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Feature

***209** WHAT'S HAPPENING TO THE PAROL EVIDENCE RULE? MORE HOLES IN THE DIKE

Increasingly and alarmingly, parties face greater risks of losing their contractual bargains, no matter how unambiguous they may seem.

I SAY to-mah-toe; you say to-ma-toe. Do we have a meeting of the minds? Should a court hear evidence to understand what we mean by "tomato?"

It appears the same judicial trends that are making it easier and more lucrative to blame others in tort contexts now are invading the contractual arena to increase an unsatisfied party's chances of avoiding or altering unambiguous contractual obligations.

Sanctity of contract has been a hallmark of American commerce. One of the guardians of this sanctity has been the parol evidence rule, which was developed to prevent contracting parties from trying to offer evidence to vary the terms of an unambiguous contract. Unfortunately, creative lawyers have persuaded some courts to effectively abandon the rule. The result is creating uncertainty in contractual relationships, turning contract interpretation into a sophomoric exercise that undermines expectations of certainty.

CONTEXTUALISM V. TEXTUALISM

A. General

The rule derives its names from the French word parole, meaning a spoken or an oral word. This term has become a misnomer, however, because the rule now refers not only to oral, but also to written evidence. In addition, commentators agree that the rule is not a rule of evidence because it does not deal with a proper method of proving a question of fact. Rather, it is a rule of substantive law that prohibits the admission of the fact itself. [FN1]

The parol evidence rule is not a clean one-owner. More than a century ago, Professor Thayer, speaking to the complexity of the rule, said, "Few things in our law are darker than this, or fuller of subtle difficulties." [FN2] While the rule is subject to multiple interpretations and formulations, it generally prohibits the admission of extrinsic evidence that contradicts or supplements an integrated written agreement. The rule applies to evidence of prior negotiations and excludes any oral and written agreements made after the written contract was executed. Some commentators agree that the rule is also applicable to contemporaneous agreements. [FN3]

Professor Corbin's formulation of the rule is:

***210** When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. [FN4]

Professor Williston, the principal drafter of the Restatement (First) of Contracts and the Uniform Sales Act, states the rule similarly:

This rule requires, in the absence of fraud, duress, mutual mistake, or something of the kind, the exclusion of

extrinsic evidence, oral or written, where the parties have reduced their agreement to an integrated writing. [FN5]

The rationale for the Rule was explained as early as the 17th century by English Chief Justice Popham, who said:

It would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. [FN6]

B. Issues of Integration

The first issue in applying the rule is to determine the scope of the written document--that is, whether the parties intended the writing at issue to be the final and complete expression of their agreement. If the parties did not intend to do so, the agreement is not integrated and the rule has no application. Once it is determined that the agreement is integrated, courts examine the parties' intent to decide whether integration is partial or complete.

Complete integration occurs when parties intended the writing as a "complete and exclusive expression" of the agreement, and no terms can exist beyond those set in the written contract. Traditionally, in such a case neither party can introduce extrinsic evidence that contradicts the written contract. Under the textual, more traditional approach of contract interpretation advocated by Professor Williston, if a written contract appears on its face to be a complete expression of the agreement, the court will consider the writing to be completely integrated and will not permit parol evidence of additional or contradictory terms. [FN7]

This approach is illustrated in Gianni v. R. Russel & Co., [FN8] a 1924 case in which a tenant agreed in a written lease to operate a store and use the premises only for the sale of soft drinks and candy, and not for sale of tobacco. Later, the tenant alleged that his agreement not to sell tobacco was in consideration of an oral promise of the landlord to give the tenant the exclusive right to sell soft drinks in the building. The court considered the writing on its face and found it was completely integrated, reasoning that the contracting parties would ordinarily and naturally have included a promise for the exclusive sale of soft drinks, if that was were their intention.

On the other side of the spectrum is Professor Corbin, who supported a contextual approach of contract interpretation. He believed that in determining integration courts should take into consideration all relevant circumstances, including evidence of prior negotiations. Thus, a court following Corbin's view would have considered all evidence surrounding the making of the lease in Gianni, including the alleged oral promise, and could have found that the lease was not completely integrated.

Some commentators have noticed that Corbin's approach "undercuts the traditional parol evidence rule" because the very evidence whose admissibility is challenged "is admissible on the issue of whether there is a [complete] integration." [FN9] ***211** Precisely. And if Corbin's view were the law in all situations, parties to contracts would have much less incentive to integrate their agreements, knowing they could come in later to supplement the language with other evidence of their intent.

Partial integration occurs when the parties intended the written contract "to be a final expression of the terms it contains, but not a complete expression of all the terms agreed upon--some terms remaining unwritten." [FN10] An example would be the following situation. A sends a letter offer to B which contains four provisions. B in the reply letter agrees to three provisions and makes a counteroffer regarding the fourth one. The parties orally agree to revise the fourth provision, but they do not discuss the first three provisions. A's offer would be partially integrated as regards the first three provisions. [FN11] If the court finds the written contract is only partially integrated, then it will allow the parties to introduce evidence that supplements, but does not contradict, the writing.

C. Issues of Contract Interpretation

After determining the scope of the writing, courts turn to the interpretation of the language of the agreement. Courts usually allow the introduction of extrinsic evidence when the language of the written contract is ambiguous, but controversy arises when the writing appears to be unambiguous on its face. [FN12] Under Williston's view, the court will admit evidence of prior negotiations only after first finding as a matter of law that the language of the

writing is ambiguous. On the other hand, Corbin thought that the court should admit all relevant evidence without first finding facial ambiguity in the writing.

Williston believed that a judge should follow the "common or normal meaning" of the language of the writing in searching for the intent of the parties. For him, the language of the writing was the only admissible evidence of the parties' intent. Therefore, if the judge, using common sense and general canons of contract interpretation, finds that the language of the writing is unambiguous as a matter of law, the inquiry of extraneous evidence stops, and Williston would exclude what the parties subjectively believed the written contract means. If the judge finds ambiguity, then evidence of prior negotiations would be admitted to resolve the ambiguity. [FN13]

Contrary to Williston, Corbin looks outside the written agreement to understand the intent of the parties. He believed that the writing itself could not be used as the sole evidence of the parties' intent. His approach has been adopted by the Restatement (Second) of Contracts. [FN14]

In Corbin's view, there is no need to make a preliminary finding of ambiguity before the judge considers extrinsic evidence. Even if the integrated writing is unambiguous, the court may consider evidence surrounding the agreement to determine its relevance to the parties' intent. That evidence includes evidence of subjective intention, of prior negotiations, and what the parties may have said to each other about the meaning of the writing.

After purportedly ascertaining the meaning of the writing, the court applies the parol evidence rule to exclude from the fact finder's consideration only the evidence that contradicts or varies the meaning of the agreement. According to Corbin, one may not determine whether a writing can be supplemented or contradicted without knowing the meaning of the writing. [FN15]

In response, some commentators have noted "a certain circularity of reasoning in this contention; the content of the contract ***212** to be interpreted cannot be known until the parol evidence rule has been consulted." [FN16] It is doubtful that one can truly determine whether a proffered testimony contradicts a writing when the meaning or intent of the writing has not yet been determined. But even Corbin admits a line must be drawn somewhere--for example, where the asserted meaning of the contract language is so unreasonable it is unlikely that the parties actually agreed to the interpretation asserted by the party offering extrinsic evidence. At what point a judge stops "listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense." [FN17] Thus, while lip service is given to the parties' objective intentions, the figurative buck stops at the judge's desk, even according to Corbin.

The parol evidence rule has been subject to two primary, but different, approaches: Corbin's (contextual) and Williston's (textual). Williston's approach encourages parties to be careful and precise when creating a written contract, thus eliminating the risk of perjured testimony and slippery memories. Corbin's approach, on the other hand, lends itself to uncertainty by permitting parties to use extraneous evidence, including self-serving testimony, to vary or avoid any contract that no longer satisfies them.

TREATMENT BY AMERICAN STATES

A. California

The controversial decision by the California Supreme Court in Pacific Gas & Electric Co. v. GW. Thomas Drayage & Rigging Co., [FN18] is among the more infamous attacks on the textual approach. In Pacific Gas, the plaintiff and defendant entered into a contract under which the defendant had to furnish labor and equipment in order to remove and replace the metal cover of the plaintiff's steam turbine. The dispute arose from the contract provision under which the defendant agreed to indemnify the plaintiff "against all loss, damage, expense and liability resulting from ... injury to property, arising out of or in any way connected with performance of this contract."

The defendant offered extrinsic evidence supporting his view that the parties meant to cover injury to the property of third parties, and not injury to the plaintiff's property. The trial court ruled that under the plain meaning of the contract, the defendant had to indemnify the plaintiff for injuries to the plaintiff's property.

The California Supreme Court, speaking through then-Chief Justice Traynor, rejected the plain meaning rule and held that such an approach ignored the relevance of the intention of the parties. The court stated that the intention of the parties can never be ascertained by just examining the language of the document without considering the surrounding circumstances. Traynor reasoned that when a court invokes the plain meaning rule, it interprets the contract only according to the "judge's own linguistic education and experience."

In place of the plain meaning rule, Justice Traynor used a two-step process.

First, the court must determine whether the contract, even seemingly unambiguous, is ambiguous by considering all "circumstances surrounding the making of the agreement ... including the object, nature and subject matter of the writing ... so that the court can 'place itself in the same situation in which the parties found themselves at the time of contracting.'" [FN19] This implies it should be a simple matter for trial judges to place themselves in the "same situation" as the contracting parties, in spite of the fact that each argues for an inconsistent interpretation.

***213** Query also whether it is possible for someone who was not part of the making of the original agreement to ascertain the true meaning of that agreement from self-serving testimony, sometimes false or unreliable, offered by the parties. The court will always be limited to interpretations that have been presented by the parties. Judges' decisions may not be based on what the contract states that the parties really intended, but may ultimately depend on the skills and entrepreneurial abilities of the parties offering evidence.

Under the second step of the Traynor approach, if the court decides that the contract language is "fairly susceptible" to either of the offered explanations, the court must admit all offered evidence that is relevant to proving the competing interpretations.

This approach was roundly criticized in the Ninth Circuit by Judge Kozinski in Trident Center v. Connecticut General Life Insurance Co., [FN20] in which a partnership borrowed money for an office building complex. The promissory note explicitly provided that the borrower had no prepayment right for the first 12 years of the loan. When interest rates started falling, the partnership wanted to refinance the loan, and it sued the lender, contending that under Pacific Gas, when interpreting even seemingly unambiguous contracts, courts should consider extrinsic evidence. The partnership contended that the language of the promissory note was ambiguous because another clause of the note provided for prepayment in the event of default.

The Ninth Circuit rejected the partnership's argument, Judge Kozinski stating that Pacific Gas creates a "shadow of uncertainty" where none would exist under the more textual approach. He acknowledged that "even if [the transaction] involves only sophisticated parties, even if it was negotiated with the aid of counsel, even if it results in contract language that is devoid of ambiguity, costly and protracted litigation cannot be avoided if one party has a strong enough motive for challenging the contract." However, because the action was based on diversity jurisdiction, the court was bound by the Erie doctrine, and it had to apply California law allowing the partnership to introduce extrinsic evidence.

While Pacific Gas is officially still good law in California, the California Supreme Court appears to have started moving away from the contextual approach. At least in Neddloyd Lines B.V. v. Superior Court, [FN21] the court found that a contract containing a choice-of-law clause was unambiguous on its face. The court also recognized a very important policy behind the textual approach to the parol evidence rule that written contracts "subject to alteration by self-serving recitals based upon fading memories of antecedent events ... [are a] serious impediment to the certainty required in commercial transactions." [FN22]

B. Contextual Approach in Other States

Courts in several other jurisdictions, including Alaska, [FN23] Vermont, [FN24] Washington, [FN25] ***214** Texas [FN26] and Arizona, [FN27] similarly to the court in Pacific Gas, appear to follow the contextual approach to the parol evidence rule. However, application varies by state. While some states, like Arizona, would allow parties to introduce any extrinsic evidence, other jurisdictions, like Vermont, would consider only limited extrinsic evidence, and sometimes even none at all.

An example of the contextual approach is found in Taylor v. State Farm Mutual Automobile Insurance Co. [FN28] In Taylor, the Arizona Supreme Court held that courts may admit extrinsic evidence without any preliminary finding of ambiguity because the main purpose of contract interpretation in Arizona is to enforce a contract according to the intent of the parties. Acknowledging that Arizona courts have adopted the Corbin contextual approach, the court established a two-step analysis.

Under the first, the court examines all of the proffered evidence to determine the extent of integration and its relevance to the parties' intent, to illuminate the meaning of the contract language. Then, if evidence is offered that contradicts or varies the language of the document, the court may not allow its introduction. If the court decides that the language is "reasonably susceptible" to the parties' interpretations, it will allow the evidence to ascertain the meaning the parties intended. Under the second step, the court "finalizes" its understanding of the writing. At this point, the court may preclude admission of extrinsic evidence that contradicts or varies the meaning of the written words.

On the other hand, in Vermont, where the courts recognize the "surrounding circumstances" approach, they apply it very narrowly. In determining whether ambiguity exists, the court considers the "limited extrinsic evidence of 'the circumstances surrounding the making of the agreement,'" which evidence must be relevant, meaning that "in combination with writing, it supports an interpretation that is different from that reached on the basis of the writing alone, and both are reasonable." [FN29]

In addition, courts in Vermont will not consider surrounding circumstances that directly contradict the written agreement. For example, the Supreme Court of Vermont in Tilley v. Green Mountain Power Corp., [FN30] found that one party's verbal assurance of its understanding of an easement deed was in contradiction with the "later written expression of agreement." The court, therefore, concluded that the easement deed was unambiguous on its face.

C. Textual Approach in Other States

There are several jurisdictions, including Arkansas, [FN31] Georgia, [FN32] Idaho, [FN33] Montana ***215**[FN34] and Pennsylvania [FN35] that continue application of the traditional approach.

For example, in Student Loan Guaranty Foundation of Arkansas v. Barnes, Quinn, Flake and Anderson, [FN36] the Court of Appeals of Arkansas considered whether the agreement under which a nonprofit corporation engaged the real estate broker as its exclusive agent to assist the corporation in locating office space was ambiguous. The corporation bought a parking lot without the help of the broker. It contended that the acquired property did not constitute "office space" within the meaning of the contract between the parties and that the broker was not entitled to a commission.

The court stated that the initial determination of the existence of an ambiguity rests with the court and if ambiguity exists, then parol evidence is admissible and the meaning of the terms becomes a question for the fact finder. The court considered the agreement on its face and found that a parking lot did not meet the dictionary definitions of "office space." The court, therefore, construed the written agreement according "to the plain meaning of the language employed" [FN37] and did not allow the introduction of parol evidence.

D. The Utah Flip-flop

One need look only to one state's jurisprudence, in which decades of textualism was implicitly but not explicitly abandoned, to see how changing to the contextual approach has led to inconsistent rulings and at least the potential for more litigation. In Ward v. Intermountain Farmers Association, [FN38] a majority of the Utah Supreme Court held that a court may consider any relevant extrinsic evidence in interpreting a contract without first finding as a matter of law that the contract is ambiguous on its face. Without expressly overruling prior precedents, the Ward court disregarded the long-standing Utah textual approach to the parol evidence rule, under which extrinsic evidence comes into play only after a judicial determination that the language of the contract is ambiguous.

In Ward, a crop owner contracted with Intermountain Farmers to spray his safflower field. IFA accidentally sprayed the field with fertilizer that had been contaminated with herbicide, resulting in killing the safflower crop. Eventually Ward and IFA entered into settlement negotiations, the result of which was that Ward signed a release in which he agreed to "hold harmless Intermountain Farmers Association for any and all damages caused by the spraying of my approximate 19 acres of safflower." After the release was signed, Ward planted beans on his field, but they ultimately died.

Three years later, Ward sued IFA, alleging damages caused to his field after the settlement. IFA pleaded the release agreement as a defense to Ward's new claims. But Ward argued that the release agreement was ambiguous and offered extrinsic evidence that the release applied only to the damage of the safflower crop, not to all present and future crops. The trial court held that the release unambiguously discharged IFA from all claims for future damages, without regard or resort to extrinsic evidence.

A majority of the Utah Supreme Court of Utah reversed, labeling "inherently one-sided" the rule that a judge first must determine whether ambiguity exists by ascertaining the meaning of the terms from the language of the document itself. Citing Corbin and some California case law in support, it formulated "the better-reasoned" approach under which a judge ***216** should consider all credible evidence without a preliminary finding that the contract was ambiguous on its face. The majority concluded that the release was ambiguous and allowed the parties to introduce any relevant evidence regarding the damages the parties had intended to cover by the release.

The majority basically acknowledged that any contract provision, even seemingly clear and unequivocal, could be ambiguous if one of the parties contends that the provision was intended to have a different meaning. This was a radical departure from decades of practice in Utah and from centuries of common law. It also created an effective bar to summary judgment in any contract case, so long as one party offers evidence of subjective intent at odds with the claimed meaning of the contract.

One justice concurred separately and another dissented. Both criticized the majority's departure from Utah's long-standing rule of contract interpretation, and advocated adherence to pre-Ward law. The dissenter found that the contract was clear and unambiguous on its face. He emphasized that the majority did not provide any legitimate reason to overrule settled precedent.

Ward has brought confusion and uncertainty to Utah contract law by allowing parol evidence into the record in the first instance. In practice, Ward means that parties cannot rely solely on contract language to embody their agreement, no matter how clear and unequivocal it may seem. The Ward approach creates uncertainty and reduces stability and predictability in contractual relationships by guaranteeing contracting parties the right to offer parol evidence in all cases of contractual disputes. It does not promote judicial economy. In fact, it gives parties an opportunity to roll the dice, play on sympathies and challenge any written contract that no longer pleases them.

1. Pre-Ward Law

Before Ward, Utah courts consistently held that a court may not consider extrinsic evidence in interpreting a contract without first making a legal finding that the contract was ambiguous on its face, [FN39] a position clearly expressed in Faulkner v. Farnsworth. [FN40] In Faulkner, the Utah Supreme Court did not allow the parties to introduce extrinsic evidence before a preliminary finding that a real estate purchase agreement was ambiguous on its face. The court ruled that the determination of whether ambiguity exists is a question of law, and the court must first examine the language of the writing in order to determine whether a contract is ambiguous.

The Utah Supreme Court followed this established approach in Winegar v. Froerer Corp., [FN41] in which the purchasers of an executory land sale contract sued the assignees of the contract. The dispute arose as to whether the assignees had assumed the assignor's obligation to convey clear title to the purchasers. The court started by examining the language of the agreement itself. The court stated that if the "contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement." The court examined the assignment agreement and found that it to be ambiguous on its face, and it allowed the introduction of the parol evidence of the parties' intent.

2. Post-Ward Law

The post-Ward law in Utah highlights both the impracticality and unpopularity of ***217** the holding. There is no uniformity of application following Ward. In fact, the Utah Supreme Court, which has had several chances to utilize the Ward approach, has on occasion ignored Ward and adhered to pre-Ward law.

For example, in Interwest Construction v. Palmer, [FN42] the court considered a contract that required that the fiberglass tanks used in the construction of a wastewater treatment facility to conform to the "applicable requirements" of the national industry standard. The court, speaking through Chief Justice Zimmerman, who was the Ward dissenter, stated that the determination of whether a contract is ambiguous is a question of law and the court can consider extrinsic evidence to determine the meaning of the contract once it is found to be ambiguous. Without resort to extrinsic evidence and by looking to the four corners of the writing, the court determined that the word "applicable" and the lack of specificity within the national standard made the contract ambiguous. One could argue that Palmer impliedly overruled Ward, just as Ward impliedly overruled older Utah precedents.

In another post-Ward decision, R & R Energies v. Mother Earth Industries, [FN43] the court considered whether a settlement agreement, which contained the term "gross geothermal energy sales," was ambiguous. The court examined the Code of Federal Regulations and cases from other jurisdictions interpreting that term, and it determined as a matter of law that the term had only one reasonable meaning. Thus, the settlement agreement was unambiguous.

It is unclear now what Utah courts will do to determine whether a contract is ambiguous. The U.S. District Court for Utah in Craner v. Northwestern Mutual Life Insurance Co., [FN44] for example, chose to follow the pre-Ward law. Referring to a 1979 Utah Supreme Court case, the federal court stated that "in determining the intent of a contract the language of the instrument itself should first be looked to, and unless there is some ambiguity or uncertainty, there is no justification for attempting to vary it by extrinsic or parole evidence." [FN45] The court enforced the insurance application contract at issue after finding that its language was unambiguous.

The Utah Court of Appeals in Gardner v. Madsen, [FN46] one of five Utah cases citing Ward, did not use its "surrounding circumstances" approach, but instead followed the pre-Ward Utah law. In Gardner, the court considered the issue of whether a contract between a corporation and two individuals for shares of ownership in a houseboat indicated that another individual, Gardner, also was a party to the agreement. The court acknowledged that it could consider extrinsic evidence only when the language of the writing is ambiguous, and that in order to do that, it must "first look to the four corners of the contract." [FN47] Since the language of the contract did not support the trial court's interpretation that Gardner was a party to the agreement, the court did not allow the consideration of extrinsic evidence to clarify the terms of the unambiguous contract.

Several other Utah decisions have impliedly rejected the "surrounding circumstances" approach without citing Ward. For example, in Dixon v. Pro Image Inc., [FN48] the Utah Supreme Court considered whether the language of an employment agreement, under which a corporate president would receive a sale bonus if the company's business were sold, was ambiguous. Citing and reiterating its position in Winegar, the court stated that if the language of the contract is not ambiguous, the parties' intent is determined from the plain meaning of the language. The court found, ***218** however, that it was unclear from the language of the agreement involved in the case whether the parties intended the sale bonus to apply to a single sale of the whole company or to the sale of individual stores or portions of the company. Only then, after finding the ambiguity, did the court conclude that extrinsic evidence is necessary to determine what the parties intended to trigger the sale bonus.

Similarly, several other Utah courts have followed pre-Ward law. In SLW/Utah v. Griffiths, [FN49] the Utah Court of Appeals stated that whether an ambiguity exists is a question of law to be decided by the trial court before considering extrinsic evidence. Another Utah Court of Appeals case, Lee v. Barnes, [FN50] looked solely at the language of a real estate purchase agreement in determining whether it was ambiguous on its face. It held that the agreement, which contained an integration clause, unambiguously provided for a specific closing date, and thus extrinsic evidence was inadmissible to demonstrate the parties' intentions.

On the other hand, several decisions citing Ward either follow or at least acknowledge its "surrounding circumstances" approach. [FN51] For example, in Cade v. Zions First National Bank, [FN52] a dispute arose as to whether the bank and its former employee intended their disputes to be governed by the arbitration provision of the Form U-4 Uniform Application for Securities Registration or Transfer. The bank argued that the parties intended the form to govern their dispute.

The Cade court acknowledged that it may consider any relevant evidence in determining whether a contract is ambiguous. It also noted that "a contract provision is not necessarily ambiguous just because one party gives that provision a different meaning than another party does. To demonstrate ambiguity, the contrary positions of the parties must each be tenable." [FN53] Applying these principles, the court took evidence, considered the language of the form in light of the surrounding circumstances, and found that it was unambiguous.

As the above cases demonstrate, the current state of Utah law on the parol evidence rule is unsettled--and unsettling. Before Ward, the Utah courts consistently applied the textual approach to the parol evidence rule. Now, Utah has two mutually inconsistent views.

3. An Old Story

This is not the first time Utah has had two mutually inconsistent but nevertheless contemporaneous rules of contract construction. In Alf v. State Farm Fire & Casualty Co., [FN54] the Utah Supreme Court held that an insurance policy is merely a contract between the insured and the insurer and is to be construed pursuant to the same rules applied to ordinary contracts. One month after Alf was issued, the court handed down another insurance contract opinion, taking a different approach. In United States Fidelity & Guaranty Co. v. Sandt, [FN55] the court reaffirmed a 72-year history of insurance contract interpretation at ***219** odds with the Alf proposition that insurance contracts are like any other "ordinary" contract. The court stated that since 1921, it had been committed to the principle that insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote the purposes of insurance. The Sandt court pointed out that insurance policies are classic examples of "adhesion contracts."

Today, insurers and insureds each have undisturbed Utah Supreme Court precedents available to them to support either approach to insurance contract interpretation. There is little one can do to predict which of the two inconsistent precedents will be followed in the next case.

PRACTICAL CONSEQUENCES

The traditional and textual view of the parol evidence rule makes business and legal sense for a simple reason. The care of parties to ensure a clear expression of their agreement should precede its execution, rather than follow in conjunction with a dispute during or after performance. The traditional approach encourages parties to be careful and precise when creating a written contract; it discourages them from believing a change in intention might survive a judicial challenge. It also recognizes that written contracts, which usually are more accurate, detailed and reliable than oral agreements, eliminate the risk of fading memories, perjured testimonies and fraud. This approach also encourages parties to use clear language in drafting contracts since they know they will be bound by it.

On the other hand, the "surrounding circumstances" approach not only relieves parties of a strong motive to express their intent in clear contractual terms, but it may potentially reward businesses and individuals for failing to do so. The contextual approach encourages the parties to a transaction to challenge a contract when circumstances change. Even transactions involving sophisticated parties, who negotiate and draft contracts with the help of legal counsel, will lead more easily to extensive litigation when there is a strong reason for challenging the contract. Such an approach encourages litigation.

While it is difficult to predict which way courts will go in future contract cases, it nevertheless remains a good idea to consider the following:

- Assume parol evidence will be considered if there is litigation.

• Any agreement intended to be final and integrated should have an integration clause. That clause also may state expressly that the court should not consider extrinsic evidence in interpreting the contract without first making a legal finding that the contract is ambiguous on its face. Query whether such a clause itself requires extrinsic evidence to understand and enforce it.

• Finally, assuming extrinsic evidence comes in, it will be beneficial for the parties to document every step of the negotiations and exchange frequently with all parties correspondence asking them to confirm the progress in negotiations and intentions of the parties. This documentation will be valuable evidence of the parties' intent in a situation where a court takes the contextual approach. This process will make contract negotiation longer, more expensive and more complex, but the current trend against trusting what the parties put in writing leaves contracting parties with only the hope that whatever adverse parol evidence is offered will not be believed by the fact finder.

CONCLUSION

The policy behind the parol evidence rule is "to give the writing a preferred status so as to render it immune to perjured testimony and the risk of 'uncertain testimony of slippery memory.'" [FN56] The courts ***220** taking a contextual approach basically acknowledge that contracting parties, even the most sophisticated ones, can never rely solely on the product of their negotiations, the written contract. Instead, the future of any deal may depend on the skill and entrepreneurship of those parties who decide to challenge a clear and unequivocal contract. The contextual rule erodes and undermines the sanctity of written contract.

In the words of Judge Kozinski, California law already has become "a circus of self-serving declaration as to what the parties to the agreement really had in mind." [FN57] Utah's and other states' adoption of the contextual approach will likely only keep that circus on the road.

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[FN1]. 3 A.L. CORBIN, CORBIN ON CONTRACTS § 573 (1960).

[FN2]. J. Thayer, The "Parol Evidence" Rule, 6 HARV. L. REV. 325, 325 (1893).

[FN3]. See E. ALLAN FARNSWORTH, CONTRACTS § 7.3 (1999).

[FN4]. CORBIN, supra note 1.

[FN5]. 4 WILLISTON, WILLISTON ON CONTRACTS § 631 (3d ed. 1961).

[FN6]. FRIEDRICH KESSLER ET AL., CONTRACTS 823 (1986), quoting Countess of Ruthland's Case, 77 Eng.Rep. 89, 90 (K.B. 1604).

[FN7].

[FN8]. 126 A. 791 (Pa. 1924).

[FN9]. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 3.4(d) (1998).

[FN10]. FARNSWORTH, supra note 3, at § 7.3.

[FN11]. Restatement (Second) of Contracts § 210 cmt. c (1981).

[FN12]. FARNSWORTH, supra note 3, § 7.12.

[FN13]. WILLISTON, supra note 5, § § 610, 618.

[FN14]. Restatement (Second) of Contracts § 209 cmt. c, § 210 cmt. b (1981).

[FN15]. CORBIN, supra note 1, § § 542, 543, 583. See also Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 CORNELL L. Q. 161, 188-89 (1965).

[FN16]. CALAMARI & PERILLO, supra note 9, § 3.11(a).

[FN17]. CORBIN, supra note 1. § 579.

[FN18]. 442 P.2d 641 (Cal. 1968).

[FN19]. Id. at 645, quoting Universal Sales Corp. v. Cal. Press Mfg. Co., 128 P.2d 665, 671 (Cal. 1942)).

[FN20]. 847 F.2d 564 (9th Cir. 1988).

[FN21]. 834 P.2d 1148 (Cal. 1992).

[FN22]. Id. at 1155, quoting Delta Dynamics Inc. v. Arioto, 446 P.2d 785 (Cal. 1968) (Mosk, J., dissenting).

[FN23]. Municipality of Anchorage v. Gentile, 922 P.2d 248, 258-59 (Ala. 1996) (Alaska courts may use extrinsic evidence regarding intent of parties regardless of whether contract appears to be ambiguous on its face), following Peterson v. Wirum, 625 P.2d 866, 871 (Alaska 1986).

[FN24]. Isbrandtsen v. North Branch Corp., 556 A.2d 81 (Vt. 1988) (considering deed in light of surrounding circumstances and finding that only one reasonable interpretation existed). See also Breslauer v. Fayson Sch. Dist., 659 A.2d 1129 (Vt. 1995) (finding contract ambiguous after considering surrounding circumstances).

[FN25]. Berg v. Hudesman, 801 P.2d 222 (Wash. 1990) (rejecting theory that ambiguity in meaning of contract language must exist before evidence of surrounding circumstances is admissible).

[FN26]. Hanssen v. Qantas Airways Ltd., 904 F.2d 267 (5th Cir. 1990) (applying Texas law under which court examined contract in light of all of surrounding circumstances). See also Reilly v. Rangers Mgmt. Inc., 727 S.W.2d 527 (Tex. 1987) (acknowledging that court determines ambiguity by looking at whole contract and considering circumstances existing when parties entered into contract).

[FN27]. Smith v. Melson, 659 P.2d 1264, 1266 (Ariz. 1983) (adopting Corbin's view and holding that contract should be read in light of parties' intentions as reflected by their language and in view of all circumstances). See also Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134 (Ariz. 1993) (recognizing that Arizona courts may consider surrounding circumstances without first finding contract ambiguous on its face).

[FN28]. 854 P.2d 1134 (Ariz. 1993).

[FN29]. Kipp v. Estate of Chips, 732 A.2d 127 (Vt. 1999), quoting Isbrandtsen, 556 A.2d at 84.

[FN30]. 587 A.2d 412 (Vt. 1991).

[FN31]. Student Loan Guar. Found. of Arkansas v. Barnes, Quinn, Flake and Anderson, Inc., 806 S.W.2d 628 (Ark.App. 1991) (following textual approach).

[FN32]. Eason Publications Inc. v. Monson, 294 S.E.2d 585, 586 (Ga.App. 1982) (existence or nonexistence of ambiguity in contract is question of law; if ambiguity is found, surrounding circumstances may be proved).

[FN33]. Perron v. Hale, 701 P.2d 198 (Idaho 1985) (admitting extrinsic evidence to determine parties' intentions only after determination that earnest money agreement on its face was ambiguous).

[FN34]. Bunker v. Johnson, 666 P.2d 1234 (Mont. 1983) (where contract is clear and unequivocal on its face, court will not consider parol evidence to modify its terms).

[FN35]. Frank v. Frank, 587 A.2d 340 (Pa 1991) (separation agreement unambiguous on its face indicated that husband was primarily responsible for higher education expenses of children).

[FN36]. 806 S.W.2d 628 (Ark.App. 1991).

[FN37]. Id. at 632, quoting C & A Constr. Co. v Benning Constr. Co., 509 S.W.2d 302 (Ark. 1954).

[FN38]. 907 P.2d 264 (Utah 1995).

[FN39]. See, e.g., Fitzgerald v. Corbett, 793 P.2d 356, 358 (Utah 1990) (whether contract is ambiguous is question of law); Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983) (court will find contract to be ambiguous "if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies'"); Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990) (parol evidence generally not admissible to explain intent of contract clear on its face).

[FN40]. 665 P.2d 1292 (Utah 1983).

[FN41]. 813 P.2d 104 (Utah 1991).

[FN42]. 923 P.2d 1350 (Utah 1996).

[FN43]. 936 P.2d 1068 (Utah 1997).

[FN44]. 12 F.Supp.2d 1234 (D. Utah 1998).

[FN45]. Id. at 1240, quoting Williams v. First Colony Life Ins. Co., 593 P.2d 534, 536 (Utah 1979)).

[FN46]. 949 P.2d 785 (Utah App. 1997).

[FN47]. Id. at 789, quoting Interwest Constr., 923 P.2d at 1359.

[FN48]. 987 P.2d 48 (Utah 1999).

[FN49]. 967 P.2d 534 (Utah App. 1998).

[FN50]. 977 P.2d 550 (Utah App. 1999).

[FN51]. Taylor v. Hansen, 958 P.2d 923 (Utah App. 1998) (considering divorce degree in light of surrounding circumstances and finding that it was unambiguous); Reliance Ins. Co. v. Mast Constr. Co., 81 F.3d 173 (10th Cir. 1996) (unpublished disposition) (applying Utah law and determining that settlement agreement in light of surrounding circumstances was unambiguous); Moon v. Moon, 973 P.2d 431 (Utah App. 1999) (recognizing that in determining whether contract is ambiguous, any relevant evidence must be considered); Cade v. Zions First Nat'l Bank, 956 P.2d 1073 (Utah App. 1998) (following Ward); Hunger United States Special Hydraulics Cylinder Corp. v. Hardie - Tynes Mfg. Co., 2000 WL 147392 (10th Cir.) (unpublished disposition) (acknowledging that under Utah law courts examine contract documents in light of surrounding circumstances in order to determine parties' intent).

[FN52]. 956 P.2d 1073 (Utah App. 1998).

[FN53]. Id. at 1079-80, quoting R & R Energies, 936 P.2d at 1074.

[FN54]. 850 P.2d 1272 (Utah 1993).

[FN55]. 854 P.2d 519 (Utah 1993).

[FN56]. CALAMARI & PERILLO, supra note 9 § 3.2(b), quoting Charles T. McCormick, The Parol Evidence Rule as a Procedural Device for Control of the Jury, 41 YALE L.J. 365, 366-67 & n.3 (1932)).

[FN57]. Wilson Arlington Co. v. Prudential Ins. Co., 912 F.2d 366, 370 (9th Cir. 1990).

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