INTERPRETING GOVERNMENT CONTRACTS: PLAIN MEANING PRECLUDES EXTRINSIC EVIDENCE AND CONTROLS AT THE FEDERAL CIRCUIT

W. Stanfield Johnson

I. INTRODUCTION

In its en banc decision in *Coast Federal Bank, FSB v. United States*,[1] the Court of Appeals for the Federal Circuit reversed a panel decision that relied on extrinsic evidence of intent to interpret a contract, broadly declaring in

1. 323 F.3d 1035 (Fed. Cir. 2003).

W. Stanfield Johnson is a partner in the law firm of Crowell & Moring LLP. *The author thanks his partner Frederick W. Claybrook Jr. for his thoughts and comments on drafts of this article.*

conclusion that "when the contractual language is unambiguous on its face, our inquiry ends and the plain language of the Agreement controls."[2]

The broad statement of this "plain meaning" rule of contract interpretation by the en banc court may resolve conflicting precedents made by panels of the court and its predecessor Court of Claims that have reflected the sometimes difficult tension between contract language and other evidence of the parties' intentions. If *Coast Federal*'s concluding statement is such a clarifying precedent, the decision will signal an end to a jurisprudential history noteworthy for its divergent statements of the role of language and extrinsic evidence in the interpretation of federal contracts. Such an authoritative statement also will put the court's federal law of government contracts at odds with the general law of contracts as set forth in the *Restatement (Second) of Contracts*.[3] Because contract interpretation is probably "the most frequently litigated issue in Government contracting,"[4] the Federal Circuit's en banc embrace of contract language as dispositive is an important development meriting attention and analysis.

II. LANGUAGE AND EXTRINSIC EVIDENCE UNDER GENERAL CONTRACT LAW

Comparison to the general contract law is appropriate and instructive because of Supreme Court precedent emphasizing that "the law of contracts between private individuals" is generally controlling in federal contracts,[5] including, most recently, *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*[6] and *United States v. Winstar Corp.*[7] There is plainly no overriding sovereign interest in special rules for interpreting contracts entered into by the United States in its proprietary capacity.

The *Restatement (Second) of Contracts*, repeatedly invoked in *Mobil Oil Exploration*,[8] makes it clear that "interpretation" is the "ascertainment of . . . meaning"[9] and the meaning sought is that of the parties, either mutually or separately.[10] Based on the circumstances, where meaning is not shared by the parties, the intent of one party may prevail, including "facts known to one

2. *Id.* at 1040–41.

3. *See* Restatement (Second) of Contracts §§ 200–23 (1981).

4. Ralph C. Nash & John Cibinic, *Interpretation Disputes: Finding an Ambiguity*, 4 Nash & Cibinic Rep. ¶ 25, Apr. 1990, at 58.

5. *E.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363, 369 (1943) ("business on business terms"); Cooke v. United States, 91 U.S. 389, 398 (1875) ("same laws that govern individuals").

6. 530 U.S. 604 (2000).

7. 518 U.S. 839 (1996).

8. *See Mobil Oil Exploration*, 530 U.S. at 608 ("The *Restatement of Contracts* reflects many of the principles of contract law that are applicable to this action."), 614, 621, 622, 624.

9. Restatement (Second) of Contracts, *supra* note 3, § 200. The *Restatement* is authored by the American Law Institute to "tell what the law in a general area is." Black's Law Dictionary 1180 (5th ed. 1979). The Federal Circuit recognizes the *Restatement (Second) of Contracts* as reporting the general contract law. *E.g.*, Centex Corp. v. United States, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (*Restatement* "duty applies to the government just as it does to private parties").

10. Restatement (Second) of Contracts, *supra* note 3, § 201.

party of which the other had reason to know."[11] Thus, the task is fundamentally one of finding intent. Such intent is evidenced by words *and* conduct "interpreted in the light of all the circumstances,"[12] which of course may be extrinsic to the contract writing. Language will not be interpreted in accordance with its "generally prevailing meaning" if "a different intention is manifested."[13] Usage of words may be judged by special, not usual, meanings, including trade or art meanings, and ultimately by the intention of the parties. "The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them which would be contrary to their understanding."[14] Thus, "general usage" and "standards of preference" do not "exclude" or "override" contrary evidence of intent.[15]

Even in the case of a completely integrated contract, extrinsic evidence must be considered.[16] In that context, the *Restatement (Second)* offers the following comment with respect to "[p]lain meaning and extrinsic evidence":

> It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in context. Accordingly, the rule [requiring consideration of the circumstances] is *not* limited to cases where it is determined that the language used is ambiguous.[17]

Without compromising or abandoning the integrated agreement's terms, the same comment explains:

> Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of the trade, and the course of dealing between the parties. *See* §§ 202, 219–23. But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intentions.[18]

Thus, under the *Restatement (Second)*, the inquiry cannot be restricted to the facial "plain meaning."

The Reporter's Notes to the *Restatement (Second)* repeatedly reference the treatise of Professor Corbin,[19] which emphasizes "the dangers of excluding all extrinsic evidence on the ground that the express words are so 'plain and clear' that their meaning as used by the parties must be determined solely by what is within the 'four corners of the instrument.'"[20] Corbin's distrust of dictionary resolutions is evident from this criticism:

---

11. *Id.* § 202 cmt. b.
12. *Id.* § 202.
13. *Id.*
14. *Id.* § 201 cmt. c.
15. *Id.* §§ 202 cmt. e, 203 cmt. a.
16. *Id.* § 214. Under this section, parol evidence may be considered to establish whether or not, or to what extent, a contract is integrated, as well as to determine ambiguity or meaning.
17. *Id.* § 212 cmt. b (emphasis added).
18. *Id.*
19. *E.g.*, *id.* §§ 200, 201, 202, 212 reporter's notes.
20. Arthur Linton Corbin, Corbin on Contracts § 542A (1960).

> [R]ules . . . indicating that words . . . have one, and only one, true and correct meaning, that this meaning must be sought only by poring over the words within the four corners of the paper, that extrinsic evidence of intention will not be heard, or that evidence of surrounding circumstances will be heard only in cases of latent ambiguity.[21]

What Professor Corbin would think of *Coast Federal*'s "plain meaning" rationale can be anticipated based on the following quotations:

> Sometimes it is said that "the courts will not disregard the plain language of a contract or interpolate something not contained in it"; also "the courts will not write contracts for the parties to them nor construe them other than in accordance with the plain and literal meaning of the language used." It is true that when a judge reads the words of a contract he may jump to the instant and confident opinion that they have but one reasonable meaning and that he knows what it is. A greater familiarity with dictionaries and the usages of words, a better understanding of the uncertainties of language, and a comparative study of more cases in the field of interpretation, will make one beware of holding such an opinion so recklessly arrived at.
>
> * * *
>
> In such cases, the court often says that "a court can not make a contract for the parties"; but when it holds the parties bound in accordance with a meaning that seems "plain and clear" to the court and excludes convincing evidence that the parties gave the words a different meaning, it is doing exactly what it declares that it can not do: the court is making a contract for the parties that they did not themselves make.[22]

It is striking that, in *Coast Federal Bank, FSB v. United States*, the en banc court supported its plain meaning conclusion by stating that if the doctrine was not employed, "'we would have to rewrite the contract, and insert words the parties never agreed to, which we do not have authority to do.'"[23]

III. COURT OF CLAIMS PRECEDENT

Contract interpretation decisions of the predecessor Court of Claims, although hardly uniform, were more in line with the general law than the *Coast Federal* rationale. In 1965, this Court of Claims law was summarized by a distinguished government contracts practitioner stating that "[w]ords . . . will be given their *common* and *normal meaning*," but not if extrinsic evidence proves that they "have some other . . . meaning accorded to them by the *parties*."[24] In 1967, the vice chairman of the Armed Services Board of Contract Appeals wrote that

> [i]t is a truism that contracts should be interpreted to carry out the intention of the parties by giving meaning to their symbols of expression, which includes both words and conduct. Words of a contract are but symbols of expression that must be trans-

21. *Id.* § 536.
22. *Id.* §§ 535, 542.
23. 323 F.3d 1035, 1039 (Fed. Cir. 2003) (quoting George Hyman Constr. Co. v. United States, 832 F.2d 574, 581 (Fed. Cir. 1987)).
24. Walter F. Pettit, *Interpretation of Government Contracts*, Briefing Papers, Dec. 1965, at 149.

> lated into concrete specific things and ideas in order for the contract to have meaning. There is no such thing as interpretation in the abstract or in an absolute sense.[25]

Stressing the need for extrinsic evidence, he rejected the plain meaning rule, stating that "[m]odern courts have departed from the medieval concept that written words have a 'plain and clear' legal meaning that can be ascertained by a judge without looking outside the 'four corners' of the document."[26]

As late as 1989, a leading text explained this basic principle applied by government contract forums:

> It is frequently stated by the courts and appeals boards that the fundamental task of the person interpreting the meaning of contract language is to ascertain the *intent* of the parties at the time they *entered into* the contract. This statement is a recognition of the fact that the job of the interpreter is to determine what the contracting *parties* meant—not what the interpreter thinks the contract means from its bare language. This requires the interpreter to place himself or herself in the shoes of the contracting parties with their understanding of the custom and usage of the trade and the circumstances of the transaction at the time they entered into the contract.[27]

This formulation obviously cannot be applied unless extrinsic evidence of intent is admissible and considered.

For example, in *Rice v. United States*,[28] the Court of Claims interpreted "request" to mean "demand." The court acknowledged that

> [t]he word "request" does generally connote asking or soliciting, in response to which assent or permission may or may not be given, as a matter of discretion, [but the court observed that] in any particular context, however, it is always possible that a "request" is in fact grounded on right or authority and is . . . understood as the polite equivalent of a command or a demand.[29]

The court then rationalized that "[f]or the interpretation of such a word as 'request,' the context and intention are more meaningful [than] the dictionary definition."[30] *Chase & Rice, Inc. v. United States*,[31] where a contract modification failed to change the delivery terms, also illustrated the primacy of proven intent:

> While it is true that the magic words "FOB Los Angeles" were not included in the Modification, it must be remembered that "in the case of contracts the avowed purpose and primary function of the court is ascertainment of the intention of the parties."
>
> * * *
>
> In light of these circumstances, the fact that the words "FOB Los Angeles" did not appear in Modification 1 is not controlling. The parties intended the FOB point

25. J. Shedd, *Resolving Ambiguities in Interpretation of Government Contracts*, 36 Geo. Wash. L. Rev. 1, 6 (1967).
26. *Id.*
27. Ralph C. Nash, Government Contract Changes 11–5 (2d ed. 1989).
28. 428 F.2d 1311 (Ct. Cl. 1970).
29. *Id.* at 1314.
30. *Id.*
31. 354 F.2d 318 (Ct. Cl. 1965).

> to be changed, and this court, like the Board, will not allow their *proven* intention to be thwarted by a technicality.[32]

In *Manloading & Management Associates Inc. v. United States*,[33] precontract discussions bound the Government even though they were not incorporated in the written contract. Over a dissent that parol evidence could not be used to contradict the writing,[34] the Court of Claims' majority stated that "taken by itself, the italicized language appears to exculpate the Government. However, when examined in context, it is apparent that the pertinent language is not applicable to the factual setting before us."[35] The court relied on its prior decision in *Sylvania Electric Products, Inc. v. United States*,[36] which held that information disseminated at a prebid conference was binding as an expression of intent, and the contract would be interpreted in accordance with that intent.

Extrinsic evidence of intent also prevailed in *Macke Co. v. United States*,[37] where the Court of Claims relied on post-award, predispute conduct to ascertain contractual meaning. The court explained:

> In this inquiry, the greatest help comes, not from the bare text of the original contract, but from external indications of the parties' joint understanding, contemporaneously and later, of what the contract imported. The case is an excellent specimen of the truism that how the parties act under the arrangement, before the advent of the controversy, is often more revealing than the dry language of the written agreement by itself. We are, of course, entirely justified in relying on this material to discover the parties' underlying intention.[38]

Perhaps the most explicit endorsement of extrinsic evidence came in *Gholson, Byars & Holmes Construction Co. v. United States*,[39] dealing with trade practice and usage. The court reversed the ASBCA for excluding such evidence from consideration, stating broadly that

> [t]he Board's failure to consider the evidence of trade practice and custom on the basis of absence of ambiguity was in error. For the principle is now established in this court (and almost every other court) that in order that the intention of the parties may prevail, the language of a contract is to be given effect according to its trade meaning notwithstanding that in its ordinary meaning it is unambiguous. That is to say that trade usage and custom may show that language which appears on its face to be perfectly clear and unambiguous has, in fact, a meaning different from its ordinary meaning.[40]

These and other precedents led many observers to place the Court of Claims in the Corbin camp, less certain about language and more willing to focus on extrinsic evidence of the intent of the parties.[41]

32. *Id.* at 321–22.
33. 461 F.2d 1299 (Ct. Cl. 1972).
34. *Id.* at 1304 (citing the dissent).
35. *Id.* at 1302.
36. 458 F.2d 994, 1008 (Ct. Cl. 1972).
37. 467 F.2d 1323 (Ct. Cl. 1972).
38. *Id.* at 1325.
39. 351 F.2d 987 (Ct. Cl. 1965).
40. *Id.* at 999.
41. *See, e.g.*, W.G. Cornell Co. v. United States, 376 F.2d 299, 311 (Ct. Cl. 1967) ("Even in

However, in truth and in fairness to the Federal Circuit, which inherited this contract interpretation jurisprudence, the message was not unambiguous. For example, after *Gholson*, *Byars & Holmes*, the court in *WRB Corp. v. United States* ruled that a trade practice "cannot properly be permitted to overcome an unambiguous contract provision."[42] Further, in *Butz Engineering Corp. v. United States*,[43] parol evidence was not permitted to show the meaning of an integrated contract "because the written terms here in question are on their face unambiguous, no legitimate purpose exists for introducing evidence of such prior negotiations and understandings."[44]

The difficulty of accommodating language and other evidence of intent was acknowledged in *Massachusetts Port Authority v. United States*,[45] where the court outlined its approach to sorting them out:

> Our ultimate goal is always to give full force and effect to the expressed or implied intentions of the parties if such can be discerned, and only by defining the contract terms clearly, simply and in accordance with commonly accepted usage, can this paramount obligation be judiciously discharged. We will not, as plaintiff has attempted to do in the instant case, ascribe a meaning to the language of a lease which is neither stated, expressly or by implication, within the four corners of the document, nor supported by the factual context in which the lease was drawn and executed.[46]

"In the absence of" "documentary or testimonial evidence which might affirmatively establish the intention of the parties," the court said, "we must look to the language of the lease itself for *presumably* it embodied the intention of the parties."[47] This presumption respected the contract language, but, being rebuttable by extrinsic evidence, allowed flexibility to evaluate extrinsic evidence of the parties' intent—an inquiry barred by the "plain meaning" rule of *Coast Federal*.

IV. THE FEDERAL CIRCUIT'S MOVEMENT TO PLAIN MEANING

The Federal Circuit's pathway to *Coast Federal* can be found in decisions through the 1980s and 1990s, in which the Circuit's panels gave priority to contract language deemed to be facially unambiguous. The prior "avowed purpose" of ascertaining the parties' intent gave way to an imperative of enforcing plain language as written. This transition was supported by reference to Court of Claims' decisions that had relied on contract language, not divergent precedents that relied on extrinsic evidence to ascertain meaning or

---

the absence of ambiguity, contract language must be given that meaning which 'would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.'").

42. 183 Ct. Cl. 409, 436 (1968).
43. 499 F.2d 619 (Ct. Cl. 1974).
44. *Id.* at 629.
45. 456 F.2d 782 (Ct. Cl. 1972).
46. *Id.* at 784 (citations omitted).
47. *Id.* (emphasis added).

find ambiguity. By 1999, this trend had produced a number of extraordinary decisions, in which the determination of plain meaning and clarity of language seemed forced, and credible extrinsic evidence of intent was disregarded and even precluded.

Whether the results in these panel decisions were wrong or could be otherwise justified is less clear and less important than the existence of the unambiguous trend: the Federal Circuit's analysis of contract interpretation issues had moved away from prior Court of Claims precedent and from the *Restatement (Second) of Contracts.* The plain meaning rationale became a mantra of sorts, as is clear from a review of some of the decisions in this period.

A. *1987:* George Hyman Construction Co. v. United States

In *George Hyman Construction Co. v. United States*,[48] the contractor sought extra payment for rock excavation, under a payment provision of the contract. The contract did not define rock by common usage; instead, the contract defined "rock" as "the stratum where the approved drill with heavy duty auger cannot advance the shaft more than 6 inches per minute."[49] The contractor claimed that, based on the testimony of three excavation contractors, in the trade "heavy duty auger," without specification as a rock auger, would be read as an earth auger. Thus, the contractor claimed for rock excavation beginning where it was necessary to switch to a rock auger, in order to excavate rock.[50] The General Services Board of Contract Appeals had "refused to find that in the excavation trade" auger "means earth auger unless rock auger is specified" and concluded that "what the government meant by rock is a stratum that not even a rock auger can penetrate."[51] The board rejected Hyman's claim.[52]

The court's panel might have sustained the board's decision on a less sweeping basis than it chose. It might have sustained the board's evaluation of the trade practice testimony as within the trial forum's fact-finding discretion and supported the most reasonable inference from other contract provisions and the geologic report provided to bidders that for extra pay purposes, rock excavation meant only bedrock excavation, as determined by resistance to a heavy duty rock auger. Indeed, the court engaged in this kind of analysis.[53]

Instead, the court also invoked the plain meaning rule. "It is well established that when, as here, the provisions of a contract are phrased in clear and unambiguous language, 'the words of the provisions must be given their plain and ordinary meaning by the court in defining the rights and obligations of the parties . . .'"[54] "Also, it is well established that evidence of trade usage and custom cannot be used to vary or contradict the terms of a contract."[55] No

48. 832 F.2d 574, 575 (Fed. Cir. 1987).
49. *Id.* at 578.
50. *Id.*
51. *Id.* at 579.
52. *Id.* at 578.
53. *Id.* at 580–81 (discussion of other grounds).
54. *Id.* at 579.
55. *Id.* at 581 (citing WRB Corp. v. United States, 183 Ct. Cl. 409, 436 (1968)).

reference was made to the *Gholson, Byars & Holmes Construction Co. v. United States* rule that extrinsic evidence, in the form of trade usage, must be considered to determine whether language is ambiguous.[56] The court's panel added this imperative to its already dispositive language: "[i]t is *our task* to interpret the provisions of the unambiguous contract before us so that the words of those provisions are given their plain and ordinary meaning."[57] With these broad declarations, the panel made *Hyman Construction* an important precedent for the plain meaning rule.

B. *1990:* R.B. Wright Construction Co. v. United States

In *R.B. Wright Construction Co. v. United States*,[58] a panel majority enforced a painting schedule as unambiguously requiring three coats of paint on surfaces, even those that had been previously painted.[59] The schedule made no explicit exception for previously painted surfaces, but the painting subcontractor believed, based on customary practice in the painting trade and what was actually needed, that the schedule addressed only unpainted surfaces.[60] Dissenting judges at the Armed Services Board of Contract Appeals[61] and the Circuit[62] agreed that the specification did not apply to existing painted surfaces and the contract reasonably could and should be interpreted as the subcontractor did. Notwithstanding these impartial views, the panel majority relied on the painting schedule as written and declared, "[n]either a contractor's belief nor contrary customary practice, however, can make an unambiguous contract provision ambiguous, or justify a departure from its terms."[63]

The dissent took a position more in line with the *Restatement (Second) of Contracts*' emphasis on context, stating that

> [t]he contract—written in usual bureaucratese—included a complex painting schedule apparently better suited to new construction than previously painted buildings. . . . Nothing in the schedule accounted for the fact that the walls had been previously painted, yet anyone who has ever painted a living room wall well knows, it is not a good idea to put primer over preexisting finish coats. . . . It is not only a waste of money, but may contribute to early peeling and deterioration of subsequently applied coats.
> * * *

56. 351 F.2d 987, 999 (Ct. Cl. 1965).
57. *Hyman Constr.*, 832 F.2d at 579 (emphasis added).
58. 919 F.2d 1569 (Fed. Cir. 1990).
59. *Id.*
60. *Id.*
61. R.B. Wright Constr. Co., ASBCA Nos. 31967, 31968, 319969, 90–1 BCA ¶ 22,364 at 112,352–54. The dissenting ASBCA judge concluded that "the only reasonable interpretation" was that the painting schedule was "inapplicable to existing work," bringing into play the Contract Drawings, Map, and Specifications clause, which required "omitted details" to be covered by work "customarily performed." "The government's insistence on three coats was completely unnecessary and completely inconsistent with trade practice."
62. *R.B. Wright*, 919 F.2d at 1573.
63. *Id.* at 1572. The court noted that, for some surfaces, the schedule explicitly did not require a third coat. *Id.* at 1570.

> This is a case of a contract poorly drafted by the Government, administered by a mentality more rigid than the walls being painted, and enforced by a Contract Appeals Board, over a strong dissent, that acted as if there was no context to the contract.[64]

The dissenter, believing "enforcement of the literal terms" to be "unconscionable," criticized the panel majority's "mechanical reading of the contract."[65] To the majority, however, it was plain meaning, which the court perceived and was obliged to enforce.

C. *1992:* Hills Materials Co. v. Rice

In *Hills Materials Co. v. Rice*,[66] the panel reviewed the ASBCA's denial of a contractor's claim for the costs of complying with OSHA regulations issued after contract award.[67] The contract's "Accident Prevention" clause required the contractor to "comply with standards *issued* by the Secretary of Labor."[68] The contractor argued that this provision did not create a contractual obligation to comply with regulations issued after contract formation.[69] The ASBCA denied the claim, in part construing the "Accident Prevention" clause to be consistent with the general "Permits and Responsibilities" clause, which required compliance with all laws and regulations applicable to the contract work.[70]

The court expressed "respect" for "the board's experience and expertise in interpreting contract language,"[71] but then reversed, showing no deference.[72] The court turned the board's effort to find harmony between the two clauses into the proposition that a consistent interpretation would make the "Accident Prevention" clause "superfluous."[73] Most significantly, however, the court rested its reversal on what it perceived to be the plain meaning of the term "issued," a meaning not plain to the experienced and expert board. As the court explained, "[b]y its plain meaning, the word 'issued' *in the past tense* logically refers to regulations *already* issued, and not to *changes which may occur* in the future."[74]

The court's addition of the modifier "already" betrayed the possibility of other constructs, such as "to be issued," and the careful phrase "which may occur" instead of "which may be issued" revealed that ambiguity was not resolved by the solitary term "issued." The court offered the alternative ground for its result that the contractor's interpretation was a reasonable one, enforceable against the drafter, but presented it only on an *arguendo* basis,

64. *Id.* at 1574.
65. *Id.*
66. 982 F.2d 514 (Fed. Cir. 1992).
67. *Id.* at 515.
68. *Id.* at 516.
69. *Id.* at 515.
70. *Id.* at 516.
71. *Id.*
72. *Id.* at 517.
73. *Id.*
74. *Id.* at 516 (emphasis added).

assuming ambiguity.[75] The decision thus rests squarely on the panel's self-confident interpretation and its articulation of a mandate for plain meaning that "*[w]herever possible*, words of a contract should be given their ordinary and common meaning."[76]

D. *1996:* McAbee Construction Inc. v. United States

McAbee Construction Inc. v. United States[77] contains the most extensive elaboration of the predilection for plain meaning and has been frequently cited and quoted in contract interpretation decisions subsequent to it.[78] *McAbee Construction*, which involved a contract with an integration clause, is also an example of the effect of perceived plain meaning and the parol evidence rule to frustrate intent, as persuasively shown by extrinsic evidence.[79]

The court's panel reversed the Court of Federal Claims' award of damages, which had been based on government breach of duties under an easement contract.[80] The trial court, relying on extrinsic evidence of intent, found that the easement allowed the Corps of Engineers to deposit dredged material on McAbee's land only to a height of 165 feet above sea level.[81] The Corps greatly exceeded that level, substantially reducing the value of the land when it was returned to its owner, justifying a damage award of $328,000.[82]

The contract contained no language addressing a specific height limitation. The Corps' rights were defined in this way: "to deposit fill, dirt, spoil and waste material thereon, move, store, and remove equipment and supplies, and erect and remove temporary structures on the land, and to perform any other work necessary and incident to the construction of the [project]."[83]

In contrast to the absence of a specific height limitation, the contract contained an "integration" clause, which said, "[a]ll terms and conditions with respect to this [contract] are expressly contained herein and [McAbee] agrees that no representative or agent of the United States ha[s] made any representation or promise with respect to this [contract] not expressly contained herein."[84] This combination undermined McAbee's damages award on appeal.

The court first addressed the implications of the integration clause. Although acknowledging that, consistent with the *Restatement (Second) of Contracts*,[85] the contract itself may not resolve whether the contract was completely or partially integrated and extrinsic evidence is admissible for this

75. *Id.*
76. *Id.* (emphasis added).
77. 97 F.3d 1431 (Fed. Cir. 1996).
78. *E.g.*, Hunt Constr. Group v. United States, 281 F.3d 1369 (Fed Cir. 2002).
79. 97 F.3d at 1434.
80. *Id.* at 1433.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* (brackets in original).
85. *See* Restatement (Second) of Contracts, *supra* note 3, § 216 cmt. e.

purpose,[86] the court noted that the existence of an integration clause makes it "likely" or "a fair bet" that the agreement is completely integrated.[87] The panel took the bet.

The court also noted extrinsic evidence of a discussion of the elevation at which the Corps would return the property and of McAbee's request for a statement of understanding, inferring therefrom that the failure to include a height limit was intentional and the integration clause meant what it said. "The available parol evidence comport[ed] with the substance of the integration clause."[88] While engaging in this appellate fact-finding, the panel did not address or even acknowledge the available extrinsic evidence relied on by the trial court. That evidence showed how the parties had resolved McAbee's request.

Perhaps this failure to note extrinsic evidence of additional understandings was because, as the panel said, the parol evidence rule prohibits the admission of extrinsic evidence to add to or modify the integrated contract's terms,[89] although the Circuit could have used such evidence to resolve whether the contract was only partially integrated. However, the court did point out, "even if the contract were only partially integrated, McAbee would be permitted to introduce parol evidence only to supplement the 'agreement by *consistent* additional terms.'"[90] But this possibility was rejected because of the panel's view that the easement's plain meaning was inconsistent with a height limit.

Acknowledging that parol evidence could be used to interpret an ambiguous integrated contract, the court rejected the trial court's view that the absence of a height limitation, considered in context and along with extrinsic evidence, indicated an ambiguity.[91] The trial court had reasoned that the Corps' dumping rights could not have been unlimited, particularly given the potential impact on the value of the land, and the resulting ambiguity required some reasonable limit, appropriately to be determined from extrinsic evidence.[92]

The appellate panel, on the other hand, thought it dispositively plain that the qualifier "'necessary and incident to the construction'" necessarily modified the right "to deposit fill, spoil and waste material," not just the right "to perform any other work," the phrase to which the qualifier was immediately attached.[93] The possibility that "necessary and incident" defined only what "other work" could be performed on McAbee's land was not addressed.[94]

86. McAbee Constr. Inc. v. United States, 97 F.3d 1431, 1434 (Fed. Cir. 1996) ("Thus, it is not only the writing that controls whether the document is fully integrated, but also the circumstances surrounding its execution.").

87. *Id.* (citing Campbell v. United States, 661 F.2d 209, 218 (Ct. Cl. 1981); also quoting Restatement (Second) of Contracts, *supra* note 3, § 216 cmt. e ("existence of integration clause is 'likely' to conclude the issue whether the agreement is completely integrated")).

88. *Id.*

89. *Id.*

90. *Id.* (emphasis added).

91. *Id.* at 1433–34.

92. *Id.* at 1433.

93. *Id.* at 1433, 1435.

94. *See id.*

The resulting interpretation, plain to the court, provided a dumping limitation of sorts—"[t]he only possible limitation on the amount of waste that the Corps could deposit was its character and source, not its amount or height."[95] Even though that limitation would seem to be irrelevant to McAbee or the valuation of the easement, the appellate panel decided that "[t]here is nothing ambiguous about this,"[96] and articulated its plain meaning rule, stating, "[w]e begin with the plain language, . . . if the 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning' and the court may not resort to extrinsic evidence to interpret them.'"[97]

The extrinsic evidence the panel barred, on which the trial court relied in finding the parties' intent and thus ascertaining the contract's meaning, is not even identified in the appellate opinion. This evidence is so probative of intent that its preclusion is stunning. Once revealed, the evidence makes the panel's rationale seem a combination of technicalities and its result unjust. The Court of Federal Claims made the following findings of fact:

> Defendant gave plaintiff a map showing the top elevation would be 165 feet when the project was completed. The price negotiated for the easement was based on the placement of 15 to 20 feet of fill on the land during the five-year term.[98]
>
> * * *
>
> Prior to the contract's execution, plaintiff expressed its concerns for the condition of the land after the Government's use. Defendant responded to these concerns by reassuring plaintiff that the amount of soil deposited would not exceed 15 to 20 feet. It presented plaintiff with a map depicting the land in the expected condition post-project. The map shows a final elevation of 165 feet.[99]
>
> * * *
>
> Defendant's own real estate appraiser testified that the Government's post-project land valuations were based on 15 to 20 feet of deposit left on the land in a leveled condition.[100]

Given this evidence set forth in unquestioned findings, one wonders how the panel could say that "McAbee has pointed to no extrinsic evidence that supports its assertion that the contract was not fully integrated."[101] Or how the panel could infer that the "necessary and incident" language plainly modified the Corps' fill rights when the discussions, the reassurance, the pricing, and *even a map* showed an intended height limitation. Or how, given this context, the easement's language could be deemed unambiguous.

What is certain, however, is that *McAbee Construction* represented a disavowal of "the avowed purpose and primary function of the court" that "the intention of the parties" may prevail,[102] in favor of "the dry language of the

95. *Id.* at 1435.
96. *Id.*
97. *Id.* (citations omitted).
98. McAbee Constr., Inc. v. United States, No. 94–274C, slip op. at 2 (Ct. Fed. Cl. Aug. 10, 1995).
99. *Id.* at 3.
100. *Id.*
101. McAbee Constr. Inc. v. United States, 97 F.3d 1431, 1434 (Fed. Cir. 1996).
102. Chase & Rice Inc. v. United States, 354 F.2d 318, 318, 322 (Ct. Cl. 1965).

written agreement itself."[103] If such powerful evidence of intent must be precluded by a reading of contract language, "plain meaning" is plainly the controlling rule.

E. *1998:* HRE, Inc. v. United States

The decision in *HRE, Inc. v. United States*[104] resolved the meaning of specifications based on plain meaning, notwithstanding the contractor's proffer of extrinsic evidence indicating government intent and the court's anomalous admonition to the procuring agency that "[t]his contract is hardly a model of clarity."[105]

The specifications in question set forth requirements for "INSULATION FOR LOW-TEMPERATURE PIPING" as follows:

> 3.3 A. General: Unless otherwise specified, insulate low-temperature piping.
> B. Locations Insulated: Install insulation in the following locations and as indicated:
> 1. Chilled water piping.
> 2. Dual-temperature piping (with alternate heating and cooling).[106]

The parties disputed whether this specification required insulation of condenser piping, piping that, though low temperature piping within the meaning of section 3.3A, was not listed in section 3.3B. Predictably, HRE contended that section 3.3B, by requiring installation of insulation for two specified types of piping, but not condenser piping, "otherwise specified" as contemplated by section 3.3A and thus excepted condenser piping from the general insulation requirement.[107]

The court's panel would have none of "[t]he negative implication on which HRE relie[d]," which "d[id] not satisfy the 'otherwise specified' requirement."[108] Relying on its own usage of words, the court's panel reasoned that "use of the word 'specified,' instead of a more general word like 'indicated,' strongly suggests that any such exception must be explicitly stated."[109] HRE's argument that reading the contract to require insulation of items not listed in section 3.3B would leave that provision with no meaning or effect also was rejected.[110] The court's rejoinder was that "[b]y the same reasoning . . . HRE's contention would deny meaning to the general insulation requirement of section 3.3A,"[111] though the contention would seem actually to give purpose to the "otherwise specified" caveat in section 3.3A. The court then speculated weakly that "[a]lthough the precise reason for the listing of two types of

103. Macke Co. v. United States, 467 F.2d 1323, 1325 (Ct. Cl. 1972).
104. 142 F.3d 1274 (Fed. Cir. 1998).
105. *Id.* at 1276.
106. *Id.* at 1275.
107. *Id.* at 1275–76. It relied, no doubt, on the recognized maxim *expressio unius est exclusio alterius.*
108. *Id.* at 1276.
109. *Id.*
110. *Id.*
111. *Id.*

piping in section 3.3B may be unclear, they may have been included to avoid any question that those two categories were low-temperature piping to be insulated."[112]

This struggle with the language did not shake the court's confidence that "the clear language of section 3.3A"[113] required insulation of condenser piping, even though its "unless otherwise specified" exception left the reader uncertain as to exactly what insulation was required.

So certain was the panel of its interpretation of the language that extrinsic evidence was ruled out. HRE proffered that "the history of the drafting of the contract shows that such piping was not to be insulated."[114] Apparently, the government draftsman had modified an industry "master spec" by deleting condenser piping from the listing in what became the contract's section 3.3B. The court rejected this evidence potentially clarifying the parties' intent, invoking its own reading as the only permissible interpretation and stating:

> HRE's construction of the contract violates the well-settled rule that when the provisions of a contract are clear, "the court may not resort to extrinsic evidence to interpret them." *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). "Outside evidence may not be brought in to create an ambiguity where the language is clear." *City of Tacoma v. United States*, 31 F.3d 1130, 1134 (Fed. Cir. 1994). Here, as we have shown, the general insulation requirement in section 3.3A is clear and unambiguous. Its coverage cannot be restricted by resort to evidence—primarily *the testimony of the government official who drafted the contract*—regarding the circumstances under which the Masterspec Supplement provision listing condenser piping as one of the six locations to be insulated was not included in section 3.3B of the contract.[115]

If, in this circumstance, the court did not want to hear even from the government draftsman, one could only wonder how rigidly the Circuit might be prepared to invoke its plain meaning rule.

F. *The Import of These Precedents*

There is no doubt that these five panel decisions moved the Federal Circuit away from those prior precedents that had looked at extrinsic evidence of intent, including trade practice and custom, to give meaning to ostensibly unambiguous contract language. Nor can there be much doubt that these decisions moved the court away from general principles of contract interpretation as stated in the *Restatement (Second) of Contracts* and explained by leading commentators.

It would be impossible to square the panel's refusal to consider (or even acknowledge) the map in *McAbee* (extrinsic evidence bearing on whether the contract was fully integrated, whether the contract was unambiguous, and what the parties intended) with principles from the *Restatement (Second) of*

112. *Id.*
113. *Id.* at 1275.
114. *Id.*
115. *Id.* at 1276 (emphasis added).

Contracts stating that "[a]greements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . the meaning of the writing, whether or not integrated."[116]

The panel's disinterest in testimony from the Government's specification draftsman in *HRE* was contrary to this fundamental *Restatement (Second) of Contracts* rule:

> Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.[117]
>
> * * *
>
> The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understandings.[118]

The court's preemptory explanations for excluding extrinsic evidence of intent cannot be harmonized with the general contract law. Compare, for example, this general statement from *R.B. Wright Construction Co. v. United States* that "[n]either a contractor's belief nor contrary customary practice however, can make an unambiguous contract provision ambiguous, or justify a departure from its terms,"[119] to this *Restatement (Second)* principle: "There is no requirement that an agreement be ambiguous before evidence of a usage of trade can be shown, nor is it required that the usage of trade be consistent with the meaning the agreement would have apart from the usage."[120]

Further, the rule of *Hills Materials Co. v. Rice* that "[w]herever possible, words of a contract should be given their ordinary and common meaning"[121] conflicts with the general spirit of the *Restatement (Second)*'s interpretive rules that attend to "all manifestations of intentions," both "words and conduct," and explain that "[t]he meaning of words and other symbols commonly depends on their context."[122]

These panel decisions thus can be seen as intentionally staking out a Federal Circuit jurisprudence of contract interpretation that is different from the general law of contracts.

Even more extraordinary is the improbability of the court's conclusion in these decisions that the language was plain. The judicial notion of the construction term "heavy duty auger,"[123] the constricted meaning of "issued,"[124] and the attachment of "necessary and incident to the work" to fill rights[125] were not obvious or necessary interpretations. Evaluated in context and in connection with extrinsic evidence of intent, some of these interpretations are

116. Restatement (Second) of Contracts, *supra* note 3, § 214(c).
117. *Id.* § 201(1).
118. *Id.* § 201 cmt. c.
119. 919 F.2d 1569, 1572 (Fed. Cir. 1990).
120. Restatement (Second) of Contracts, *supra* note 3, § 222 cmt. b.
121. 982 F.2d 514, 516 (Fed. Cir. 1992).
122. Restatement (Second) of Contracts, *supra* note 3, § 202 cmts. a, b.
123. George Hyman Constr. Co. v. United States, 832 F.2d 574, 578 (Fed. Cir. 1987).
124. *Hills Materials*, 982 F.2d at 516.
125. McAbee Constr. Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1991).

questionable. Declarations that the language was facially unambiguous bring to mind Corbin's strenuous objection that

> [t]here are, indeed, a good many cases holding that the words of a writing are too "plain and clear" to justify admission of parol evidence as to their interpretation. In other cases it is said that such testimony is admissible only when the words of the writing are themselves ambiguous. Such statements assume a uniformity and certainty in the meaning of language that do not in fact exist; they should be subjected to consistent attack and disapproval . . .[126]

It is also difficult to understand how contract language could be deemed unambiguous when other judges, impartially reading it at the trial level or in dissent on appeal, or both (as in *R.B. Wright Construction*[127]), viewed it differently. A leading commentator on government contract law has characterized disagreements between judges about contract language in this way:

> In two cases we have identified, judges have reached different views of the plain meaning of the language but have still held that there was no ambiguity and hence no interpretation issue. This result is not only mysterious but almost completely unfathomable.
>
> * * *
>
> If judges are a good reflection of reasonable business[men], the fact that they arrived at conflicting meanings would seem to be the ultimate (and best) proof of an ambiguity. . . .
>
> * * *
>
> I have been using this case in my teaching for a number of years in order to inject some comic relief into the interpretation area. . . .
>
> * * *
>
> But it is infinitely more difficult to conclude that *judges*, standing above the controversy as *impartial* observers, have reached unreasonable interpretations of the contract language. Yet that is exactly what these cases are saying. The judges are treating each other as unreasonable people. . . .
>
> * * * *
>
> How disillusioning . . . we suggest that [judges] should be very cautious in finding the plain meaning of contract language.[128]

Adding to such disillusionment is the puzzling advice the court gave the Government in *HRE, Inc. v. United States*. Having declared the specification unambiguous (and therefore having refused to consider extrinsic evidence), the panel opined that it was not "a model of clarity"[129] and instructed the Government how to clear it up. The court recommended clarification of the very provisions in question, saying, for example, "[s]uch a provision is bound to cause confusion and disputes"[130]—apparently like the one before the court. The Government was "well advised" by the court "to review its provisions to

126. Corbin, *supra* note 20, § 542.
127. *See* R.B. Wright Constr. Co. v. United States, 919 F.2d 1569, 1573 (Fed. Cir. 1990).
128. Nash & Cibinic, *supra* note 4, at 59–60.
129. HRE, Inc. v. United States, 142 F.3d 1274, 1276 (Fed. Cir. 1998).
130. *Id.* at 1277.

make them more comprehensible and avoid ambiguity for the benefit of contractors, government officials, and the courts."[131]

V. PLAIN MEANING AND THE STANDARD OF APPELLATE REVIEW

It is interesting that the Federal Circuit panel in *George Hyman Construction Co.* coupled its statement of the plain meaning rule with a statement about the appellate standard of review in contract interpretation cases: "[i]t is our task to interpret the provisions of the unambiguous contract before us so that the words of those provisions are given their plain and ordinary meaning. The interpretation of a contract is a legal issue reserved for decision by the court."[132]

This combination, whether intentionally or not, suggested a relationship between the plain meaning rule and the standard of review. While examining the court's preference for plain meaning over extrinsic evidence, it is worth exploring this relationship.

Indeed, it is worth exploring whether contract interpretation really is a question of law, as the Federal Circuit, the Court of Claims,[133] and other courts[134] have repeatedly said it is. The Federal Circuit's panels have been insistent on their leeway to review issues of contract interpretation without deference to the trial forum's determination, on the premise that such issues posed questions of law.

For example, in *Harris v. Department of Veterans Affairs*, the court began its analysis by stating broadly that interpretation of an agreement "is an issue of law, which we review without deference to the Board's decision."[135] In *H.B. Mac, Inc. v. United States*, the court defined the issue as "'a matter of contract interpretation and thus presents a question of law,' which we decide *de novo*."[136] *Hunt Construction Group v. United States* put the same premise in the same unequivocal way: "The question of contract interpretation is one of law, and we review the Court of Federal Claims' interpretation without deference."[137] In *T. Brown Constructors, Inc. v. Pena*, the panel declared without qualification that "a Board's interpretation of a contract is not binding upon this court."[138] In *Grumman Data Systems Corp. v. Dalton*, the court stated that "[i]nterpretation of a contract provision is a question of law" and "[w]hether a contract provision is ambiguous is also a question of law."[139]

131. *Id.*
132. George Hyman Constr. Co. v. United States, 832 F.2d 574, 579 (Fed. Cir. 1987).
133. *E.g.*, ITT Arctic Servs., Inc. v. United States, 524 F.2d 680, 681 (Ct. Cl. 1975) ("The legal task before the court is one of interpreting the parties' contract.").
134. *See* Corbin, *supra* note 20, § 554 n.61.
135. 142 F.3d 1463, 1467 (Fed. Cir. 1998).
136. 153 F.3d 1338, 1345 (Fed. Cir. 1998) (whether the "contract contained indications of a particular site condition") (quoting P.J. Maffei Bldg. Wrecking Corp. v. United States, 732 F.2d 913, 916 (Fed. Cir. 1984)).
137. 281 F.3d 1369, 1372 (Fed. Cir. 2002).
138. 132 F.3d 724, 727 (Fed. Cir. 1997).
139. 88 F.3d 990, 997 (Fed. Cir. 1996).

Whether contract interpretation presents a question of law or fact really did not matter much to the Court of Claims when it was sitting as a trial forum,[140] without jury, until the Wunderlich Act[141] transformed its role and made the Boards of Contract Appeals' fact-finding presumptively correct.

The issue surfaced in *Chase & Rice, Inc. v. United States*, when the parties were "at variance in their delineations of . . . fact and law," with respect to the board's conclusions.[142] The Court of Claims finessed "foray[ing] into the furrowed field of fact-law distinction," because under either standard, it agreed with the board.[143] However, in *Dynamics Corp. of America v. United States*,[144] the Court of Claims sharply rejected the Government's argument that the question of intent of the parties is a question of fact as "semantic sophistry," which did "not warrant much discussion."[145] Noting that the Wunderlich Act explicitly precluded a board decision from finality on a question of law and declaring "the interpretation of the language of a contract . . . a question of law," the court stated:

> The Board cannot convert these clearly legal issues of contract interpretation into factual issues simply by resolving them in terms of the intent of the parties. For it is always true that "in the case of contracts, the avowed purpose and primary function of the court is the ascertainment of the intention of the parties. . . ." The intent of the parties is the ultimate legal conclusion, not a factual matter. If the Board could make binding decisions on matters of contract interpretation merely by speaking in terms of the intent of the parties, the Wunderlich Act would be robbed of much of its purpose.[146]

Concerns about restricting its review under the Wunderlich Act thus led the court to declare questions of intent matters of law.

But are they really? Professor Corbin asks the question this way: "Is [i]nterpretation [a] [m]atter of [f]act or . . . [l]aw?"[147] His answer is contrary to the Federal Circuit's repeated and strikingly unequivocal declaration:

> The question of interpretation of language and conduct—the question of what is the meaning that should be given by a court to the words of a contract, is a question of fact, not a question of law. . . . There is no "legal" meaning, separate and distinct from some person's meaning in fact.[148]

140. *See* WPC Enters., Inc. v. United States, 323 F.2d 874, 877–78 (Ct. Cl. 1963) (taking account of new evidence).

141. Ch. 199, 68 Stat. 81 (1954) (codified at 41 U.S.C. §§ 321, 322 (2000)); *see also* United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963).

142. 354 F.2d 318, 321 (Ct. Cl. 1965). The same approach was taken in *WPC Enters., Inc.*, 323 F.2d at 878 ("That is a problem which we shall doubtless have to meet again in other cases. For the present, we can pretermit it. . . . We have concluded that, even if the Board's findings are fully treated as factual, they are not final under the Act because they lack substantial support in the record as a whole.").

143. *Chase & Rice, Inc.*, 354 F.2d at 321. As noted previously, the court looked to extrinsic evidence to ascertain the intention of the parties, which was "'the avowed purpose and primary function of the court.'" *Id.*

144. 389 F.2d 424 (Ct. Cl. 1968).

145. *Id.* at 429.

146. *Id.* at 429–30 (citation omitted).

147. Corbin, *supra* note 20, § 554.

148. *Id.*

Corbin cautions that this question of fact "may be a question that should be answered by the judge rather than . . . the jury," indicating a practice that may explain the "question of law" declarations.[149] He goes on, however, to specify what issues belong to judge and "jury or other trier of fact":

> Even in the case of an integrated written contract, the meaning of the words may depend [on] various surrounding circumstances that are in dispute; the circumstances must be found as a fact before interpretation can proceed.
>
> * * *
>
> If from the whole material thus adduced more than one inference may reasonably be drawn, the determination of the inferences to be drawn—the interpretation—is for the jury or other trier of the facts.

The "legal effect" of the contract is different:

> The determination of the legal operation of a contract, after the meaning of its language [is] adopted by process of interpretation, is always for the court, because "legal operation" is the result of applying rules of law to the facts.

But this does not make contract interpretation even a mixed question of fact and law:

> If the sole question raised by the conflicting evidence is as to the "interpretation" of language, it is a question of fact with which no question of law is mixed.[150]

It is noteworthy that the author of the Supreme Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*,[151] Justice Breyer, when writing for the First Circuit, agreed with Corbin:

> In our opinion, an argument between the parties about the meaning of a contract is typically an argument about a "material fact," namely, the factual meaning of the contract. But, sometimes this type of argument raises "no genuine issue." The words of a contract may be so clear themselves that reasonable people could not differ over their meaning. Then, the judge must decide the issue himself, just as he decides any factual issue in respect to which reasonable people cannot differ. *See* 3 *Corbin on Contracts* § 554 (1960). Courts, noting that the judge, not the jury, decides such a threshold matter, have sometimes referred to this initial question of language ambiguity as a question of "law," which we see as another way of saying that there is no genuine factual issue left for a jury to decide.[152]

Significantly, after deciding the language was not unambiguous or "the supporting evidence" not "sufficiently one-sided," the appellate court remanded to the trial court for resolution of the "genuine issue of fact" as to the contract's meaning.[153]

More significantly, the *Restatement (Second) of Contracts* also contradicts the Federal Circuit's "question-of-law" premise, agreeing "analytically" with Corbin, but reaching a slightly different result. Section 212(2) provides that

149. *Id.*
150. *Id.*
151. 530 U.S. 604 (2000).
152. Boston Five Cents Sav. Bank v. HUD, 768 F.2d 5, 8 (1st Cir. 1985).
153. *Id.*

> [a] question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.[154]

The reference to "question of law" in the last sentence is qualified and explained in comment d to Section 212:

> Analytically, what meaning is attached to a word or other symbol by one or more people is a question of fact. But general usage as to the meaning of words in the English language is commonly a proper subject for judicial notice without the aid of evidence extrinsic to the writing. Historically, moreover, partly perhaps because of the fact that jurors were often illiterate, questions of interpretation of written documents have been treated as questions of law in the sense that they are decided by the trial judge rather than the jury.

This explanation continues with a focus on appellate review:

> Likewise, since an appellate court is commonly in as good a position to decide such questions as a trial judge, they have been treated as questions of law for purposes of appellate review. Such treatment has the effect of limiting the power of the trier of fact to exercise a dispensing power in the guise of a finding of fact, and thus contributes to the stability and predictability of contractual relations. In cases of standardized contracts such as insurance policies, it also provides a method of assuring that like cases will be decided alike.[155]

This rationale may explain the Court of Claims' reaction in *Dynamics Corp. of America v. United States*,[156] but whether Congress intended such a result when in the Wunderlich Act[157] and the subsequent Contract Disputes Act[158] it gave presumptive finality to the findings of fact of specialized board of contract appeals judges, sitting without juries, is an interesting question. Indeed, it is a question that has not been addressed adequately,[159] only dismissed as "semantic sophistry" or avoided by the repeated premise that contract interpretation is a matter of law.

But the connection between this question-of-law refrain and the plain meaning rule relates to the other part of the *Restatement (Second)*'s rule, which empowers the trier of fact to determine questions of contract interpretation that turn "on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence."[160] As the commentary explains immediately after dealing with "questions of law": "if the issue depends on evidence outside the writing, and the possible inferences are con-

154. Restatement (Second) of Contracts, *supra* note 3, § 212(2).
155. *Id.* § 212 cmt. d.
156. 389 F.2d 424 (Ct. Cl. 1968).
157. Ch. 199, 68 Stat. 81 (1954) (codified at 41 U.S.C. §§ 321, 322 (2000)).
158. 41 U.S.C. § 601 (2000).
159. Even though, as noted previously, in WPC Enters., Inc. v. United States, 323 F.2d 874, 878 (Ct. Cl. 1963), Judge Davis wrote: "That is a problem which we shall doubtless have to meet again in other cases. For the present, we can pretermit it."
160. Restatement (Second) of Contracts, *supra* note 3, § 212(2).

flicting, the choice is for the trier of fact."[161] These issues of contract interpretation are not questions of law in either an analytical or practical sense—and it follows that they are not for the appellate court to decide *de novo*.

The Federal Circuit has thus overstated its usual premise of review. The court's "question-of-law" proposition should certainly only apply when extrinsic evidence is not in play and therefore needs support from a rule that precludes consideration of extrinsic evidence, such as: "When the contract . . . language is unambiguous on its face, our inquiry ends, and the plain language of the Agreement controls."[162] Therefore, it is not surprising that the panel in *George Hyman Construction Co.* connected this plain meaning rule with the *de novo* standard of review.

From time to time, panels of the Federal Circuit have acknowledged that underlying findings about extrinsic evidence are subject to a restricted review, though they have not recognized any deference required for inferences as to the contract's meaning drawn from such evidence.[163] One such acknowledgment appears in *Metric Constructors, Inc. v. NASA*, where the court's panel, after denying deference on contract interpretation, added that "[t]his court will accept any *underlying findings* of the Board, . . . unless they are 'fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or . . . not supported by substantial evidence.'"[164] However, as explained below, this articulation presaged this particular panel's resistance to the plain meaning rule and its effort in 1999 to accommodate those prior precedents that allowed further inquiry to see whether extrinsic evidence displaced plain meaning.

VI. THE UNSUCCESSFUL EFFORT TO HARMONIZE THE CONFLICTING PRECEDENTS

In *Metric Constructors*,[165] a panel of the Federal Circuit engaged in the effort to harmonize the "plain meaning" rule of *McAbee* and other decisions with the earlier precedents that relied on extrinsic evidence in the absence of facial ambiguity. The ASBCA had found the language of a specification that required the contractor to install "new lamps 'immediately prior to the completion of the project'" unambiguous and rejected the contractor's argument that it was unusual and contrary to trade practice to require "relamping,"[166] as opposed to replacement only of broken or burned-out lamps.[167] The

161. *Id.* § 212(2) cmt. e.

162. Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1040–41 (Fed. Cir. 2003).

163. *E.g.*, C. Sanchez & Son v. United States, 6 F.3d 1539, 1544 (Fed. Cir. 1993) (reviewing Court of Federal Claims: "The interpretation of a contract term is a question of law. If a contract is determined, as a matter of law, to be ambiguous, and evidence is required to resolve the ambiguity, facts found from such evidence are reviewed for clear error, whereas the contract interpretation based thereon is reviewed *de novo.*").

164. 169 F.3d 747, 751 (Fed. Cir. 1999) (emphasis added) (quoting 41 U.S.C. § 609(b) (1994)).

165. *Id.*

166. Metric Constructors, Inc., ASBCA No. 48852, 98–1 BCA ¶ 29,384, at 146,050.

167. *Id.*

board's decision read like the Federal Circuit's most recent "plain meaning" rulings: the "unusual nature of the specification does not diminish its clarity."[168]

The court observed that *Metric Constructors* squarely presented the recurring issue of the role of evidence of trade practice and custom in contract interpretation. "The case law identifies two seemingly divergent roles for such evidence":[169]

> One line of cases holds that this court may consult evidence of trade practice and custom to discern the meaning of an ambiguous contract provision, but not to contradict or override an unambiguous contract provision.[170]
>
> The second line of cases holds that this court may consult evidence of trade practice and custom to show that "language which appears on its face to be perfectly clear and unambiguous has, in fact, a meaning different from its ordinary meaning."[171]

Notwithstanding, the panel insisted that "these two lines of cases . . . only seem to diverge."[172]

The court began its harmonizing effort by reciting principles of contract interpretation having application beyond the consideration of trade practice, general principles calling for consideration of all kinds of extrinsic evidence of intent. The court's panel in *Metric Constructors* declared these general principles of contract interpretation:

> *This court* adheres to the principle that "the language of a contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Mfg. Co. v. United States*, 169 Ct. Cl. 384, 351 F.2d 972, 975 (1965). Thus, to interpret disputed contract terms, "*the context and intentions [of the contracting parties] are more meaningful than the dictionary definition.*" *Rice v. United States*, 192 Ct. Cl. 903, 428 F.2d 1311, 1314 (1970). . . . Trade practice and custom illuminate the context for the parties' contract negotiations and agreements. *Before* an interpreting court can conclusively declare a contract ambiguous or unambiguous, it must consult the context in which the parties exchanged promises. . . . *Before* arriving at a legal reading of a contract provision, a court must consider the context and intentions of the parties.[173]

With specific respect to trade practice and custom, the court stated that

> evidence of trade practice and custom is part of the *initial* assessment of contract meaning. It illuminates the contemporaneous circumstances at the time of contracting, *giving life to the intentions of the parties.* It helps pinpoint the bargain the

168. *Id.*

169. *Metric Constructors*, 169 F.3d at 751.

170. *Id.* (citing R.B. Wright Constr. Co. v. United States, 919 F.2d 1569, 1572 (Fed. Cir. 1990) ("Neither a contractor's belief nor contrary customary practice . . . can make an unambiguous contract provision ambiguous or justify a departure from its terms.")).

171. *Id.* (citing Gholson, Byars, and Holmes Constr. Co. v. United States, 351 F.2d. 987, 999 (Ct. Cl. 1965) ("The principle is now established in this court (and almost every other court) that in order that the intention of the parties may prevail, the language of [the] contract is to be given effect according to its trade meaning notwithstanding that in its ordinary meaning it is unambiguous.")).

172. *Id.* at 752.

173. *Id.* (emphasis added).

> parties struck and the reasonableness of their subsequent interpretations of that bargain.[174]

These principles directly and obviously contradict notions that "our inquiry ends" with plain meaning, which must be given effect "whenever possible" and without consideration of extrinsic evidence of intent.

The panel sought to harmonize the divergence by stating that "this role for evidence of trade usage does not mean that a court should always accept evidence of trade practice and custom in interpreting the terms of a contract."[175] It "cannot . . . create an ambiguity where a contract was not reasonably susceptible of differing interpretations at the time of contracting."[176] "Trade practice evidence is not an avenue for a party to avoid its contractual obligations by later invoking a conflicting trade practice."[177] The panel thus seemed to limit "*R.B. Wright* [*Construction Company v. United States*] and similarly decided cases" to ensuring that "[t]he evidence of trade practice and custom truly reflects the intent of the contracting party, and avoids according undue weight to that party's purely *post hoc* explanations of its conduct."[178]

That the rationale forcibly pulled back from the peremptory language of *R.B. Wright* and similarly decided cases is clear from the court's resolution of Metric's claim. The "plain meaning" of the contract language became less clear when considered with the extrinsic evidence, which established these facts the court found compelling:

> The evidence shows that the electrical industry commonly uses the term "relamping" to mean the total replacement of lamps at a particular facility. Not only does that term not appear in the contract, relamping is rarely performed in connection with a newly constructed facility. . . . Metric's reliance on its interpretation is reflected in its bid, which included labor to install only one set of lamps and the cost of only one set of lamps.[179]

Thus, the court ruled, "new lamps" were not required to be "installed immediately prior to completion of the project," even though the specifications without qualification appeared to say they were.[180]

To support this harmonizing analysis, apparently in the absence of any harmonizing Federal Circuit precedent, the court surprisingly turned to a decision of the Court of Federal Claims, stating that its "analysis correctly applies the law of contract interpretation."[181] In *Western States Construction Co.*

---

174. *Id.* (emphasis added).
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* This rationale seemed to be in accord with Professor Corbin's "warning against the too ready acceptance of flimsy and prejudiced testimony motivated by subsequently realized self-interest," to which he caveated: "But this latter danger can not safely be avoided by a mechanical rule of exclusion. *The problem is as to the weight of evidence, not its admissibility.*" Corbin, *supra* note 20, § 542A (emphasis added).
179. Metric Constructors Inc. v. NASA, 169 F.3d 747, 753 (Fed. Cir. 1999).
180. *Id.* at 749.
181. *Id.* at 752.

v. United States,[182] the lower court allowed trade practice to be considered in interpreting a specification that required that underground "metallic pipe" be wrapped with protective tape. The plain meaning of "metallic pipe" encompassed cast iron soil pipe (CISP). The court denied the Government's motion for summary judgment, "based on the existence of a customary trade practice in the plumbing industry not to wrap factory-coated CISP with any type of protective tape."[183] The court found that the contract language might have a "specialized meaning in the industry in the context of a wrapping requirement," giving this explanation:

> If an informed person reading the contract would reasonably assume that wrapping is not required because cleaning and wrapping underground CISP makes no sense, and if that assumption would not deprive the specification of all meaning, i.e., if there is a more limited sense in which the requirement is apparently intended to apply, then the court is faced with conflicting meanings, not nullification.[184]

Although the court talked of "specialized meaning," this passage indicates that "the customary trade *practice*" of not wrapping cast iron pipe, rather than any word usage of the term "metallic pipe," permitted a restricted application of the term "in the context" of the specification.[185] In other words, because in the trade this type of "metallic pipe" is not normally wrapped, the specification may not have been intended in accordance with its plain meaning.

Western States Construction—striking the harmonizing balance between the diverging lines of authority—still insisted that "the guiding principle is that the contract controls the work to be done and cannot be trumped by a trade practice, regardless of how prevalent."[186] While many of the authorities the decision cites refer to "usage of the language of the trade" and "particular expressions," others speak of "trade practice" and "custom"—even of other "circumstances" and "qualifying or supplementing terms"—and still others do not seem to discriminate analytically between these concepts.[187] But the extent of *Western States Construction*'s exception to the plain meaning rule is suggested not only by its reliance on the *Restatement (Second) of Contracts*,[188] but also by its quotation of principles declared by the Supreme Court in 1866:

> Courts, on the construction of contracts, look to the language employed, the subject matter, *and* the surrounding circumstances. They are *never shut out from the same light* which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, *so as to view the circumstances as they viewed them*, and so to judge of

182. 26 Cl. Ct. 818 (1992). The decision was made by the United States Claims Court, subsequently renamed the United States Court of Federal Claims.
183. *Id.* at 820.
184. *Id.* at 826.
185. *Id.*
186. *Id.* at 824.
187. *See id.* at 822–24.
188. *Id.* at 822.

> the meaning of words and of the correct application of the language to the things described.[189]

The Court of Federal Claims summarized its approved accommodation of the divergent authorities in this way:

> Trade practice and custom can thus be used to support a contention that a certain contract provision was legitimately interpreted in a way different than a layman's reading. However, the evidence would only be accepted because a contractor, in the industry targeted by the solicitation, made a colorable showing that it relied on a competing interpretation of words and not just on the fact that things are not customarily done in the manner called for by the contract. As a result, there would thus be present the ambiguity necessary to resort to trade custom and usage.[190]

The harmony sought by the *Metric Constructors* panel did not last long, however. *Metric Constructors* was narrowly read in two subsequent decisions of other Federal Circuit panels that restored the primacy of contract language. These narrow interpretations of *Metric Constructors* were possible, but seemed to be in disagreement with its underlying premises and principles. In *Jowett, Inc. v. United States*, a panel limited trade practice to a "lexicographic function in some cases."[191] "Lexicography" is the business of definitions.[192]

According to this panel, the key to *Metric Constructors* was therefore limited to *word* usage—i.e., that "the term 'relamping' would have been used if the parties had intended to require the replacement of all lamps," as the plain meaning indicated. Thus, the court concluded that "affidavits that those familiar with trade practices in the construction industry would interpret the specifications differently are irrelevant, unless they identify a specific term that has a well understood meaning in the industry and that was used in, or omitted from, the contract."[193] In contrast to *Metric*'s premise that "[b]efore an interpreting court can conclusively declare a contract ambiguous or unambiguous, it must consult the context in which the parties exchanged promises,"[194] the *Jowett* panel complained that "[t]his view, in essence, enables industry practice to create an ambiguity, even before the language of the contract is itself analyzed to determine if an ambiguity lies within the four corners of the contract."[195]

189. *Id.* at 825 (quoting Nash v. Towne, 72 U.S. (5 Wall.) 689, 699 (1866) (emphasis added)). The court also relied on Rice v. United States, 428 F.2d 1311, 1314 (Ct. Cl. 1970) ("In judging the import of words in the contract, the context and intention [of the contracting parties] are more meaningful than the dictionary definition.").

190. W. States Constr. Co. v. United States, 26 Cl. Ct. 818, 824 (1992).

191. 234 F.3d 1365, 1368 (Fed. Cir. 2000).

192. Webster's Third New International Dictionary 1301 (2002). The Federal Circuit's pre-occupation with words is also evidenced by Banknote Corp. of Am., Inc. v. United States, 365 F.3d 1345, 1354 (Fed. Cir. 2004), where the court declined to find ambiguity and thus rejected extrinsic evidence because the solicitation was *silent* on an essential issue (the relative importance of evaluation factors), explaining that "there is no language . . . susceptible to more than one reasonable interpretation."

193. *Jowett*, 234 F.3d at 1369–70.

194. Metric Constructors, Inc. v. NASA, 169 F.3d 747, 752 (Fed. Cir. 1999).

195. *Jowett*, 234 F.3d at 1368.

Two years later, in *Hunt Construction Group v. United States*,[196] another panel rejected the contractor's argument that "the existence of trade practice can render a contract ambiguous that is otherwise clear on its face," stating that "*Metric* [*Constructors*] stands for no such proposition."[197] Because the contractor did not cite "a term of art included or omitted," "[t]rade practice is therefore irrelevant."[198]

This distinction, whether or not intended by the *Metric Constructors*'s panel, is not drawn by the *Restatement (Second)*'s section 219, which defines "usage" broadly as "habitual or customary practice" and identifies "word usage" as a subset.[199] Section 222 defines "Usage of Trade," without limitation to "word usage," as "a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement."[200] Working with these definitions, section 220, "Usage Relevant to Interpretation," indicates that "[u]sage" may give particular meaning to "an agreement, or may supplement or qualify it."[201] The illustrations under section 220 deal with customs and practices, not just "terms of art" or word usage, which supplement or qualify an agreement.[202] Moreover, section 221 goes beyond giving trade meaning to contract language, by *actually authorizing adding* qualifying terms consistent with trade practice:

> An agreement is supplemented or qualified by a reasonable usage with respect to agreements of the same type if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage.[203]

The restriction of trade usage to lexicography represented a further way in which the court's panels did not adhere to the *Restatement (Second) of Contracts*.

Moreover, by its decision in *Hunt Construction Group*, the panel went even further to undermine the harmonizing effort of *Metric Constructors* and restore the divergence that the panel hoped was more apparent than real. In *Metric Constructors*, the court had "adhere[d] to" principles that included "[b]efore arriving at a legal reading of a contract provision, a court must consider the context and intentions of the parties. That context may or may not disclose ambiguities."[204] Only three years later, the *Hunt Construction* panel repeated the contradictory plain meaning maxim that "[w]here the contract language is unambiguous on its face, our inquiry ends, and the plain meaning of the contract controls."[205]

196. 281 F.3d 1369, 1373 (Fed. Cir. 2002).
197. *Id.*
198. *Id.*
199. Restatement (Second) of Contracts, *supra* note 3, § 219.
200. *Id.* at § 222.
201. *Id.* at § 220 cmt. a.
202. *Id.* at § 220 illus. 3–7, 10.
203. *Id.* at § 221.
204. Metric Constructors Inc. v. NASA, 169 F.3d 747, 752 (Fed. Cir. 1999).
205. Hunt Constr. Group v. United States, 281 F.3d 1369, 1373 (Fed. Cir. 2002).

VII. TIGHTENING THE PAROL EVIDENCE BAR

In *Rumsfeld v. Freedom N.Y., Inc.*,[206] a Federal Circuit panel further tightened the rule against parol evidence, also resisting *Restatement (Second) of Contract*'s principles. The court went beyond the questionable contract-specific resolution in *McAbee Construction, Inc. v. United States*,[207] declaring a stricter version of the rule than the court had previously applied. *McAbee Construction* had acknowledged that contract language itself, including a merger clause, may not prove complete integration, and extrinsic evidence should be evaluated for this determination.[208] Whereas the *McAbee Construction* panel considered the merger clause "a fair bet,"[209] in *Freedom N.Y.* the panel spoke in exclusionary terms:

> Like "most courts" we elect to follow the "traditional rule" set forth in the *third edition* of the Williston treatise, . . . namely that an integration clause "conclusively establishes that the integration is total unless (a) the document is obviously incomplete or (b) the merger clause was included as a result of fraud or mistake or any other reason to set aside the contract.[210]

The court added that "[t]here are no such circumstances . . . here."[211]

The circumstances as found and reported by the ASBCA[212] were the following: The Government sought to bar Freedom N.Y.'s claim on the basis of a release in Modification 25, which also provided that "[t]he parties expressly state that the aforesaid recitals are the complete and total terms of their Agreement. . . ." Freedom asserted that the agreement was conditioned on and included a "side" letter in which the Government made certain promises and, because the Government had not fulfilled those commitments, the claim release was not effective. The trial forum agreed with Freedom,[213] making the following findings of fact:

> Based upon prior correspondence
>
> 92. Henry Thomas understood that Messrs. Chiesa and Lambert [DLA's Director of Contracts and Freedom's lawyer] had agreed that FNY would waive its $3.4 million claim and DLA would commit to process a $2.7 million V-loan for FNY and to negotiate an MRE-7 contract with FNY, although the Government could not "guarantee" an MRE-7 contract to FNY.
>
> 93. On 29 May 1986, Henry Thomas and consultant Francois met with PCO Bankoff. Mr. Thomas had a 28 May 1986 letter to DLA's R. Chiesa, conforming

206. 329 F.3d 1320 (Fed. Cir.), *reh'g denied*, 346 F.3d 1359 (Fed. Cir. 2003).
207. 97 F.3d 1431, 1434 (Fed. Cir. 1991).
208. *Id.*
209. *Id.*
210. *Freedom N.Y.*, 329 F.3d at 1328–29 (emphasis added). Williston's fourth edition states the "modern rule": "In many more jurisdictions, however, the presence of an integration or merger clause is merely presumptive evidence of the parties' intentions as to integration." 11 Samuel Williston & Richard Lord, A Treatise on the Law of Contracts § 33:21 (4th ed. 1999).
211. *Freedom N.Y.*, 329 F.3d at 1329.
212. Freedom N.Y., Inc., ASBCA No. 43965, 01–2 BCA ¶ 31,585.
213. *Id.* at 156,066.

> in substance to the 2 May 1986 version, attached to proposed Modification No. P00025. Mr. Bankoff saw the 28 May date of the letter, and provided an essentially identical FNY 13 May 1986 letter to Mr. Chiesa, which Mr. Thomas attached to Modification P00025. Mr. Bankoff said that he would send that letter to Mr. Chiesa for approval. At 11:00 a.m. DPSC telefaxed to DLA headquarters a copy of the signed 13 May letter. Mr. Thomas heard no objection to the 13 May letter, understood that Mr. Chiesa had agreed, and said that without DLA's agreement he would not have signed Modification No. P00025. Soon thereafter, Messrs. Thomas and Bankoff signed Modification No. P00025.
>
> 94. According to Mr. Bankoff, on 29 May 1986 he told FNY that he knew nothing of any side agreement FNY made with DLA: "There is no side agreement. There is no attachment to the modification. . . ." Considering the documents in evidence and Mr. Bankoff's demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous testimony, we attach no probative weight to Mr. Bankoff's denial of the "side agreement" attached to P00025.[214]

One might have thought these ASBCA findings of fact would carry the day under the Contract Disputes Act, because they established that the side letter was attached to the executed modification, that Freedom's president thought it part of or a condition of the modification, that he would not have assented to the modification without agreement to the side letter, and that the contracting officer knew all of this and refused to admit it. But they did not.

Apparently, the court's panel was initially unaware of the specific findings, because when Freedom raised them in a petition for rehearing, the court's reaction was that Freedom had "waived" the argument that the side letter was incorporated by attachment.[215] The court then dismissed the ASBCA findings and finessed the contracting officer's participation in the attachment and knowledge of the contractor's intent, by stating, "One party to a contract cannot bind the other simply by attaching a document to a copy of the contract, even if that particular copy is signed."[216] In the end, the court ruled that the extrinsic evidence could not overcome the conclusive integration clause,[217] confirming its overruling of the ASBCA decision.

In its initial opinion, the panel had declared that its review was *de novo* and stated that "[w]hether a contract is integrated is a question of law. . . . We therefore review the finding of the Board without deference."[218] There was authority for this proposition,[219] but, like similar statements with respect to issues of contract interpretation, it was an oversimplification. According to the *Restatement (Second)*, "[w]hether a writing has been adopted as an integrated agreement is a question of fact to be determined based on all the relevant evidence. . . . Ordinarily the issue whether there is an integrated

214. *Id.* at 156,055–56.
215. Rumsfeld v. United States, 346 F.3d 1359, 1360(Fed. Cir. 2003).
216. *Id.*
217. *Id.*
218. Rumsfeld v. United States, 329 F.3d 1320, 1328 (Fed. Cir. 2003).
219. The court cited Sylvania Elec. Prods., Inc. v. United States, 458 F.2d 994, 1006 n.9 (Ct. Cl. 1972).

agreement is determined by the trial judge. . . ."[220] The *Restatement (Second)* would thus require some attention, at least, to be given to the statutory constraint on the Circuit's appellate review authority because the ASBCA trial judges' findings of fact are presumptively correct under the Contract Disputes Act.[221]

However one might characterize the standard of review, it is clear that *Freedom N.Y.*, like the plain meaning decisions, represents a rejection of the *Restatement (Second)*. The "traditional" Williston rule, which the panel "elected" in *Freedom N.Y.*, is plainly not the *Restatement (Second)* rule, which in contrast focuses on such extrinsic evidence of intent. Section 214 provides that

> Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish
>
> a) that the writing is or is not an integrated agreement;
> b) that the integrated agreement, if any, is completely or partially integrated . . .[222]

Section 209(3) states:

> Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.[223]

The comments to sections 209 and 210 bear directly on the issue in *Freedom N.Y.*:

> *Form of integrated agreement* . . . Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, but such a declaration may not be conclusive.[224]
>
> *Proof of complete integration.* That a writing was or was not adopted as a completely integrated agreement may be proved by any relevant evidence. . . . But a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties.[225]

In contrast, Williston's traditional rule, elected in *Freedom N.Y.*, does "not seek out the actual intention of the parties in determining whether the writing was a complete integration."[226] Williston's treatise describes the difference in this way: "The traditional rule prefers the certainty of the writing itself."[227] In *Freedom N.Y.*,[228] a panel thus elected to bring the court's version of the parol evidence rule in line with the exclusionary plain meaning rule of interpretation.

220. Restatement (Second) of Contracts, *supra* note 3, § 209 cmt. c.
221. *See* 41 U.S.C. § 609(b) (2000).
222. Restatement (Second) of Contracts, *supra* note 3, § 214.
223. *Id.* § 209(3).
224. *Id.* § 209 cmt. b.
225. *Id.* § 210 cmt. b.
226. John D. Calamari & Joseph M. Perillo, The Law of Contracts § 3.4(h) (5th ed. 1998).
227. Williston & Lord, *supra* note 210, § 33:16.
228. Rumsfeld v. Freedom N.Y., Inc., 329 F.3d 1320 (Fed. Cir. 2003).

VIII. *COAST FEDERAL BANK FSB V. UNITED STATES*

These various panel decisions of the Federal Circuit resolve the court's divergent jurisprudence on contract interpretation in favor of contract language, rather then attempting to harmonize its inconsistent precedent on the subject. But not until *Coast Federal* did the court en banc speak squarely on the subject.[229] The *Coast Federal* case was not a likely subject to become such a precedent, as can be seen from its convoluted history. *Coast Federal*'s path to en banc consideration suggests that the case was not as simple, and the contract language not as unambiguous, as the Circuit ultimately ruled they were.

A. *The Contract Language and the Issue*

Coast Federal's proof of damages for breach of an Assistance Agreement with the Federal Home Loan Bank Board, as a result of the passage of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA),[230] depended on establishing that the Agreement promised certain accounting forbearances for regulatory purposes. Coast Federal had agreed to acquire a failed thrift, for which the Government had exposure for federally guaranteed deposits.[231] The liabilities of the insolvent bank exceeded its assets by $347 million, which, under the then-accepted practice in thrift accounting, would have been treated as an asset in the form of regulatory goodwill.[232] As an inducement, the Government made a $299 million cash contribution, which customarily would have reduced the regulatory goodwill to $48 million. However, as a further inducement, the Government agreed to an accounting forbearance from generally accepted accounting principles (GAAP) with respect to the $299 million contribution.[233] The parties did not dispute that this forbearance allowed Coast Federal to credit the $299 million contribution to net worth as regulatory capital. The issue was whether the agreed-to forbearance also relieved Coast Federal of a GAAP requirement to amortize the $299 million in regulatory goodwill.[234]

The forbearance was set forth in section 6(a)(1)(c) of the Agreement:

> For purposes of reports to the Bank Board other than reports or financial statements that are required to be governed by generally accepted accounting principles, *the cash contribution made under this § 6(a)(1) shall be credited to the [plaintiff's] net worth and shall constitute regulatory capital.*

It was undisputed that this sentence represented a forbearance from GAAP. However, the paragraph went on to say in the next sentence that

229. Coast Fed. Bank, FSB v. United States, 48 Fed. Cl. 402 (2000), *rev'd*, 309 F.3d 1353 (Fed. Cir. 2002), *vacated and reh'g en banc granted*, 320 F.3d 1338 (Fed. Cir. 2003), *on reh'g*, 323 F.3d 1035 (Fed. Cir. 2003) (*en banc*).

230. *See* 12 U.S.C. § 1464 (2000).

231. *Coast Fed.*, 48 Fed. Cl. at 409.

232. *Id.*

233. *Id.* at 410.

234. *Id.* at 409.

> It is understood by the parties that the preceding sentence is not intended to address in any way the accounting treatment of contributions from [FSLIC] that must be reflected in any filing that [plaintiff] may make, whether to the Bank Board or otherwise, that requires the submission of financial statements prepared in accordance with generally accepted accounting principles.[235]

This apparent double-talk was explained by the undisputed governance of a separate accounting system known as Regulatory Accounting Principles (RAP), which permitted the reporting of the $299 million as regulatory capital.[236]

Another relevant provision was section 20, which provided:

> *Accounting Principles.* Except as otherwise provided, any computations made for purposes of this Agreement shall be governed by generally accepted accounting principles as applied in the savings and loan industry, except that where such principles conflict with the terms of the Agreement . . . then this Agreement . . . shall govern.[237]

Section 20 also provided that, "[i]n the case of any ambiguity in the interpretation or construction of any provision of this Agreement," the ambiguity would be resolved by "the Bank Board's resolution or action relating . . . to this Agreement."[238] Finally, section 20 provided that "[n]otwithstanding the foregoing, nothing in this § 20 shall affect the first sentence of the second paragraph in § 6(a)(1) of this Agreement."[239] The dizzying back-and-forth of "except thats," "notwithstandings," and other cross-referenced qualifiers opened the question that had priority: Which was the exception and which was the rule?

Based on this language and extrinsic evidence, the parties differed as to the accounting procedures required by the Agreement as stated by the Court of Federal Claims:

> Specifically, defendant argues that the amount of the cash contribution provided to plaintiff by the Federal Savings and Loan Insurance Corporation (FSLIC) was required to amortize for purposes of regulatory reporting requirements. Plaintiff disputes this interpretation and responds that the contract in fact permitted it to include the entire contribution as a permanent and nonamortizing credit for purposes of regulatory reporting.[240]

B. *The Decision of the Court of Federal Claims*

Ruling on motions for summary judgment with an extensive record of documents and depositions,[241] the Court of Federal Claims decided in favor

235. *Id.* (emphasis added).
236. *Id.* at 410.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 406.
241. *See id.* at 406. The parties' reliance on and dispute about extrinsic evidence, as well as the court's consideration of it, made this case seem inappropriate for summary judgment. *See* then Judge Breyer's guidance in Boston Five Cents Sav. Bank v. HUD, 768 F.2d 5, 11–12 (1st Cir. 1985): "The (sometimes unrecognized) difference between these two procedures is impor-

of the Government. Discounting and distinguishing extrinsic evidence that the Board's examiners had not objected to Coast Federal's annual reports that showed nonamortization[242] and that the Bank Board Chairman might have agreed with Coast Federal's interpretation,[243] the court relied significantly on a textual examination.

It is not clear that the court considered the proper interpretation plain from the language. Instead, the court said the text of the forbearance "favors" the Government's interpretation. The phrase "shall be credited to" describes the "initial treatment" of the cash contribution, but "says nothing about the proper subsequent treatment of the amount initially credited."[244] "[T]he phrase 'shall constitute,' while not on its face inconsistent with plaintiff's view of permanence, is fully consistent as well with amortization."[245] "The plain language," therefore, "does not preclude" (as distinguished from require) amortization.

The court then relied on the next and seemingly contradictory sentence of section 6(a)(1), which disclaimed addressing the accounting for any filing required to be in accordance with GAAP. The court found the language of this separate sentence "plain" even though the permitted "initial crediting" in the previous sentence constituted an agreed-to deviation from GAAP. Trying to make sense of this contradiction, the court inferred that "[t]he *apparent* purpose of this sentence in conjunction with the previous sentence, *in the court's view*, is to apply GAAP to the subsequent reporting of the capital contribution, as distinct from the initial 'crediting' of the contribution to regulatory capital."[246]

However, the text—and Coast Federal's financial reports without amortization (to which the Board's examiners did not object)—did prompt the court to acknowledge that Coast Federal could establish that it "viewed the agreement as precluding amortization."[247] The court acknowledged the "bona fides of plaintiff's belief that its treatment of RAP goodwill was proper."[248]

But the court relied on the language of section 20, which it found empowered the Board to resolve "ambiguities" about reporting under the Agreement. However, "[s]ince FHLBB was never requested to issue a statement to plaintiff explaining FHLBB's interpretation of GAAP on this issue, the court looks to other . . . statements and actions by FHLBB to determine its interpretation."[249] The court then concluded that this collateral "evidence strongly sup-

tant; to stipulate a record for decision allows the judge to decide any significant issue of material fact that he discovers; to file cross-motions for summary judgment does *not* allow him to do so" (emphasis added).

242. Coast Fed. Bank, FSB v. United States, 48 Fed. Cl. 402, 415–18 (2000).
243. *Id.* at 418–19.
244. *Id.* at 411–12.
245. *Id* at 412.
246. *Id.* (emphasis added).
247. *Id.*
248. *Id.* at 416.
249. *Id.* at 413.

ports the view that FHLBB consistently took the position that RAP goodwill must amortize."[250] On this basis, and dealing with other evidence (including the deposition of the FHLBB chairman that "indicated considerable confusion"),[251] the Court of Federal Claims granted summary judgment for the Government.

C. *The First Federal Circuit Decision*[252]

Coast Federal looked very different on appeal—at least at first and to the majority of the Federal Circuit panel. In a comment that might have surprised the court below, the panel said, "[w]e agree with the trial court that the language of § 6(a)(1)(C) is sufficiently ambiguous that it should be construed with the aid of extrinsic evidence."[253] The panel thus looked to extrinsic evidence of the intent of the parties. Perhaps anticipating the dissent, the majority explained:

> At first blush, this appeal seems to depend solely on the rules of the purchase method of accounting and the technicalities of GAAP. In actuality, however, the appeal turns on contract construction and the practical business understandings of the non-accountants who were the parties to the Agreement. The reason that the appeal turns on the understanding of the parties, to which they testified, is because the language of the three critical provisions of the Agreement is by itself ambiguous.[254]

But, as seen by the majority, the evidence of intent was not ambiguous—the shared intent was a permanent credit to regulatory capital. Coast Federal's negotiator, its CEO, and the chairman of the Bank Board "all testified that their understanding of the incentives behind the deal were both the cash payment, and the forbearances of crediting regulatory capital . . . without having to amortize the offsetting regulatory goodwill. Not only that, . . . there was no contradictory testimony."[255] The majority quoted the deposition testimony at length, particularly that of the Board chairman, in which it found no confusion. The court thus concluded that "[t]he testimony in the case leaves no doubt about the intent of the parties," which was "'a permanent addition to Coast's regulatory capital in an amount equal to the cash contri-

250. *Id.*

251. *Id.* at 418–19. After noting "considerable confusion" in the questioning that drew the chairman's response that "the capital credit would last in perpetuity," the court thought it likely that Mr. Gray was indicating that the bank "did not need to repay the credit, not describing the credit as non-amortizing." The Board chairman's "ambiguous references to 'perpetuity' did not require the court to ignore the text of the contract."

252. Coast Fed. Bank, FSB v. United States, 309 F.3d 1353 (Fed. Cir. 2002). Judge Michel wrote the opinion, with Chief Judge Mayer joining and Judge Gajarza dissenting.

253. *Id.* at 1355. Notwithstanding, the panel majority also agreed, with both parties, that "on this record there are no triable issues of material fact and thus summary judgment was appropriate"—endorsing this questionable procedure. *Id.* at 1354. Certainly once it became clear that there were different readings of the *deposition* testimony of the Bank Board chairman, a trial to further explore his intent would seem to have been required, particularly in lieu of appellate fact-finding, unless the plain meaning rule barred such consideration.

254. *Id.* at 1356.

255. *Id.* at 1357.

bution made under § 6(a)(1)(c).'"[256] Accordingly, the panel interpreted the language "shall constitute regulatory capital" as meaning "'shall always (or every year) constitute regulatory capital, not merely in the first year.'"[257]

The majority then took on the lower court's reliance on section 20, dismissing it as an irrelevant "default that controls if nothing else does."[258] Because the panel determined, as the parties intended, that section 6(a)(1)(c) control which accounting governed, GAAP and the "subordinate" section 20 were, "therefore, not applicable."[259] As a result, the panel concluded that the Bank Board's interpretations under section 20 were irrelevant, and that the Board had not "acted in one of the three specified ways"[260] with respect to the Agreement, and therefore the lower court's reliance on "'FHLBB's interpretation of GAAP'" was in error.[261] The issue, in the majority's view, was not what GAAP required, but whether GAAP applied at all, or, as the majority found, was preempted by the parties' specific agreement.

D. *The Dissent*

The dissent used sharp words to criticize the decision:

> Interpreting the contract in context requires an understanding of the relevant accounting principles. This is an understanding which the majority opinion lacks.[262]
>
> * * *
>
> This case turns on the proper accounting treatment of goodwill, not as the majority states, on the perceived intent of the contractual language premised upon biased testimony of Coast's witnesses.[263]
>
> * * *
>
> In short, the majority's substitution of its interpretative beliefs for those of the parties without reference to relevant accounting principles is an inappropriate and unnecessary guessing game. Such guesses are not the enterprise of this court.[264]

But, putting aside the rhetoric, the difference seemed to be that, whereas the majority resolved the interpretation issue by relying on testimony of the parties, the dissent gave meaning to the language by relying on accounting usage to give "context." Both relied on extrinsic evidence.

Acknowledging a facial ambiguity, the dissent stated this principle of contract interpretation:

> Where a contract does not define a particular—and potentially ambiguous—term, an established custom or widespread usage fills in the gaps left by the drafters. *See, e.g.*, *Robinson v. United States*, 80 U.S. (13 Wall.) 363, 366, 20 L.Ed. 653 (1871) ("Parties who contract on a subject matter concerning which known usages prevail,

256. *Id.* at 1358.
257. *Id.*
258. *Id.* at 1359–60.
259. *Id.* at 1360.
260. *Id.*
261. *Id.* at 1361.
262. *Id.*
263. *Id.* at 1363.
264. *Id.* at 1365.

> by implication incorporate them into their agreements, if nothing is said to the contrary."). When interpreting a contract, therefore, an established definition provided by industry usage will serve as a default rule, and that definition will control unless the parties explicitly indicate, on the face of their agreement, that the term is to have some other meaning. By looking to these sources for guidance, a putative ambiguity may ultimately prove to be illusory.[265]

Using accounting usage rather than testimonial evidence of shared intent as extrinsic evidence, the dissent found nothing "permanent" in the Agreement's language: "shall constitute regulatory capital."[266] As the dissent explained:

> Without being cognizant of the relevant accounting principles, it may be difficult to determine that the regulatory capital referred to in § 6(a)(1)(C) is not permanent. However, the fact that regulatory capital under § 6(a)(1)(C) is not permanent can be seen if one remembers that GAAP requires goodwill to be amortized under § 20.[267]

In sum, a "one-time, non-permanent credit to regulatory capital" was deemed "the more realistic of the interpretations because it conforms to the appropriate accounting principles."[268]

E. *The En Banc Decision*[269]

When *Coast Federal* was considered by the en banc court, the case received a still different—and simpler—analysis. Although the panel majority decision had been vacated,[270] the dissenter's resort to trade custom to resolve ambiguity was not adopted.[271] The lower court's result was affirmed, but not on the same basis that amortization of the regulatory capital was the "more realistic" or "favored" interpretation. Notwithstanding the admitted forbearance from GAAP, the disagreement about which cross-referenced provisions were subordinate, the testimony, and the somewhat tortured history of the case, *Coast Federal* was now surprisingly governed by this familiar rule of contract interpretation: "Where, as here, the provisions of the Agreement are phrased in clear and unambiguous language, they must be given their plain and ordinary meaning, and we may not resort to extrinsic evidence to interpret them. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996)."[272] The en banc decision prefaced this statement with the even more

265. *Id.* at 1361.
266. *Id.* at 1362.
267. *Id.* at 1363. The dissent rejected "the majority's distinction between goodwill, which is amortized under GAAP, and 'regulatory goodwill,' which is not amortized under the majority's analysis," as "completely unfounded either in law or in accounting practice." *Id.* at 1362.
268. *Id.* at 1363.
269. Coast Fed. Bank, FSB v. United States, 323 F.3d 1035 (Fed. Cir. 2003) (*en banc*).
270. *See* Coast Fed. Bank, FSB v. United States, 320 F.3d 1338 (Fed. Cir. 2003).
271. *Coast Fed.*, 323 F.3d at 1042. Although Judge Gajarza wrote both the dissent and the en banc decision. Even more surprising, Judge Michel concurred, explaining how the panel majority erred: "The panel got confused by the language of the testimony," "which it took too literally," and "imprecise terminology led to incorrect logic." *Id.*
272. *Id.* at 1038.

surprising observation that "[i]t is significant in this case that both Coast and the government agree that the contract is unambiguous."[273]

The crux of the matter for the Circuit was that section 20 "unambiguously" required amortization of goodwill in accordance with GAAP. The language was deemed "plain,"[274] notwithstanding section 20's exceptions, which arguably gave primacy to other provisions of the Agreement. The opinion acknowledged that

> [i]n some respects the terms of the Agreement conflict with GAAP. . . . The phrases "shall be credited" and "shall constitute" in § 6(a)(1)(C) authorize a *limited* deviation from GAAP by permitting Coast to credit the $299 million cash contribution to increase regulatory capital instead of requiring Coast to credit the cash contribution to decrease the $347 million of goodwill.[275]

But the court did not read the language of section 6(a)(1)(C) as allowing a further deviation, though recognizing that it was "not facially inconsistent with Coast's view of 'permanent' regulatory capital."[276]

Relying on section 20's accounting principles as "unambiguously" governing,[277] the court repeated its plain meaning principle that "Coast cannot rely on extrinsic evidence to interpret the phrases 'shall be credited' and 'shall constitute' to contradict the plain language of the Agreement. If the 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning.'"[278] The en banc court concluded its brief opinion with a third statement of the rule: "When the contractual language is unambiguous on its face, our inquiry ends and the plain language of the Agreement controls."[279] Although there had been differences about whether the Coast Federal agreement was unambiguous, the Federal Circuit adhered to the plain meaning rule.

IX. CONCLUSION

The Federal Circuit has relied on the plain meaning rule and excluded extrinsic evidence so many times, and now has done so en banc in *Coast Federal*, that its rejection of the *Restatement (Second) of Contracts* is undeniable. It is not clear why the Circuit has cast aside the *Restatement (Second)*'s more flexible, perhaps more equitable, fact-based approach to contract interpretation, often followed in precedents of its predecessor court. Perhaps ad hoc and undocumented understandings are deemed insufficient for protection of the Government and the public fisc, protection dependent on reviews and approvals of the acts of agents. Perhaps the "certainty of the writing" is simply

273. *Id.*
274. *Id.* at 1040.
275. *Id.* at 1039.
276. *Id.* at 1040.
277. *Id.* at 1038.
278. *Id.* at 1040.
279. *Id.* at 1040–41.

preferred to amorphous evidentiary inquiries. Perhaps it reflects an admixture of patent law, another major responsibility of the Circuit, which involves writings that must be understood by third parties, as distinguished from bilateral contractual relationships informed by circumstances known to the parties. Perhaps it is no more than the reaction of an appellate court, skeptical of lower tribunal decisions and disinclined to relinquish its power of review to presumptively correct findings of fact based on extrinsic evidence.[280]

The Circuit has not explained its reasons for rejecting the *Restatement (Second)*'s rules of contract interpretation. Notwithstanding the Supreme Court's insistence that the general law of contracts governs federal contracts, the Circuit may see no need to explain, finding justification—as it did in *Freedom N.Y.*[281]—in authorities interpreting nongovernment contracts with strict, "traditional" rules.[282] But, in *Mobil Oil Exploration*, the Supreme Court supported its proposition with repeated citations to the *Restatement (Second) of Contracts*,[283] recognizing it as embodying the general law of contracts. Perhaps a case of sufficient importance will come along for the Supreme Court to address this basic contract interpretation issue. Or perhaps not, so hopefully the Federal Circuit will be cautious in declaring contract language unambiguous based on its own lexicography and allow words to be seen in "the same light which the parties enjoyed" and in the "circumstances as they viewed them."[284]

These speculations do not and should not, however, diminish the importance of the message the Federal Circuit has sent to the government contracting community. Within the court's exclusive jurisdiction over federal contract appeals, issues of contract interpretation are among the most frequently presented and the rules the court declares have an important flow-down effect in the statutory trial forums, and, in turn, at the contract administration level. For those parties about to execute federal government contracts, the lesson of *Coast Federal* appears clear enough and needs to be reckoned with: If there is an understanding that is important to the agreement, it had better be in writing—*and plainly so*.

280. *See* Restatement (Second) of Contracts, *supra* note 3, § 212 cmt. d.
281. *See* Rumsfeld v. Freedom N.Y., 329 F.3d 1320 (Fed. Cir. 2003).
282. Illustrative precedents collected at Corbin, *supra* note 20, § 542 n.84.
283. Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 608, 614, 619, 621, 622, 624 (2000).
284. Nash v. Towne, 72 U.S. (5 Wall.) 689, 699 (1866).