policy), *Underwriters Subscribing to Lloyd's Insurance Cert. No. 80520 v. Magi, Inc.*, 790 F. Supp. 1043 (E.D. Wash. 1991) (commercial coverage), and *Denny's v. Security Union Title Ins.*, 71 Wn. App. 194, P.2d (Div. 1 1993). Although these cases cite *Berg*, they produced results which probably would have been the same even under the prior rules of interpretation.

McDonald related to exclusionary language in a homeowner's insurance policy. The homeowners sued State Farm for breach of contract for failing to pay damages when the home's foundation gave way. The Supreme Court *reversed* the Court of Appeals and *reinstated* the Superior Court's summary judgment in favor of the insurer. Although under *Berg*, extrinsic evidence is *always* admissible to determine the *context* of a contract regardless whether the contract is or is not ambiguous, the Supreme Court in *McDonald* examined the insurance exclusion to determine *whether it was ambiguous*. 119 Wn. 2d at 733. Loosely citing to *Berg*, the court wrote in the main:

> The focal question is whether the exclusionary language of the policy is ambiguous. This question requires us to interpret the policy's exclusionary language and provisions . . . Thus, if an insurance policy's exclusionary language is ambiguous, the legal effect of such ambiguity is to find the exclusionary language ineffective. [In this case], we find no ambiguity in the policy's exclusionary language.

119 Wn.2d at 774, (citations omitted).

If there is a conflict between *McDonald* and *Berg* in their analysis of "ambiguity," it is more an apparent conflict than a real one. Although extrinsic evidence is admissible under *Berg* to understand the context of any contract (including insurance agreements), that extrinsic evidence still cannot be used to import a meaning *contrary* to what is clearly written. Thus, if exclusionary language in an insurance policy is *not ambiguous* -- that is, it is susceptible of only one reasonable meaning -- then there is nothing useful the extrinsic evidence brings to the debate at all.

By contrast, the Court of Appeals in *Everett v. American Empire*, *supra*, used extrinsic evidence (the declaration of the insurance company's senior vice-president and underwriter) to set the *context* for the policy's exclusionary language. This extrinsic evidence supported the insurer's position of denying coverage and was a basis for the court's affirmation of the Superior Court's summary judgment in favor of the insurer on a wrongful death declaratory judgment action. 64 Wn. App. at 88.

In *Denny's v. Security Union Title Ins.*, *supra*, the Court analyzed *Berg* in the context of the coverage intended by a title insurance policy. Observing,

> [T]he *Berg* decision was intended to reconcile previous inconsistent case precedent and provide a uniform guideline for contract interpretation.

Division 1 of the Court of Appeals nevertheless found that *Berg* did *not* obviate the parol evidence rule as it would apply to insurance contracts. 71 Wn. App. at 201.

However, to the extent an insurance policy provision was susceptible to different *reasonable* interpretations, then that policy provision would be inherently *ambiguous* and subject to a determination of the contracting parties' intent. *Id*. at 209. If, after examining the extrinsic evidence, the contract provision *remains* ambiguous, then the court will construe insurance contract language *in favor of the insured*, which is consistent with prior case law and rules of insurance contract rules of interpretation. *Id*. at 209-210.

On the other hand, in *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, P.2d (1994), the Washington Supreme Court cited *ambiguous language* in an exclusionary clause of a directors' and officers' liability policy as the basis for negating the efficacy of the clause. Rather than analyze the parties' mutual intent, the Court applied the rule that if exclusionary language in an insurance policy is ambiguous, then there is no need for further debate because the exclusionary language is simply *ineffective*.

In all fairness, the Court in *Lynott* found that there really *was* no "mutual intent" of the disputing parties concerning the contested language. Typical of what happens in most insurance policies, the parties never negotiated or, for that matter even discussed the exclusionary language. It was simply "there," part of the contract. *Id.* at 685. Thus, the Court saw no point in considering the insurance company's "unilateral or subjective purposes and intentions about the meaning of what is written . . ." *Id*. at 684.

What You Meant, What You Knew and What You Did: Litigation About Settlement Agreements and Releases

In two published post-*Berg* cases dealing with settlement agreements, the courts have referred to the context rule but left intact preexisting policies favoring settlements and releases.

The earlier case, *Baker v. Winger*, 63 Wn. App. 819, 822 P.2d 315 (Div. 1, 1992), involves a highly convoluted fact pattern resulting in the loss of the settling defendants' rights of contribution from another party. For the purposes of this discussion, the significance of *Baker* is that the court used the context rule articulated in *Berg* to *infer what the parties meant in their oral, on the record, settlement agreement*. Thus, almost by reading between the lines, the court reviewed the *context* of the settlement agreement, *inferred the intent* of the settling parties and ruled accordingly. 63 Wn. App. at 823.

On the other hand, in *Nationwide Mutual v. Watson*, 120 Wn. 2d 178, 840 P.2d 851 (1992), the court reviewed and then rejected extrinsic evidence offered to contradict the language of a general release. Specifically, the Supreme Court reversed the Court of Appeals and reinstated the Superior Court's summary judgment in favor of the insurer. 120 Wn.2d at 195.

The issue in this case was the breadth of a general release and whether the parties meant it to encompass PIP benefits as well as UIM benefits. Although the insurer and the claimant asserted different "intentions" when each signed the general release, the court returned again to the fact that the *plain meaning of the words in the release were not ambiguous*. *Id*. at 189. The release covered "any and all claims . . . of any kind or nature whatsoever . . .," and although the parties ".

. . may have had different subjective intentions, . . . the words employed in the general release signed by respondent on December 14, 1987, clearly constitute a release of all claims." *Id*. Interestingly, although the extrinsic evidence in this case was not admitted to *change* the clear meaning of the release agreement, the extrinsic evidence explained the *context* of the release agreement and, undoubtedly, helped the court arrive at the "just" decision it reached.

Real Estate Contracts In The Post-*Berg* World

The *Berg* case involved real property as do a large number of reported post-*Berg* opinions. Several of these cases have been mentioned in the preceding discussion: *Wells Trust v. Grand Central Sauna and Hot Tub Co. of Seattle*, 62 Wn. App. 593, 815 P.2d 284 (Div 1 1991) (commercial landlord-tenant dispute regarding abandonment of premises); *Vacova Company v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (Div 1 1991) (payment of promissory note related to earnest money agreement); *Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 810 P.2d 27 (Div. 1 1991) (interpretation of restrictive covenant). A clutch of 1992 appellate decision, however, show that at least in the realm of real property, the decision has increased the courts' latitude for "doing justice," while decreasing the predictability of the courts' decisions.

The following three cases were each decided by a different division of the Court of Appeals, each with a different twist. In *Voorde Poorte v. Evans*, 66 Wn. App. 358, 832 P.2d 105 (Div. 3 1992), the court affirmed the Superior Court's partial summary judgment in favor of the buyer of a mobile home destroyed by fire. The purchase and sale agreement provided that if, prior to closing, the property was destroyed by fire, then the buyers could back out of the deal -- a fairly standard real estate purchase agreement provision. Prior to closing, the buyers took possession of the mobile home, moved employees into it and reconnected electrical service. While the buyer's employees were lunching in the mobile home, an electrical fire started in the kitchen and destroyed the mobile home. The buyer then terminated his purchase agreement and the sellers sued for breach of contract (among other causes of action not relevant to this discussion).

The *Voorde Poorte* case, the parties did not dispute the language of the contract which placed the risk of loss with the sellers. What the parties disputed was whether the sellers had consented to the buyers' pre-closing possession of the mobile home and the *legal effect* of early possession. 66 Wn. App. at 362. Without any reference to *Berg*, the court affirmed the partial summary judgment in favor of the buyer:

> If a contact is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision. Interpretation of an unambiguous contract is a question of law.

Id. at 362 (citations omitted).

Reading between the lines, the *Voorde Poorte* case does not consider extrinsic evidence, *a la Berg*, because there could be no possible "intent" memorialized in the written agreement except that which it unambiguously states. In other words, because there was no dispute about the unambiguous language of the contract itself, the issue could be resolved as a matter of law without reference to extrinsic evidence.

Consider, on the other hand, *Honan v. Ristorante Italia, Inc.*, 66 Wn. App. 262, 832 P.2d 89 (Div. 2 1992). In this case, Division 2 of the Court of Appeals considered a sale of restaurant equipment on an installment contract. After the buyer fell in arrears, the seller attempted a "self-help" remedy by changing the locks on the restaurant to prevent the buyer from removing equipment. The seller eventually sued the buyer -- that is, the individual *and* the corporate entity with which seller believed he had been dealing (which, of course, was not identified as the buyer in the contract documents).

The Superior Court applied the statute of frauds, refused to consider any oral agreements outside the scope of the fully integrated written contract documents, and dismissed the seller's claims in large measure. The Court of Appeals *reversed* and remanded the case for trial. 66 Wn. App. at 273. Citing *Berg*, the court in *Honan* held that extrinsic evidence, including testimony about the side oral agreements of the parties, should have been considered by the Superior Court in order to determine the intent of the parties. *Id*. at 271. Contrasted with the *Voorde Poorte* case discussed, *supra*, *Honan* was a case in which the meaning of the contract language itself was disputed; hence, the court's consideration of extrinsic evidence.

The third real estate case of this group is *Parry v. Hewitt*, 68 Wn. App. 664 ___ P.2d ___, 1993 WL 25566 (Div. 1 1992). In *Parry*, the court considered whether a mobile home was a "trailer" as defined by a restrictive covenant in a residential subdivision. The specific language of the restrictive covenant prohibited placing on the property any "structure of a temporary character, trailer, basement, tent, shack, garage, barn or any other outbuilding . . ." 68 Wn. App. at 665. The superior court concluded that the mobile home was a "trailer" as defined by the restrictive covenant and granted partial summary judgment against the mobile home owners on that issue. The Court of Appeals reversed. Moreover, it then granted judgment for defendants finding that the mobile home was *not* a "trailer" prohibited by the restrictive covenant. Citing *Berg* and (among other testimony the affidavit of the attorney who drafted the restrictive covenant, the Court of Appeals concluded that the "obvious intent of the parties . . . was to assure the attractiveness and permanence of the homes in the subdivision. *Id*. at 668. This, the court concluded, meant that whereas "eyesores and junk such as old travel trailers" were excluded from the subdivision, modern manufactured homes were never meant to be excluded. *Id*. at 669.

The main theme of these three post-*Berg* real estate related cases, therefore, is the court's interest in "rejecting interpretations that are unreasonable and imprudent and accepting those which make the contrast reasonable and just." *Homeowners Ass'n v. Witrak*, 61 Wn. App. at 181 paraphrasing *Berg*, 115 Wn.2d at 672. For lawyers and clients involved in real estate transactions, the knowledge that "justice" will be done in the post-*Berg* world must be very comforting. However, as the three cases discussed in this section demonstrate by their disparate results, the comfort of "justice" being done sometimes comes at the expense of *knowing* with any degree of reasonable certainty how (or whether) a court will use extrinsic evidence to resolve a contract dispute.

The Choice of Laws Clause to the Rescue?

Parties who reside in different states, or who engage in interstate commerce, frequently include a choice of laws clause in their written agreements. Generally, Washington courts will enforce a choice of laws so long as its application does not offend the forum state's fundamental public

policy and there is a substantial relationship with the state whose law was chosen. *McGill v. Hill*, 31 Wn. App. 542, 547, 644, P.2d 680 (Div. 1 1982). Although each contracting party normally wants to choose its own state's laws to construe the contract, it may be worthwhile to choose the *other state's* laws if the parties want to ensure that the contract is interpreted by more traditional techniques than those described in *Berg*.

For example, in *Truck Center Corp. v. General Motors Corp.*, 67 Wn. App. 539, 837 P.2d 631 (Div. 1 1992), the court interpreted a General Motors dealer sales and service agreement which was expressly governed by Michigan state law. 67 Wn. App. at 544. Unlike Washington law post-*Berg*, Michigan law provides that extrinsic evidence relating to the intent of the parties is admissible *only when the contract terms are so ambiguous that the parties' intent cannot be discerned from the contract itself*. The Court of Appeals in *Truck Center* appreciated the significance of this difference by foot-noting the contrasting, broader use of extrinsic evidence adopted in *Berg*, 67 Wn. App. at 544, f.n. 3 and 4. Therefore, applying Michigan's laws and restricting its analysis to the language of the contract itself, the court in *Truck Center* held in General Motor's favor and affirmed the Superior Court's order on summary judgment.

A related, but more radical, issue is whether residents of Washington who enter into a Washington contract with no connection with a foreign jurisdiction can expressly designate another state's laws to interpret the contract. The *Restatement (Second) of Conflicts of Law* § 187 states that the parties should be able to choose any law they wish to interpret their contract, provided no public policy of the forum state is violated and there is some relationship with the chosen state law. In dictum and in a footnote, the court in *Truck Center* commented that "no public policy is violated by application of Michigan law." *Id*. at 544, f.n. 3. In the absence of *any* significant contacts with the state of the chosen law, however, it is very possible that a court will vitiate the choice of laws clause. However, more out of curiosity than knowledge, we invite *some other lawyer* to risk this theory with *someone else's clients*.

Discussion, Hoots and Mud-Slinging

Although when first published *Berg* engendered much concern in the business community, the courts' application of *Berg* has not been as radical as feared. So long as extrinsic evidence is admitted primarily to illuminate the context of a written contract to understand the parties' intent, properly and fairly drafted contracts are not likely to be gutted by the courts. The *Berg* approach to contract interpretation, however, is not the only one available. As discussed in the *Truck Center* case in the preceding section, some states, like Michigan, *only admit extrinsic evidence if the intent of the parties cannot be understood simply by reading the language of the contract itself*.

There is some sentiment in Washington to modify the approach and move closer to Michigan's model. Thus, in *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 826 P.2d 664 (1992), J. Anderson wrote a concurring opinion, joined by J. Dolliver, in which he expressed the following thoughts:

> My concern is that the majority's broad characterization of *Berg* will upset the finality of unambiguous integrated written contracts and require every contract dispute to be determined by the trier of fact only after a full trial.

> When the case arises where a written integrated contract is clear and unambiguous on its face, I would hold that extrinsic evidence is not admissible. Certainly of contract depends on parties being bound to their clearly drafted written contracts.

118 Wn.2d at 550.

J. Anderson's comments certainly resonate in the business community. It would not surprise this author if, either over time or in a particular test case selected by the Supreme Court, the broad interpretative rules of *Berg* are trimmed back. In any event, time and the advance sheets will show whether *Berg* was the final word in contract analysis in Washington or if it was simply the latest stage in the process of evolution.

Selected post-Berg Cases

Insurance

McDonald v. State Farm Fire and Casualty Co., 119 Wn.2d 724, 837 P.2d 1000 (1992) (homeowners coverage)

Underwriters Subscribing to Lloyd's Insurance Cert. No. 80520 v. Magi, Inc., 700 F. Supp. 1043 (E.D. Wash. 1991) (commercial coverage)

City of Everett v. American Empire Surplus Lines Ins. Co., 64 Wn. App. 83, 823 P.2d 1112 (1991) (E & O policy)

Denny's v. Security Union Title Ins., 71 Wn. App.194, ____ P.2d ____ (Div. 11993) (title insurance)

Real Estate

Harris v. Ski Park Farms. Inc., 120 Wn.2d 727,844 P.2d 1006 (1993) (easements)

Parry v. Hewitt, 68 Wn. App. 664, ____ P.2d ____, 1993 WL 25566 (1992) (restrictive covenants)

Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990) (lease)

Honan v. Ristorante Italia, Inc., 66 Wn. App. 262, 832 P.2d 89 (1992), review denied by 120 Wn.2d 1009, 841 P.2d 47 (1992) (restaurant rental)

Watkins v. Restorative Care Center. Inc., 66 Wn. App. 178,831 P.2d 1085 (Div. 1 1992), review denied by 120 Wn.2d 1007, 841 P.2d 47 (1992) (lease)

Burgeson v. Columbia Producers Inc., 60 Wn. App. 363, 803 P.2d 838 (Div. 3 1991), review denied by 116 Wn.2d 1033, 813 P.2d 583 (1991) (farm development)

Vacova Company v. Farrell, 62 Wn. App. 386, 814 P.2d 255 (Div. 1 1991) (earnest money agent)

Wells Trust v. Grand Central Sauna and Hot Tub Co. of Seattle, 62 Wn. App. 593, 815 P.2d 284 (Div. 1 1991) (landlord-tenant)

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