Dr. Strangelaw or How I Learned to Love the Berg

by Steven A. Reisler

When the Washington Supreme Court decided *Berg v. Hudesman*[1] in 1990, it dropped a bomb on the legal community. No longer could contracts be read in black and white, groaned the business lawyers; no longer could contracts be confined to their four corners, moaned the civil litigators; no longer could courts grant summary judgments in contract disputes, intoned the trial judges.[2]

Now, 10 years later, we know that the *Berg* bombshell left only a broad, shallow crater, and its fallout was harmless. In some ways, *Berg* cleared the way for a more intelligent approach to contract law. Rather than have us hew literally to the two-dimensional words of a contract, *Berg* held that a *third dimension*, the intent of the parties making the contract, was the *starting point* for interpreting the parties' agreement.[3] No one will argue that this is bad. It makes perfect sense. The evil inherent in the *Berg* approach, say its critics, is that it made the enforcement of contracts more difficult, less certain and more time-consuming.

Not entirely true. The evil inherent in *Berg* was that it stated very straightforward principles of law in a not very straightforward way. It used many words, sometimes obscurely expressed, to describe a sensible approach to contract interpretation.[4] Here, in wallet-sized version, is the essence of *Berg*:

- The construction of a contract (that is, its legal consequences) is an issue of law;
- The interpretation of a contract is the ascertainment of its meaning;
- The meaning of a contract depends on what the parties intended it to mean;
- Extrinsic evidence is always admissible to determine the context of a contract, regardless of whether the contract is ambiguous;
- If a contract is fully integrated, extrinsic evidence can be used to understand or explain the context of the agreement and what the parties intended. But extrinsic evidence cannot be used to add or subtract language in the agreement;
- If a contract is not fully integrated, extrinsic evidence can be used to prove additional terms, provided that the additional terms are not inconsistent with and do not diminish the written terms of the contract;
- Unilateral and unexpressed intentions mean nothing in understanding the intentions of the contract;
- Reasonableness and justice trump blind and illogical adherence to mere words.

The saw heard since *Berg* was decided is that no one will ever again win a summary judgment on a litigated contract. This has not proven true: since *Berg*, trial judges can, do and should grant summary judgment motions in contract disputes in appropriate circumstances. A survey of recent cases in particular areas of law helps to illuminate how courts deal with *Berg*-like situations.[5]

Insurance Contracts

The basic principles of interpreting insurance contracts did not change after *Berg*. These principles include:

1. Ambiguities in an insurance contract are construed against the insurer;
2. Insurance contracts are construed as if read by an ordinary insurance purchaser;
3. Exclusions from insurance coverage will be strictly construed and not read beyond their clear meaning;
4. If an insurance contract, or an exclusion, can have different reasonable meanings, the courts will favor the meaning that most favors the insured;
5. An insurance clause is ambiguous if, on its face, it can have two different, reasonable interpretations;
6. The courts will enforce insurance contracts that are clear and unambiguous and they will not create ambiguity where there truly is none.

The "super-rule" imposed on all of these rules, however, is that they merely aid in determining the intention of the parties to a contract of insurance. And, as with all contracts, no strict interpretation of the insurance agreement should prevail over reason, nor cause a contorted or forced resolution.[6]

Thus, in *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678 (1994), a majority of the Washington Supreme Court found a key provision in a directors' and officers' liability policy to be ambiguous. Central to the decision was the context in which the insurance policy was purchased.[7] Months later, in *Key Tronic Corporation v. Aetna*, 124 Wn.2d 618 (1994), the Supreme Court, on direct review, reversed summary judgment for the insurers on the basis of an ambiguous pollution exclusion. It was an issue of fact, a majority of the Court concluded that, in reality, the insurer had to satisfactorily resolve. "If there is no extrinsic evidence offered to resolve the ambiguity in the pollution exclusion, or if extrinsic evidence which is offered does not clarify the contract, then the ambiguity will be resolved against the insurer."[8]

Likewise, in *Clayton v. Grange Insurance Ass'n*., 74 Wn.App. 875 (Div. 3 1994), the appellate court reversed summary judgment in favor of the insurer where the insured claimed UIM benefits for injuries sustained while operating his tractor on the shoulder of the road. The court found the insurance policy's lack of any definition for the term "motor vehicle" ambiguous, and the case was sent back to the trial court for a factual determination of what the parties intended by that undefined term in the insurance contract.[9]

Nevertheless, in *U.S. Life v. Williams*, 129 Wn.2d 565 (1996), the Supreme Court affirmed summary judgment for the insurer in a case where a husband and wife had purchased insurance to continue payments on their new van should the insured die or become disabled before the vehicle had been paid off. Only the husband was identified as an insured, and premiums for only one insured were charged. Nevertheless, the certificate of insurance itself had double Xs in the

boxes next to the types of insurance coverage purchased by the insured. When Mrs. Williams became disabled, however, she demanded that the insurance policy pay off the new van because, she contended, extrinsic evidence would show that the double Xs meant both she and her husband were intended to be insured under the policy. The Supreme Court could not countenance this argument, however, because to do so might lead to a rewriting of the plain language of the insurance certificate itself.[10] Unlike *Clayton* and *Lynott*, *supra*, the language of the insurance contract itself was not ambiguous, only the extrinsic evidence surrounding the contract.

Similarly, in *Daley v. Allstate Ins. Co.*, 135 Wn.2d 777 (1998), the Supreme Court reinstated summary judgment in favor of the insurer because plaintiff could not, under his automobile UIM policy, recover for emotional damages unrelated to personal physical injury. The Court found that the language of the pertinent clause was not ambiguous on its face, so there was nothing to resolve at trial.[11]

The counterpoint to this series of cases is *Reynolds v. Farmers Ins. Co.*, 90 Wn.App. 880 (Div. 3 1998), in which the court reversed the trial judge's summary judgment in favor of the insured and ordered judgment for the insurer. In *Reynolds*, the insured's automobile accident was clearly covered under the terms of the reinstatement declaration defining when coverage began. Although the insurer complained that the clear language of the policy was simply a mistake, the insured wanted to prevent the admission of any extrinsic evidence which might rewrite that clear language. The appellate court held that whereas extrinsic evidence would not ordinarily be admissible to contradict, modify or add to a clearly worded contract of insurance, extrinsic evidence would be admissible to show that there had been an accident or mistake.[12] Because the intent of the parties in this particular case, as evidenced by the context and circumstances, was that there should be no insurance coverage, there would be no insurance coverage.

Wills and Trusts

In *Estate of Catto*, 88 Wn.App. 522 (Div. 2 1997), the husband and wife had entered into a community property and survivorship agreement. Later, the wife left her husband, cut him out of her will and filed for divorce. The day after filing for divorce, Mrs. Catto died. Notwithstanding the protestations of Mrs. Catto's heirs, the surviving husband received the bulk of her estate pursuant to the community property and survivorship agreement entered into during their marriage. The Court of Appeals affirmed even though the decedent had changed her will and had filed for divorce.

The Court applied these principles:

1. The same rules of construction apply to community property agreements as to any other contracts;

2. When reviewing a community property agreement, the objective is to understand and implement the parties' bilateral intent;

3. "Intent" can be established directly or by "inference";

4. Whether established directly or by inference, "intent" can only be derived from its objective manifestations; and

5. Objective manifestations of "intent" can be read either in the written agreement itself, or in the context of the agreement.[13]

The community property and survivorship agreement in this case lacked a termination clause, perhaps because the parties deliberately omitted it ... or perhaps because someone neglectfully forgot to put in that standard language. Regardless, the appellate court agreed with the trial judge that the agreement itself did not provide for termination in the event the marriage failed, and nothing about the context of the agreement when it was formed suggested any different intent. Although Mrs. Catto clearly intended to divorce her husband and effectively cut him out of her will, the expression of "intent" was not part of the context when the original agreement was put together. Thus, the winner was the estranged husband, not the decedent's heirs.[14]

In *Estate of Lindsay*, 91 Wn.App. 944 (Div. 3 1998), two people married and signed reciprocal wills. Almost four years later, they split and signed a separation agreement relinquishing any claim to each other's property from the date of their separation. Following that, the couple's relationship was schizophrenic — sometimes they lived together, sometimes not. At one point, however, the husband executed a new, handwritten will and simultaneously revoked his prior will. After separation, the wife had also executed a new will cutting out her husband. After the husband died in a motorcycle accident, his spouse petitioned to admit "Will Numero Uno" to probate. In the alternative, she demanded an award in lieu of homestead under RCW 11.52.020.

The Court affirmed the trial judge who gave nothing to the surviving spouse. The second, handwritten will was admitted to probate, and she was also denied an award under the statute in lieu of a homestead allowance. In examining the written separation agreement of the couple, the Court concluded that it clearly reflected their intent to give up inheritance rights that would usually apply to legal spouses. This was the clear intent expressed in the written separation agreement, and it was the surrounding circumstances, including the subsequent acts of the parties, that reinforced that intent.[15]

Employment Law

In *Hall v. Custom Craft Fixtures, Inc*., 87 Wn.App. 1 (Div. 2 1997), the former officer of a company sued his former employer for compensation and bonuses he contended were due under a written employment agreement. Adhering to the "four corners" of the written employment agreement which, in the trial court's words, contained "not even a hint" of any contrary intent, the trial court summarily dismissed the CEO's complaint against his former (and now bankrupt) employer. The Court of Appeals, however, looked at correspondence exchanged by the parties, saw surrounding circumstances that suggested (objectively speaking) two competing but equally reasonable interpretations of their contract, and reversed the summary judgment.[16] Thus, when examining an employment agreement, the courts will examine not only the written agreement itself, but also "the circumstances leading up to and surrounding the writing."[17]

Consider, however, *Miller v. Arctic Alaska*, 133 Wn.2d. 250 (1997). A seaman on an Alaskan crab-processing boat was injured when, in separate events, a door smacked his knee, a 500 lb.

crab cage struck his back, and boiling water seared his buttocks (all this on one voyage of the good ship Westward Wind!). The injured seaman sued for breach of contract, negligence, and under the Jones Act, for maintenance and cure, punitive damages and attorneys' fees. At the close of trial, the trial judge dismissed the breach of contract claims, among others, leaving only negligence for the jury. The jury found 50 percent contributory negligence, and awarded the net miserly award of $687. The Court of Appeals reversed based on an ER 904 error (an issue worth studying in itself). The Supreme Court, however, reversed again and reinstated the jury verdict.[18]

The issue of contract law revolved around the seaman's written employment agreement. Federal law required the maritime employer and its employee to set forth in writing the length and pay of the job. Although the seaman wanted the trial court to consider extrinsic evidence about his understanding of the employment agreement, the Supreme Court nixed the idea.[19] Citing general *Berg* principles, the Washington Supreme Court explained that extrinsic evidence could not be used to alter the written terms of an agreement. More interestingly, however, the Supreme Court also wrote that:

> We do not believe where federal law requires the maritime employer and seaman to agree in writing on the length and terms of employment we will permit variation of the terms of the agreement by parole evidence.[20]

In *Syputa v. Druck, Inc.*, 90 Wn.App. 638 (Div. 1 1998), the Court considered a contract for commissioned sales in the aerospace industry. The employer paid commissions on orders placed during the term of employment, but refused to pay commissions or orders placed after the date of termination. The plaintiff sales representative's claims based on contract were denied by the trial court on summary judgment, and the appellate court affirmed. The Court was unwilling to admit parole evidence that the parties agreed to additional terms because, under standard *Berg* analysis, the parties could not, with parole evidence, import into a written contract words or intentions not contained within it.[21]

The *Syputa* Court did, however, resuscitate the sales representative's claims for post-termination commissions under the procuring cause doctrine. As the Court explained, you generally can terminate a sales agent at will, but you cannot terminate an agent's right to compensation if the agent caused a sale. "In the absence of a contractual provision specifying otherwise, the procuring cause doctrine acts as a gap-filler."[22] Thus, the Court tipped its hat to *Berg*, but still found a way to permit factual consideration of compensation beyond the scope of the written employment agreement.

Landlord Tenant Law

A landlord-tenant case worth reviewing is *Pacific N.W. Group A v. Pizza Blends*, 90 Wn.App. 273 (Div. 1 1998). The Court of Appeals reversed summary judgment in favor of the landlord in a commercial tenancy. Although the written lease agreement of the parties clearly prohibited oral modifications, the Court pointed out that "no-oral-modification clauses have consistently been deemed unenforceable in this state."[23] "A paradox of the common law is that a contract clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification."[24] Thus, the Appellate Court reversed summary judgment in favor of the

landlord and remanded to the trial court the factual question of whether there was an oral lease modification agreed to by the parties.[25]

Family Law

In re Marriage of Sievers, 78 Wn.App. 287 (Div. 1 1995) is a rags-to-riches-to-rags story involving the dissolution of a couple who made millions in the adult "1-900" telephone business. In nine years of marriage, the couple's fortunes went from "nada" to about $10 million. Husband and wife entered into a property settlement agreement that, ultimately, allocated money and stock. Tax liabilities were to follow the distributed assets and, accordingly, be shared.[26] In a roughly hewn late-night settlement memorandum, the parties set forth, somewhat inarticulately, their intentions regarding tax liabilities. Thus everyone was happy – until the IRS came calling, seeking about two million dollars in unpaid taxes!

The ex-husband had written a detailed memorandum to his accountant describing his anxiety about the tax liabilities. In the memorandum, the ex-husband told his accountant he sought accounting advice that would saddle his ex-wife with a disproportionate share of the federal income-tax burden. Nevertheless, the ex-husband wrote his accountant, "I hope the advice is that we can accept this [language in the property settlement agreement] as written so we don't have to discuss this, and draw their attention to a problem that they have not focused on."[27]

The ex-wife testified that her understanding of the property settlement agreement was that there was no problem to focus on in the first place; taxes were to be shared and tax liabilities were to follow the assets.[28] In other words, just like the old gypsy curse, the ex-husband got exactly what he wished for. The trial court concluded that the parties both agreed in their understandings that the property settlement agreement meant exactly what it said: the ex-wife thought there was no tax problem to focus on, the ex-husband knew she had not focused on the tax problem, and, as written, the agreement said exactly what both parties thought it said. This is one of those contract situations where it does not pay to leave some ambiguous language in a contract provision that you know the other party simply has not considered. The Court of Appeals, in a complicated mixed-bag decision on various issues, ultimately found there was no need to allow the ex-husband to introduce extrinsic evidence about the divorcing couple's actual intentions in executing the property settlement agreement. There really had been a meeting of the minds; the plain language of their agreement proved it. Thus, no extrinsic evidence was necessary or permitted.[29] Compare this with the insurance cases previously discussed.

In re Marriage of Sievers was cited in *In re Marriage of Boisen*, 87 Wn.App. 912 (Div. 2, 1997). Once again, the divorced parties disputed the meaning of their separation agreement (and its tax ramifications). Once again, the Court tried to ascertain their intent by examining the objective manifestations of their intent in the written agreement itself, and by examining the context of the agreement.[30] Although one party thought the unintended tax consequence of the property settlement agreement was so grossly unfair that the agreement had to be reformed, the Court of Appeals declined to do so. It focused not on the current situation of the parties, but on both of their subjective beliefs about what the language of the agreement meant in the first place. The parties initially had agreed, and the language of the agreement supported their subjective understandings at the time they signed it. By split decision, the Court of Appeals affirmed the

trial court's judgment because it was based on fundamental fairness as well as the intent of the parties.[31]

In re Marriage of Monaghan, 78 Wn.App. 918 (Div. 2 1995) was a case involving a dentist and his wife. The Court of Appeals reversed the judgment of the Superior Court. At issue was the wife's right to part of the proceeds from the post-dissolution sale of her husband's dental practice in the context of their decree of dissolution. The Court of Appeals held that the trial court's finding of facts was insufficient to explain its ultimate conclusion.[32] More interestingly, however, the Court of Appeals cited the wife's *Berg* argument that the trial court had mistakenly failed to interpret the sale of the dental practice as a whole, rather than simply consider the transaction documents themselves.[33] The issue revolved around the valuation of a closely held business, the value ascribed to goodwill, and whether a covenant not to compete was a business asset. These were all "big picture" and contextual issues which the Appellate Court held the trial court needed to consider before it could decide whether the spouse was entitled to an award of money from the sale of the dental practice.[34] The unmistakable *Berg* theme of the Appellate Court decision was that fairness and common sense had to prevail over a literal interpretation of a contract.

In re Marriage of Schweitzer, 132 Wn.2d 318 (1997) is a family law case that laps at estate planning issues. The disputants married but kept their separate assets separate. Prior to Mr. Schweitzer embarking on a major vacation, he and his wife sauntered over to their local business-supply store, purchased and signed a standard-form community property agreement.[35] This was a three-pronged agreement that, according to both parties, they intended would provide for Mrs. Schweitzer in the event of Mr. Schweitzer dying during his vacation. Mrs. Schweitzer, however, also testified that the first prong of the community property agreement was intended to be permanent, i.e., if her husband died on his travels, all their separate property would still be unquestionably converted to community property.[36] "Gadzooks!" exclaimed Mr. Schweitzer (or something similar, I am sure), because he did not recall having even read the community property agreement in the first place!

The trial court found the community property agreement was really an estate planning document and did not express the intent of both parties to permanently convert separate property into community property. Both the Court of Appeals and the Supreme Court disagreed with the trial court, however. The factual record showed that, although their long-term intentions might have differed, they both agreed that the agreement served to convert their separate property into community property. Beyond that, however, the Supreme Court would not go. The essential and initial paragraph of the boilerplate three-pronged community property agreement converted separate property into community property. The parties had never revoked that paragraph. Although Mr. Schweitzer trotted out *Berg* to show what his intent was *not*, the Court would not allow extrinsic evidence to delete the clear written terms of the agreement.[37] There had been no fraud and no mutual mistake, and there could be no sympathy for a man who had freely signed what he had not read. Therefore, the Court also refused to void the agreement.[38]

Real Property

In the arena of real estate law, contract cases decided in the last five years generally adhere to the *Berg* principles described above – with some twists. One twist pertains to restrictive covenants.

Two cases involving restrictive covenants reported in 1994 were *Shafer v. Board of Trustees*, 76 Wn.App. 267 (Div. 1 1994), and *Thorstad v. Federal Way Water & Sewer*, 73 Wn.App. 638 (Div. 1 1994). In both cases, the Court of Appeals cited liberally to *Berg* and used *Berg*-like analysis to ascertain the intentions of the affected parties.

In *Shafer*, the Court affirmed summary judgment for a non-profit corporation which had developed a residential community on Whidbey Island. The two themes in *Shafer* were that: (1) extrinsic evidence was always admissible to understand the context of a restrictive covenant, even if the language of the covenant was not ambiguous; and 2) unambiguous language in a restrictive covenant will be enforced as written, unless its terms are unclear or susceptible to more than one reasonable meaning. 76 Wn.App. at 275.[39]

Likewise, in *Thorstad*, the Court accepted extrinsic evidence of the contracting parties' intent, both before and after the execution of their agreement, as an aid in understanding whether an otherwise buildable lot was burdened by a decades-old covenant that prohibited construction. In counterpoint to the panel which had decided *Shafer*, however, the *Thorstad* Court focused less on the covenant and more on the real-estate transaction itself. Partly reversing and partly affirming the trial court, the Court of Appeals found that the contracting parties themselves had never even considered the restrictive covenant when they did their deal, and the covenant itself was not recorded until after the transaction, nor was it ever executed.[40]

By 1997, however, the Court of Appeals' analysis of restrictive covenants had become a blunter instrument. Thus, in *Ackerman v. Sudden Valley Community Association*, 89 Wn.App. 156 (Div. 1 1997), the Court wrote that the interpretation of a restrictive covenant is a question of law, and clear, unambiguous language in a restrictive covenant will be interpreted exactly as it reads. *Hollis v. Garwall, Inc.*, 86 Wn.App. 220 (Div. 3 1997) gave the nail an additional whack when it cited *Mountain Park Home Owners Association, Inc. v. Tydings*, 125 Wn.2d 337, 344 (1994), for the proposition that "[a] court must construe restrictive covenants by discerning the intent of the parties as evidenced by clear and unambiguous language in the document." To drive the message home, the *Hollis* Court wrote:

> The applicability of the context rule announced in *Berg* to the interpretation of restrictive covenants is impliedly rejected by *Mountain Park Home Owners Ass'n, Inc. v. Tydings,* 125 Wn.2d at 344: "A court must construe restrictive covenants by discerning the intent of the parties as evidenced by clear and unambiguous language in the document.... *Only in the case of ambiguity* will the court look beyond the document to ascertain intent from surrounding circumstances." 87 Wn.App. at 225. [emphasis added]

To the practitioner, it is unclear whether the law pertaining to restrictive covenants has evolved back to where it was before *Berg*, whether *Berg* never really changed anything in the first place, or whether sloppy language in certain reported cases has created an opportunity for others to try to turn back the clock. The wise practitioner knows, however, that while jurisprudential questions are best left for law-school professors, the most recent statement of the law is the one that will carry the weight with your trial judge.

In some real-estate contract cases, the *Berg* rules have become very streamlined. Thus in *State v. Brown*, 92 Wn.App. 586 (Div. 2 1998), the Court of Appeals affirmed summary judgment in favor of the state in a drug forfeiture of 20 acres of land used for marijuana agribusiness.[41] Stripped of citations, the Court wrote:

> In construing a written contract, basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous. Interpretation of an unambiguous contract is a matter of law. If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.[42]

Paradoxically, even though a contract may be unambiguous, a court may still grant summary judgment for the wrong party. A case in point is *Meyer v. Consumers Choice,* Inc., 89 Wn.App. 876 (Div. 1 1998). The issue was whether $25,000 deposited by a buyer of a Bellingham site for a prospective supermarket was "earnest money." How this sum was characterized was relevant because, relative to the land's purchase price, the true earnest money either did, or did not, exceed five percent of the sales price. This, in turn, was relevant because, under RCW 64.04.005, forfeiture of the earnest money was the exclusive remedy for breach of the real-estate purchase and sale agreement if the earnest money did not exceed five percent of the purchase price.

The trial court found the contract language was unambiguous – only $10,000, not $25,000, was the earnest money amount. Therefore, the earnest money was less than five percent of the purchase price, and the would-be buyer's lawsuit for specific performance and for damages was dismissed on summary judgment.[43] The Court of Appeals, on the other hand, examined the exact same purchase and sale agreement, also found the issue of the earnest money amount unambiguous, but held that it totaled $25,000, not $10,000. Therefore, the earnest money exceeded five percent of the purchase price and summary judgment should have entered for the buyer.[44]

There is yet another wrinkle in real estate contract law that is worth noting. In *Olson v. Trippel*, 77 Wn.App. 545 (Div. 2 1995), the Court of Appeals reversed the trial judge's grant of summary judgment in favor of defendants and granted summary judgment to plaintiffs. The case concerned a written easement agreement that predated the current owners of the appurtenant properties. Defendants built a fence to block the easement across their property, and plaintiffs sued to maintain it in a quiet title action. The parties both relied on the recorded documents, but the defendants also introduced, and persuaded the judge to rely upon, four affidavits concerning their intentions in acquiring their property.[45] The affidavits were all extrinsic to the public record, and all related to events predating the plaintiffs' acquisition of their property. Although the trial judge held that "evidence of the intent of the parties is always admissible,"[46] the Court of Appeals threw out the affidavits altogether. The Court wrote:

> Assuming without holding that the context rule may be applied in a dispute between an original grantor and an original grantee of real estate, it cannot be applied in a dispute between an original party and a subsequent purchaser who is not under a duty of inquiry. To hold otherwise would be to require that a subsequent purchaser investigate not only the chain of title, but also the "context"

> within which each conveyance in the chain was executed. That would be an impractical burden, perhaps an impossible one, and would virtually destroy the utility of the real-estate recording system.[47]

In granting summary judgment to the plaintiffs, the Court of Appeals stated its holding unequivocally: "[W]e hold that in a dispute involving a subsequent purchaser of real estate, as opposed to a dispute between the original grantor and grantee, the inquiry rule displaces the context rule."[48]

Business

Washington courts apply *Berg* analyses to general and special types of business-related lawsuits. Thus, in *Confederated Tribes v. Johnson*, 135 Wn.2d 734 (1998), the Washington Supreme Court recited the standard *Berg* touchstones in the context of a suit to prevent public disclosure of information relating to tribal-state gambling compacts. As in so many previous cases before it, however, the Supreme Court affirmed the principle that no extrinsic evidence (and, specifically, not an after-the-fact declaration of "intent") should be considered if: (1) the extrinsic evidence tended to change the meaning of what was written; and (2) that the meaning of the agreement was apparent in itself.[49]

Nevertheless, a lawyer is cautioned to carefully define terms in a business agreement that one ordinarily takes for granted. Otherwise, a loosely defined or undefined term can become the proverbial hole big enough to drive a truck through. A case in point is *Chatterton v. Business Valuation Research, Inc.*, 90 Wn.App. 150 (Div. 3 1998), a quirky little case in which a minority shareholder of a closely held business sued a mutually agreed-upon business evaluator (as well as the minority share-holder's own business from which he was retiring) in order to upset the buy-out price established by the business evaluator.

The key issue was the meaning of the word "value," as used in the parties' agreement for the business valuation by a third party. The court found the word "value" was undefined and "inherently ambiguous." It could mean, for example, "fair value, intrinsic value, market value, fair market value, true value, liquidation value, earnings value and actual value."[50] Thus, the Appellate Court upheld the trial court's consideration of the "circumstances surrounding the formation of the agreement," and held that the business evaluator was wrong to conclude that the business's fair market value was its liquidation value.[51] Rather, the Court agreed that the circumstantial evidence showed the parties intended that the business be valued as a going concern — a 100 percent gain to the retiring minority shareholder.[52]

In another lawsuit between "friends," *DeBenedictis v. Hagen*, 77 Wn.App. 284 (Div. 2 1995), the Appellate Court affirmed the trial court's decision not to award any fee to a collection agency hired by the one friend to "motivate" his debtor buddy to make good on the balance of his $45,000 debt. The lender had signed a form agreement with Vito DeBenedictis, proprietor of the collection agency. When the lender ultimately settled up directly with his old friend and paid no collection fee to Mr. DeBenedictis, he sued for his 35 percent commission.

The debt collector contended that the written agreement between his company and the lender proved without question that the lender had sold the claim to him. The lender, on the other hand,

contended that he had only entered into a principal-agent relationship that he terminated prior to settling with the debtor.[53]

The courts looked beyond the mere language of the collection agreement and examined the context in which it came about. That context, in combination with the language of the agreement itself, caused the Appellate Court to agree with the trial judge that the litigants' relationship was an assignment for collection, rather than a complete sale of a claim.[54]

Indeed, the Washington Supreme Court has held that "[i]nterpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence." *Tanner Electric Cooperative v. Puget Sound Power & Light*, 128 Wn.2d 656, 674 (1996) (summary judgment reversed in contract dispute regarding which utility had the right to provide electric power to a large industrial customer straddling their service boundaries).

Another corollary to the *Berg* rule sometimes surfaces in business-contract litigation: the parties are presumed to contract in the context of existing law. In *State v. Farmers Union Grain Co.*, 80 Wn.App. 287 (Div. 3 1996), the Court affirmed a 100 percent condemnation award in favor of the owner of a WASHDOT-condemned building, and denied a tenant's claims to a portion of the condemnation proceeds. At issue was the meaning of a condemnation clause contained in the lease between the owner and the tenant.

The Court not only examined the factual context of the lease and the parties' testimony about what they thought they were trying to accomplish, but also considered the existing statutes and rules of law that pertain to judicial condemnation.[55] This is consistent with what the Washington Supreme Court wrote in 1996 in the *Tanner Electric Cooperative* case: "Contractual language also must be interpreted in light of existing statutes and rules of law." *Tanner Electric Cooperative v. Puget Sound Power & Light*, 128 Wn.2d 656, 674 (1996), citing 3 Arthur L. Corbin, Contracts § 551, at 198 (1960). This is not so much another rule of contract interpretation as a rule of common sense. No matter how unambiguous the contract, and no matter what the intentions of the contracting parties, the courts will not enforce an illegal contract or one that makes no sense in the context of legal precedent.

Conclusion

This survey of contract cases should not lead you to the conclusion that the legacy of *Berg v. Hudesman* was chaos and anarchy in contract law. Where it should lead you is to the realization that our Washington courts are not always bound by the written language of contracts to give effect to absurd or unfair consequences. This is bad if you want to gain from a literal, absurd and unfair result, but good for the general principles of what the legal system should do.

On the other hand, the *Berg* legacy has also limited the extent to which courts may throw out wholesale carefully crafted and clear contract language. If there is any theme which permeates all of these cases, it is that the courts will not permit an equally absurd and unfair result to occur by admitting extrinsic evidence that concocts ambiguities.

Ultimately, *Berg* and its progeny are mere tools that lawyers and judges can use to do better justice in contract law than could be done by a more rigid, black-and-white, four-corners-of-the-

document rule of analysis. Though we live in an age of technology and precision, the *Berg* approach to contract analysis reaffirms that contracts are agreements between people, not machines. The human insight of a judge into the context of an agreement and the intent of the parties may be the most just, if not the most efficient, method of resolving contractual disputes.

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NOTES

[1] 115 Wn.2d 657 (1990).

[2] In fact, Berg did not create the context rule in Washington. It merely harmonized the prior confusion in the cases which sometimes cited the "four corners" of a contract as the courts' divining rod and sometimes cited the "context rule."

[3] 115 Wn.2d at 663, quoting Corbin, The Interpretation of Words and the Parole Evidence Rule, 50 Cornell L.Q. 161, 162 (1964-65).

[4] For an overview of Washington cases discussing Berg, *see Contract Litigation Post Berg v. Hudesman, Did Your Black & White Contract Turn a Lighter Shade of Pale* by Steven A. Reisler, published in two parts in *Bar News*, June and July 1994.

[5] This survey is not intended to cover every reported case of contract litigation. It begins roughly where the 1994 survey left off. See footnote 3, above.

[6] *See,* generally, City of Bremerton v. Harbor Ins. Co., 92 Wn.App. 17, 21-22 (Div. 2 1998).

[7] *Id.* at 689-90. Although the dissenters in Lynott contended that the directors and officers insurance policy was clear and unambiguous as written, the fact that the nine Justices of the Supreme Court could not even agree among themselves what the pertinent language meant, must mean ipso facto that it truly was ambiguous. 123 Wn.2d at 698.

[8] *Id.* at 630.

[9] *Id.* at 878-79.

[10] *Id.* at 570-71.

[11] *Id.* at 784.

[12] *Id.* at 884-85.

[13] *Id.* at 528-529.

[14] *Id.* at 529.

[15] *Id.* at 951.

[16] *Id.* at 9-10.

[17] *Id.* at 8.

[18] *Id.* at 269.

[19] *Id.* at 267.

[20] *Id.* This begs the question: Is the context rule of contract interpretation out of context when the contract is subject to federal mandates? Or does this exception apply to any contract that must be in writing, such as contracts for real estate subject to the statute of frauds? Compare Jones v. Best, 134 Wn.2d 232 (1998), in which the Washington Supreme Court reversed the Court of Appeals and reinstated summary judgment for plaintiff in a real estate commission dispute. Jones

turned on an analysis of an attempted, but unsuccessful modification of a valid contract, i.e., there must be mutual assent to modify a contract. *Id.* at 240. The dictum, though, was more interesting:

Having decided there was no modification of the original, written contract, we need not determine the outcome of this case under the Statute of Frauds. We note only that contracts for the sale of land are required to be in writing, as are agreements authorizing agents to sell or purchase real estate for a commission. It is well settled that subsequent oral agreements to modify such contracts can run afoul of the Statute of Frauds if not performed. We do not reach this issue because there was no agreement, oral or otherwise, to modify the valid written contract. *Id.* at 241.

[21] *Id.* at 644-45.

[22] *Id.* at 645-46.

[23] *Id.* at 281.

[24] *Id.* at 277-78.

[25] *Id.* at 280-82.

[26] *Id.* at 293.

[27] *Id.* at 295.

[28] *Id.* at 295-96.

[29] *Id.* at 303-304.

[30] *Id.* at 920. At issue was whether the former wife could collect reimbursement from her ex-husband for his share of the hundreds of thousands of dollars it cost to give their kids a college education.

[31] *Id.* at 921.

[32] *Id.* at 925.

[33] *Id.* at 924.

[34] *Id.* at 926-929.

[35] This is the perfect "do-it-yourself brain surgery" story to tell your clients who ask why they should pay you to prepare a standard legal document that they can buy for a few bucks at a bookstore.

[36] *Id.* at 322-323.

[37] *Id.* at 326-327.

[38] *Id.* at 327-328.

[39] The essential subplot of the case was that restrictive covenants could be applied to everyone who, knowingly or unknowingly, had bought into the community's by-laws and plat restrictions; and, furthermore, that more stringent covenants could, through authorized processes, later be imposed even on those who did not want or know about them.

[40] *Id.* at 643-644.

[41] Criminal law aficionados will love this twisty little bar-exam-like case that interweaves contract law, Oregon's civil RICO law, Washington's Criminal Profiteering Act, the Uniform Controlled Substances Act and real estate law.

[42] *Id.* at 594.

[43] *Id.* at 879-880.

[44] *Id.*

[45] *Id.* at 549.

[46] *Id.* at 550.

[47] *Id.* at 553.

[48] *Id.*

[49] *Id.* at 752.

[50] *Id.* at 156.

[51] *Id.* at 156.

[52] *Id.* at 156-157.

[53] *Id.* at 286-287. This was not the only factual dispute. The lender testified how he told the collector that he was a friend of the debtor, and that he did not want undue pressure brought to bear. The collector, on the other hand, testified that the lender "was hoping that [DeBenedictis] was gonna jack the man up [sic.]," and that he was told, "I don't care what you do to that man…whatever you want to do, whatever way you want to do it, just get me my money."

[54] *Id.* at 292-293. The court did believe that the collector could have pursued a claim *in quantum meruit* for his contingent services rendered up to the time of the allegedly wrongful discharge of his agency. The court pointed out, however, that the collector had failed to introduce evidence to support a claim for the reasonable value of his services.

[55] *Id.* at 292-293.