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In the Wake of Coast Federal: The Plain Meaning Rule and the Anglo American Rhetorical Ethic

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IN THE WAKE OF *COAST FEDERAL*: THE PLAIN MEANING RULE AND THE ANGLO-AMERICAN RHETORICAL ETHIC

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INTRODUCTION

> "No where other than in [Caucasian] culture[s] do words mean so little as indices of belief [and practices]."
> — Dr. Marimba Ani

The recent Federal Circuit decision of *Coast Federal Bank, FSB v. United States* ("Coast Federal")[1] portends a revival of the Plain Meaning Rule ("PMR") in government contract litigation and a concomitant curtailing of reliance upon extrinsic evidence. In an ever diversifying America and increasingly global economy, this dependence is likely to lead to increased unjust results in future contractual litigation due, in significant part, to the Euro-American cultural trait of the Rhetorical Ethic ("RE").[2]

Contract interpretation disputes constitute a significant portion of all government contract litigation,[3] and the PMR is one of the key tools available to courts to resolve such disputes. Since inception of the PMR, a tension has existed in contract interpretation cases between strict adherence to the "four-corners" of the contract and allowance of extrinsic evidence to establish contractual meaning. *Coast Federal* represents the inevitable and latest shift back into favor of the PMR in the field of government contracts. This shift is concurrent with the

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

2. As discussed in detail below at page 2, the rhetorical ethic is an anthropological concept that has been identified as a key tenant of Euro-American culture. The rhetorical ethic concept captures, *inter alia*, the dynamic between thought, deed, belief and hypocrisy in Euro-American culture and societies. MARIMBA ANI, YURUGU: AN AFRICAN-CENTERED CRITIQUE OF EUROPEAN CULTURAL THOUGHT AND BEHAVIOR 312–13, 315 (1994).

3. "Contract interpretation is probably 'the most frequently litigated issue in Government contracting.'" W. Stanfield Johnson, *Interpreting Government Contracts: Plain Meaning Precludes Extrinsic Evidence and Controls at the Federal Circuit*, 34 PUB. CONT. L.J. 635, 636 (2005) (citing Ralph C. Nash & John Cibinic, *Interpretation Disputes: Finding an Ambiguity*, 4 NASH & CIBINIC REP. ¶ 25, Apr. 1990, at 58).

PMR's return into favor with courts interpreting private sector contracts as well.[4]

This article engages in an interdisciplinary exploration of the relationship between the PMR and the RE, and argues for the expanded usage of extrinsic evidence–not the restriction of it that the PMR mandates–in contract interpretation. Numerous commentators have analyzed and argued for and against the PMR;[5] none have explored the crucial link between the PMR and Euro-American cultural trait of the RE. As discussed below, the relationship of the RE to the PMR makes the PMR inherently flawed in Euro-American societies. Further, extrinsic evidence provides the better tool for deciding contract interpretation issues as it elucidates and bridges the gap between what was written (or said) by the parties and what was actually meant by the parties.[6]

First, this article provides background on the Euro-American RE cultural trait. Next, it briefly discusses the history of the PMR, including the Federal Circuit's decision in *Coast Federal*. Finally, it explores the relationship of the PMR and the RE, and the implications for Anglo-American contract law.

I. THE ANGLO-AMERICAN RHETORICAL ETHIC

Dr. Marimba Ani, in her groundbreaking and highly-acclaimed anthropological work, *Yurugu: an African-Centered Critique of European Cultural Thought and Behavior*, identifies and introduces the concept of the RE: "[w]ithin the nature of European culture there exists a statement of value or of 'moral' behavior that has no meaning for the members of that culture. I call this the 'rhetorical ethic'; it is of great importance for the understanding of the dynamics of the culture."[7]

The RE "[assists Euro-American] culture in the achievement and maintenance of power [–] [w]ithout this interpretation certain manifestations within the verbal [and written] iconography of the culture appear to be inconsistent with its underlying ideological

4. *See generally,* George Hyman Constr. Co. v. United States, 832 F.2d 574 (Fed. Cir. 1987).

5. *See, e.g.*, Carlton J. Snow, *Contract Interpretation: The Plain Meaning Rule in Labor Arbitration*, 55 FORDHAM L. REV. 681, 705 (1987); Johnson, *supra* note 3, at 639; Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1745 (1995).

6. ANI, *supra* note 2, at 315.

7. *Id.* at 312.

thrust."[8] Essentially, the RE helps to explain and demystify how European people and culture have been able to effectively spread around the globe projecting statements of peace, goodwill and civilization to other peoples, while actually engaging in war, destruction, theft and colonization towards other peoples.

According to Dr. Ani, traditional anthropology is inadequate and misleading because it draws a distinction between ideal culture and actual behavior, and posits that this gap is universal to all cultures.[9] The RE, however, is not merely a gap between ideal and actual, and it is a mistake to link it to the ideal.[10] The RE has to do with how Euro-Americans "want to appear to others, most often to non-European peoples–their 'objects' because this appearance works to his advantage."[11] The superficial nature of the RE distinguishes it from any attempts at universalizing the RE and from merely dismissing it as a gap from the ideal:

> [the] 'rhetorical ethic' is not a 'deep-lying assumption' [i]t is superficial verbal [or written] expression that is not intended for assimilation by the members of the culture that produced it . . . [a]nthropologists talk about the gap in all cultures between thought and deed, between ideas and actions. The gap to which I am referring, however, is between verbal [and written] expression and belief or commitment; between what people say and what they do. *Nowhere other than in European culture do words mean so little as indices of belief.*[12]

By way of example, Dr. Ani offers that, "[it is a] long cherished [notion] in America that all doctors are selfless, friendly people who chose medicine as their profession because they felt themselves 'called' to serve humanity, and who have little interest in either the money or the prestige of their position."[13] Despite many physicians' inability to maintain this view, it persists. This unrealistically maintained image of altruism is an indicator of the fact that "this is how Americans want to appear to others, most often to

8. *Id.* at 313.
9. *Id.*
10. *Id.* at 313–14.
11. *Id.* at 313.
12. ANI, *supra* note 2, at 315 (emphasis added).
13. *Id.* at 313.

non-European peoples–their 'objects' . . . In this case it is the way that the doctor wants to appear to his patients, or 'objects,' because this appearance works to his advantage,"[14] making him appear compassionate and altruistic.

The United States Declaration of Independence contains the phrase "all men are created equal[.]"[15] Yet, the Anglo-American drafters of the document neither believed nor acted consistently with their written statement, as they stole, raped, exploited, enslaved and oppressed numerous men, women and children at levels previously unheard of to humanity.[16] The statement "all men are created equal" was meant for consumption by 'others,' non-Europeans, and acted to create a favorable impression of the drafters to the 'others,' and to set up the 'others' for the machinations of the drafters.

The court system in America is generally divided into federal and state courts, ostensibly to administer justice. Yet, at every state or federal courthouse on a typical workday, the criminal defendants are overwhelmingly from the extremely poor, working poor, lower and lower-middle economic classes.[17] Seemingly, the middle-class, upper middle-class, wealthy, and super-rich economic classes are excluded from being criminal defendants, and simply being in the lower economic classes is criminal. This is hardly just or fair. Nevertheless, society advances the message that courts administer justice and are fair and impartial, working to the advantage of, *inter alia*, the judges who are themselves members of the upper classes.[18]

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14. *Id.*; *See, e.g.*, HARRIET A. WASHINGTON, MEDICAL APARTHEID (2006); ALLEN M. HORNBLUM, ACRES OF SKIN (1998), Vanessa Northington Gamble, MD, PhD, *Under the Shadow of Tuskegee: African Americans and Health Care* 87 AM. J. PUB. HEALTH 1773 (1997).

15. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

16. *See generally*, 1 ELIZABETH DONNAN, DOCUMENTS ILLUSTRATIVE OF THE SLAVE TRADE TO AMERICA (1930); *and* 2 ELIZABETH DONNAN, DOCUMENTS ILLUSTRATIVE OF THE SLAVE TRADE TO AMERICA (1930) (providing a comprehensive and detailed exploration of the enslavement of African people and their transportation across the Atlantic ocean); MALCOLM X, MALCOLM X ON AFRO-AMERICAN HISTORY (1970) (discussing the enslavement process of Africans); KOBI K.K. KAMBON, AFRICAN/BLACK PSYCHOLOGY IN THE AMERICAN CONTEXT: AN AFRICAN CENTERED APPROACH 29–64 (Nubian Nation Publications 1998) (providing historical overview and context of Europeans relationships to Africans and Native Americans).

17. *See, e.g.*, Tracey L. Mears, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 671 (1998).

18. According to the 2009 U.S. Census report, the real median American household income was $49,777, compared to the 2009 salary of Federal Circuit Court Judges of $184,500 annually. Carmen DeNavas-Walt ET AL., *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, September 2010, available at http://www.census.gov/hhes/www/income/income.html (Last visited April 23, 2011). United States Courts, *Salaries of Federal Judges, Associate Justices and Chief Justice since 1968*, 2010, available at

In Euro-American societies, there is a business field called marketing that rests on the RE. Misrepresentation is considered "normal" and expected, as companies propagate statements (video, audio, and tactile) designed to deceive. For example, a company that goes by the name BP markets itself as "Beyond Petroleum" when their major business and primary activity is acquiring, extracting and refining–oil and natural gas.[19] Contrary to being "beyond" petroleum, the company actually is covered in petroleum, and seeks activities to remain that way, as opposed to moving into other alternative energies.[20] Marketing itself as "Beyond Petroleum" works to the company's advantage with respect to the "other" which, in this case, is the general public.

The socialization process in Euro-American societies fosters the RE:

> [Euro-American societies are] constructed in such a way that successful survival within it discourages honesty and directness and encourages dishonesty and deceit–the ability to appear to be something other than what one is; to hide one's [intent and] motives . . . Hypocrisy in this way becomes not a negative . . . not immoral or abnormal behavior, but it is both expected and cultivated. It is considered to be a crucial ingredient of 'sophistication,' a European goal.[21]

Other indicia of this feature of the culture are imbedded in the language and are sometimes substituted for sophistication, words and phrases like: "savvy," "professional," "knows how to play the game," "polished," etc.[22]

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http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/JudicialSalarieschart.pdf (Last visited April 23, 2011).]

19. *What BP does*, BRITISH PETROLEUM, http://www.bp.com/extendedsectiongenericarticle.do?categoryId=5& contentId=7044157 (last visited Feb. 24, 2011).

20. In 2009, BP only invested six percent of the overall investments into alternative energy. Dana Ford, *BP to Invest $1 Billion in Alternative Energy This Year,* REUTERS, (Apr. 13, 2010, 7:11 PM), http://www.reuters.com/article/2010/04/13/bp-altenergy-idUSN1310080220100413.

21. ANI, *supra* note 2, at 316.

22. Further, terms and phrases in the English language are ripe with examples of the RE at play in the culture as Euro-Americans refer to people that make statements or believe things at face value as "country bumpkins," "suckers," "and foolish[.]" *Id.* This is in contrast to people who do not tie their beliefs to their statements or their actions to their words and who thusly are favorably thought of as "sophisticated," "worldly," "polished," or "politically-savvy[.]" *Id.*

The RE's primary role in the success of Europeans and its consequences to the majority of peoples around the world should not be underestimated; it even functions when the intentions of Europeans are to help:

> [the RE] is an inherent [and ubiquitous] characteristic of [Euro-American] culture that prepares members of the culture to be able to act like friends toward those they regard as enemies; to be able to convince others that they have come to help when they, in fact, have come to destroy the others and their culture. That some may 'believe' that they are actually doing good only makes them more dangerous, for they have swallowed their own rhetoric–perhaps a convenient self-delusion.[23]

Thus, as discussed below, this Euro-American cultural feature, the RE, has significant implications with respect to considering a party's intent; and, therefore, the PMR.[24]

II. A BRIEF HISTORY OF THE PLAIN MEANING RULE

What would your words mean in the mouth of a "normal" English speaker? The PMR disregards your intent by asking this very question. In evaluating the terms of a contract, the PMR desires a formal and judicial approach to interpretation.[25] The judicial belief is that "words are symbols with fixed meanings, and parties to a writing should be held to that meaning, regardless of whether it coincides with their intention."[26] Courts have wrestled with the PMR for several centuries, yet there is still no specific method or circumstance to determine when courts will use PMR.

The PMR states that "if a writing, or the term in question, appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to

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23. *Id.* at 315.

24. The RE's implications regarding one's intent are crucial for other central components of Anglo-American contract law (like the concept of a *meeting of the minds*) and for other areas of Anglo-American law including, but not limited to, Constitutional, Criminal and Civil Rights law. In future writings, I plan to continue to explore the RE's implications relating to Anglo-American contract law. It is my hope that other scholars begin to examine the RE's implications in other areas of Anglo-American law.

25. Snow, *supra* note 5, at 685.

26. *Id.*

extrinsic evidence of any kind."[27] Therefore, in interpreting contracts according to the PMR, courts must give words their plain, ordinary, and literal meaning. If the words are clear, they must be applied, even though the intention of the parties may have been different or the result is harsh and undesirable.[28]

The PMR continues to survive in some jurisdictions, despite being rejected by the Restatement (Second) of Contracts, Uniform Commercial Code, and several courts.[29] Those jurisdictions that follow the rule are divided over whether "extrinsic evidence is admissible to show that a term of the written agreement is ambiguous."[30] This means that, "application of the plain meaning rule requires the preliminary step of characterizing contractual language as either plain or ambiguous."[31] Since there are no guidelines for this determination, courts encounter difficulty deciding whether the written agreement is plain or ambiguous.[32]

In a plain meaning jurisdiction, if the questionable term "is susceptible to more than one reasonable interpretation, it contains an ambiguity."[33] An ambiguity is not established by the mere existence of a disagreement between the parties, and once an ambiguity is identified, a court must decide what extrinsic evidence is admissible to clarify the ambiguity.[34]

The PMR was originally used as a method of interpreting government legislation and statutes.[35] An explanation of the rule was

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27. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 3.10 (4th ed. 1998).

28. McAbee Constr. Inc. v. United States, 97 F.3d 1431, 1434 (Fed. Cir. 1996).

29. CALAMARI & PERILLO, *supra* note 27, at 148–49 (noting several cases that continue to use the PMR including Lion Oil Co. v. Tosco Corp., 90 F.3d 268 (8th Cir. 1996) (applying Arkansas law); Lambert v. Berkley South Condo. Assn., 380 So.2d 588 (Fla. App. 1996); Dawson v. Norfolk & Western Ry., 197 W.Va. 10, 475 S.E.2d 10 (1996)). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981); U.C.C. § 2-202 (2010).

30. CALAMARI & PERILLO, *supra* note 27, at 149.

31. Snow, *supra* note 5, at 685.

32. *Id.*

33. JOHN CIBINIC, JR. ET AL., ADMINISTRATION OF GOVERNMENT CONTRACTS 227 (4th ed. 2006) (citing Hills Materials Co. v. Rice, 982 F.2d 514, 516 (Fed. Cir. 1992)); *see also id.* at 169 (citing Alaska Lumber & Pulp Co. v. Madigan, 2 F.3d 389, 392 (Fed. Cir. 1993)).

34. *Id.* at 227. Indeed, "[r]eliance on this kind of [extrinsic] evidence is necessary to ensure that the interpretation is based on a knowledge of all the facts and circumstances that could have a bearing on the parties' intent." *Id.* at 183. Further, "[t]he general rule is that extrinsic evidence will not be received to change the terms of a contract that is clear on its face." *Id.*; *accord* McAbee Constr., Inc. v. United States, 97 F.3d 1431, 1434–45 (Fed. Cir. 1996); Fluor Daniel, Inc. v. Regents of the Univ. of Cal., EBCA No. C–9909296, 02–2 BCA (CCH) ¶ 32,017 at 158, 202 (2002).

35. *See* 8 Eng. Rep. 1034, 1038, 1057 (1844).

first seen in the British case *Sussex Peerage*, which held "if the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the law giver."[36] The United States Supreme Court first addressed the PMR in 1917 when it held that courts must enforce a statute where the language is plain and does not lead to absurd results.[37]

The PMR in contracts has gone through periods of favor and disfavor over the last two hundred years. The earliest cases dealing with contract ambiguity referred ambiguous terms to the jury, where the jury decided the meaning by considering extrinsic evidence such as custom and trade.[38] However, where there was no ambiguity, the judge decided the meaning of contract terms.[39]

In the early to mid 1900s, equity was a prevalent theme in resolving contract disputes:

> Where the language of a contract is contradictory . . . or where the meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract."[40]

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36. *Id.* at 1057.

37. *See* Caminetti v. United States, 242 U.S. 470, 471 (1917) (holding that where the language of the statute is "plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent").

38. *See* Eaton v. Smith, 37 Mass. 150, 154, 156 (1838) (stating that an ambiguous word "in common language, susceptible of two meanings, should have been left to the jury to determine by the aid of the extrinsic circumstances, which sense was intended by the parties"); *see also* Worcester Medical Institution v. Harding, 65 Mass. 285, 287–89 (1853); Prather v. Ross, 17 Ind. 495, 499 (1861) (stating that ambiguous language, "and used in different senses, or general words in particular trades and branches of business may be used in a new, peculiar or technical sense, and therefore...evidence may be received from those who are conversant with such branch of business, and such technical or peculiar use of language, to explain...it").

39. Collins v. Benbury, 27 N.C. 118, 124 (1844); Nash v. Drisco, 51 Me. 417, 418 (1864).

40. Union Trust Co. v. Shelby Downard Asphalt Co., 156 P. 903, 906 (Okla. 1916) (citing Kansas City Bridge Co. v. Lindsay Bridge Co., 32 Okl. 31, 121 Pac. 639 (1912)); *see*

Thus, extrinsic evidence was frequently relied on and the PMR was not strictly followed.[41]

The mid to late 1900s also viewed the PMR with disfavor. For example, the rule was strictly rejected when the California Supreme Court held that the exclusion of extrinsic evidence "attaches a meaning to disputed contractual language in accordance with the judge's own 'linguistic education and experience.'"[42] Moreover, it held that adhering to the rule would "presuppose a degree of verbal precision and stability our language has not attained . . . [and] the proper test of admissibility of extrinsic evidence to aid in contractual interpretation is . . . whether the offered evidence is relevant to prove a meaning to which the language is reasonably susceptible."[43]

Despite its history of disfavor, the PMR resurfaced in a number of Federal Circuit cases since the late 1980s, and the trend now is for federal courts to adhere to it.[44] Several construction-related cases ushered in this latest era favoring the PMR. An important precedent was the *Hyman Construction* case in 1987.[45] Several similar cases followed suit, and in the 1996 *McAbee Construction* case, the rule was expanded to include an even stricter interpretation that applied the PMR to even ambiguous terms.[46] A recent Federal Circuit victory in the resurgent trend of the PMR is *Coast Federal*, applying the PMR in the context of Government contracting.[47]

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also Kavanaugh v. Cohoes Power & Light Co., 187 N.Y.S 216, 227 (1921); Jacobs v. Teachout, 219 P. 38, 40 (Wash. 1923).

41. American Ins. Co. v. Damascus Lumber Co., Inc., 124 S.E. 269, 270 (Va. 1924).

42. Snow, *supra* note 5, at 690; *see also* Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 37 (1968).

43. Snow, *supra* note 5, at 690. *Pacific Gas* in establishing the principle that "evidence of an extrinsic agreement or understanding . . . can be admitted to assist in the interpretation of a written contract . . . [if] the evidence is being offered to prove a meaning to which the language of the writing is reasonably susceptible . . . [allows for] more frequent use of extrinsic evidence to explain the intended meaning of contract terms . . . [and] avoids the necessity of finding 'ambiguity'[.]" CLAUDE D. ROHWER & ANTHONY M. SKROCKI, CONTRACTS IN A NUTSHELL 235 (7th ed. 2010).

44. Johnson, *supra* note 3, at 671.

45. George Hyman Constr. Co. v. United States, 832 F.2d 580–81 (Fed. Cir. 1987). In *Hyman*, the court refused to apply the custom and trade meaning of the term "heavy duty auger" and instead applied what it thought was the literal and plain meaning. *Id.*

46. McAbee Constr. Inc. v. United States, 97 F.3d 1431, 1434–36 (Fed. Cir. 1996).

47. Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1038, 1040–41 (Fed. Cir. 2003) (*en banc*).

III. *COAST FEDERAL* AND THE PLAIN MEANING RULE

In 2003, the final decision in *Coast Federal Bank FSB v. United States*[48] solidified the prominence of the PMR in the Federal Circuit and established its application to government contracts. The history of this case evidences the dissention associated with the use of the PMR.

In *Coast Federal*, a dispute arose from an Assistance Agreement (the "Agreement" or "Contract") between Coast Federal Bank, FSB ("Coast") and the Federal Savings and Loan Insurance Corporation (the "Government" or "Bank Board"). Coast agreed to acquire a failed thrift with net liabilities of $347 million.[49] As an incentive to enter into this agreement, the Government made a $299 million cash contribution to Coast to be treated as a credit to Coast's regulatory capital.[50] The Government also agreed to an accounting forbearance from generally accepted accounting principles ("GAAP") regarding the $299 million contribution.[51] The relevant language of the Contract containing the forbearance can be found at §6(a)(1)(c) of the agreement:

> For purposes of reports to the [Government] 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 [Coast's] net worth account and shall constitute regulatory capital.* It is understood by the parties that the preceding sentence is not intended to address in any way the accounting treatment of contributions from [the Government] that must be reflected in any filing that [Coast] may make, whether to the Bank Board or otherwise, that requires the submission of financial statements prepared in accordance with generally accepted accounting principles.[52]

48. 323 F.3d 1035, 1038, 1040–41 (Fed. Cir. 2003) (*en banc*).

49. *Id.* at 1037.

50. *Id.*

51. Coast Fed. Bank, FSB v. United States, 48 Fed. Cl. 402, 410 (2000), *rev'd*, 309 F.3d 1353 (Fed. Cir. 2001), *vacated and reh'g en banc granted*, 320 F.3d 1338 (Fed. Cir. 2003), *aff'd*, 323 F.3d 1035 (Fed. Cir. 2003).

52. *Coast Fed. Bank*, 323 F.3d at 1037 (emphasis added).

The dispute, however, arose when interpreting §6 of the Agreement with the "Accounting Principles" clause, which provides, in pertinent part:

> 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, applicable regulations of the Bank Board or [the Government], or any resolution or action of the Bank Board approving or relating to the Acquisition or to this Agreement, then this Agreement, such regulations, or such resolution or action shall govern."[53]

"Also, §20 of the Agreement 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."[54]

These terms (Section 6, the Accounting Principles clause, and Section 20), complete with the "'notwithstandings,' and other cross-referenced qualifiers, opened the question that had priority: which was the exception and which was the rule?"[55]

In the Court of Federal Claims, Coast contended that the Agreement provided that the Government's cash contribution for the acquisition of the failed thrift constituted permanent regulatory capital which precluded amortization of a corresponding amount of goodwill.[56] The Government argued that the agreement clearly required the full amount of the contribution to be recognized as goodwill subject to amortization under GAAP.[57] The Court of Federal Claims, without explicitly stating that it was applying the PMR, ruled in favor of the Government because "the text of the forbearance 'favors' the Government's interpretation."[58] The Court "discounted and distinguished extrinsic evidence that the Board's examiners had not objected to Coast Federal's annual reports that showed nonamortization and that the Bank Board Chairman might have agreed

53. *Id.* (quoting from Agreement § 20 on Accounting Principles).

54. *Coast Fed. Bank*, 48 Fed. Cl. at 410, (quoting from Agreement §20 on Accounting Principles).

55. *See* Johnson, *supra* note 3, at 666.

56. *Coast Fed. Bank*, 48 Fed. Cl. at 406.

57. *Id.*

58. *See* Johnson, *supra* note 3, at 667.

with Coast Federal's interpretation. [Instead,] the Court relied significantly on a textual examination."[59]

In 2002, the Federal Circuit panel reversed the Court of Federal Claims decision. The panel "looked to extrinsic evidence of the intent of the parties" to make their decision. . .because "the language of the three critical provisions of the Agreement [were] ambiguous."[60] In finding that, "'the testimony in the case [left] 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 contribution made under §6(a)(1)(c),'"[61] the panel reversed and remanded the Court of Federal Claims decision.[62]

The panel's decision was subsequently vacated and the Government's petition for a rehearing *en banc* was granted.[63] The *en banc* Court ruled differently than the prior courts: "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."[64] The *en banc* court determined that, "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 . . . governed by" the PMR.[65] Additionally, the *en banc* court stated that §20 of the Agreement unambiguously required that computations and filings be made in accordance with GAAP.[66] Concluding its opinion, the *en banc* court stated that "[w]hen the contractual language is unambiguous on its face, our inquiry ends and the plain language of the Agreement controls."[67] Thus, it was firmly established that the PMR governs the interpretation of government contracts in the Federal Circuit.

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59. *Id.*

60. *Id.* at 668 (citing Coast Fed. Bank, FSB v. United States, 309 F.3d 1353, 1356 (Fed. Cir. 2002)).

61. Coast Fed. Bank, FSB v. United States, 309 F.3d 1353, 1358 (Fed. Cir. 2002).

62. *Id.* at 1361.

63. Coast Fed. Bank, FSB v. United States, 320 F.3d 1338, 1339 (Fed. Cir. 2003).

64. Johnson, *supra* note 3, at 670.

65. *Id.*

66. Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (*en banc*).

67. *Id.* at 1040–41.

IV. "YEA" AND "NAY" TO THE PLAIN MEANING RULE

There are many arguments for and against the usage of the PMR as an interpretive measure for government and private sector contracts. Supporters of the PMR argue that using extrinsic evidence would allow for "ad hoc" and "undocumented understandings" which are "insufficient for protection of the government . . ."[68] Supporters also say there is a "certainty of the writing" that is not present when extrinsic evidence of party's intent is introduced.[69] Additionally, supporters argue that the "writing must be understood by third parties,"[70] and an interpretation based on the plain meaning rather than using extrinsic evidence ensures that outcome.

Critics of the PMR say that the use of extrinsic evidence serves to "carry out the understanding of the parties rather than to impose obligations on them which would be contrary to their understanding."[71] Critics also argue that "meaning can almost never be plain except in context" so the "consideration of the circumstances" is necessary.[72] Finally, the argument has been made that the definition of "'interpretation' is the 'ascertainment of . . . meaning' and the meaning sought is that of the parties, either mutually or separately."[73]

Ironically, both the critics and the supporters argue that "a court cannot make a contract for the parties."[74] The supporters of the PMR say that parties should be bound by the language of a contract that a court has deemed to be "plain and clear."[75] Otherwise, if the court used extrinsic evidence to determine what the parties intended, the court would essentially be "mak[ing]" the contract that the parties should have made originally, thus making a contract for the parties.[76] Critics of the PMR use the same statement to argue that if the parties have attached a meaning different from which an ordinary person would believe the language to mean, the court would be "making a contract for the parties."[77] Thus, the court would be binding them to

68. Johnson, *supra* note 3, at 671.

69. *Id.*

70. *Id.* at 672.

71. *Id.* at 637.

72. RESTATEMENT (SECOND) OF CONTRACTS §212, cmt. a, b (1981).

73. Johnson, *supra* note 3, at 636.

74. *Id.* at 638.

75. *Id.*

76. *See* Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1039 (Fed. Cir. 2003) (*en banc*); *see also* George Hyman Constr. Co. v. United States, 832 F.2d 574, 581 (Fed. Cir. 1987).

77. *See* Johnson, *supra* note 3, at 638.

what the ordinary person (the judge) has deemed the language to mean, instead of what the parties actually meant.[78]

Arguments on both sides are not limited to the contractual context, one commentator notes similar arguments and ironies with respect to the PMR in the context of interpreting the Federal Rules of Evidence and other legal language:

> In a textualist approach, one interprets a legal text simply by resorting to its 'plain meaning.' A delightful irony is that there is no plain meaning to the 'plain meaning rule' or 'textualism.'. . .Several arguments support applying the plain meaning of a statutory provision. . . . First, respecting the plain or ordinary meaning of a legal text gives effect to the expectations and understanding of those citizens or officials who must follow or administer the legislation. Second, by enforcing the "ordinary" community's linguistic choices, the plain meaning rule serves coordinating and stabilizing functions, preventing the substitution of idiosyncratic and contingent choices by individual judges. Third, the text is said to be the most reliable evidence of the intent of all of the participants in the legislative process. . . Fourth, textualism narrows the scope of government action, allowing more opportunity for private ordering, and is thus 'consistent with the liberal principles underlying our political order.' Finally, limiting interpretation to plain meaning prevents a judge from grafting her own values onto the legal text, substituting her views for those of the democratically elected legislature and Executive.[79]

The commentator goes on to provide some of the arguments against PMR:

> The arguments against the plain meaning approach are similarly powerful. First, there is the realist and post-modern critique that words simply do not have plain meaning. . . . [T]erms are often susceptible of multiple definitions [as] the meaning of a term is influenced by its context[,] and [] an interpretation of the 'plain

78. *Id.*

79. Scallen, *supra* note, 5 at 1745–46.

> meaning' of a word will not be objective (its central virtue) because 'the interpreter's perspective will always interact with the text and historical context.' At the other side of the political perspective, even Judge Frank Easterbrook argues that, while a moderate textualist position is defensible, the strict 'plain meaning' rationale is not: Plain meaning as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid that [sic] a dictionary–which is a museum of words, an historical catalog rather than a means to decode the work of the legislature.
>
> Second, courts have been accused of selective application of the plain meaning rule, resulting in uncertainty and unpredictability rather than stability. Third, the plain meaning rule can produce harsh results, unexpected by the drafters of the legislation. And, in the case of the Federal Rules of Evidence, the rule 'will take away much of evidence law's dynamic quality, forcing courts to decide cases without considering evidentiary policy.'[80]

The PMR has generated much controversy and passion from both its proponents and critics. Yet, prior to this article no one has considered the factor of the RE in settling this long-running PMR debate.

V. CONSIDERATIONS IN THE RELATIONSHIP OF THE PMR AND RE

A. The PMR Resurfaces Because it Must

The current resurgence the PMR is enjoying was inevitable because it is more consistent with Euro-American cultural traits, specifically the RE, than the usage of extrinsic evidence. Often, institutions in a given society reflect and support that society's culture, and the judicial system is no exception. Within a given institution, the rules and operations reflect and support the ideas of the institution. Given the dichotomous choice between the PMR and usage of

80. *Id.* at 1746–47.

extrinsic evidence, the PMR is more reflective and supportive of the judicial system itself, and; accordingly, Euro-American culture.

First, the judge uses the PMR to objectively ascertain meaning by examining only the relevant document and ultimately makes a determination that he or she finds acceptable, although not necessarily what the parties intended. This assures, *inter alia*, that Euro-American cultural norms (specifically the RE) as embodied by the judge ultimately decide the outcome–not justice.[81] In addition, it propagates the RE as potential future litigants alter their conduct in response to such judicial decisions.

Second, the PMR supports hierarchical relationships and standardization to a greater degree than extrinsic evidence. Both of these traits are of high value in Euro-American culture. As commentators have noted, a classic example of the value of hierarchical relationships in western society is embodied by the Descartes mind over body or reason over emotion split of the self and subsequent hierarchical ordering.[82] Legal Feminist theorists readily recognize the highly valued hierarchical ordering of male over female in western society. As Dr. Ani notes, this valuing of hierarchies (and standardization) "allows for control" and ultimately provides "effective ideological underpinning for politically and culturally aggressive and imperialistic behavior patterns on the part of European people[.]"[83]

Third, the RE itself "is designed to create an image that will prevent others from successfully anticipating European behavior, and its objective is to encourage nonstrategic (i.e. naïve, rather than successful) political behavior on the part of others."[84] The PMR allows judges to advance their own "image," without deference to the parties' intent. Judges in applying the PMR propagate an image of themselves as being impartial, objective, or fair as they are merely applying the plain meaning to a particular term or phrase at issue. A plain meaning ostensibly derived from an outside independent source. The degree of the judiciary's success in projecting this image bolsters the likelihood of future parties' reliance upon the judiciary. Even the PMR's potential for disregard of one or more of the parties' intent does not

81. Judges as privileged members of the upper-class have substantial interests in promoting Euro-American cultural norms as their privileged position is derived from those norms, societies, and systems. Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" on the Bench*, 39 U. RICH. L. REV. 849, 864–64 (2005).

82. ANI, *supra* note 2, at 31, 32, 45.

83. *Id.*

84. *Id.* at 316.

defeat this dynamic. Like the RE, the PMR "'packages European cultural imperialism in a wrapping that makes it appear more attractive and less harmful. None of these features represents what can culturally be referred to as an "ideal" in any sense."[85]

Thus, these factors enable the PMR to resurface even after periods of disfavor and apparent defeat.[86] Moreover, because Euro-American culture is so deeply imbued with the RE, the PMR will not be totally defeated even though judges periodically state that the strict plain meaning rational is asinine: "Plain meaning as a way to understand language is silly."[87]

B. The Holy Trinity: PMR, "Reasonable Man," and Hypocrisy

The reasonable man standard is always in play when the court deploys the PMR. When a court employs the PMR and decides that the meaning of the plain and unambiguous language will be exclusively determined at face value from the four corners of the document, it does so "objectively"[88] as a "reasonable man." Also, when a court decides there is ambiguity in the disputed language of a contract and examines the plain meaning of the contract, it looks to what that language would mean to the "reasonable man."

Many insightful legal scholars have correctly noted that the reasonable man standard is in fact the white male standard: "[T]he 'reasonable [man]' is understood . . . to be white, male, heterosexual, able-bodied, and class privileged."[89] Most courts have made a largely cosmetic change in the doctrinal standard from 'reasonable man' to 'reasonable person.'[90] The white race as the norm, the unspoken

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85. *Id.*

86. The factors provided are not necessarily the universe of supportive factors, however, they are among the most salient.

87. Scallen, *supra* note 5, at 1787.

88. Some have noted that objectivity itself is a cover in Euro-American societies since "[o]bjectivity is dominant culture subjectivity." Wekesa O. Madzimoyo, Instructor, Lecture at AYA Educ. Inst. (Winter, 2003) (quoting Dr. Valerie Batts, PhD., Executive Director, VISIONS, Inc., Consulting and Training in Diversity & Inclusion).

89. "[T]he 'reasonable [man]' is understood . . . to be white, male, heterosexual, able-bodied, and class privileged." Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law,* 63 U. CIN. L. REV. 269, 297(1994); *see, e.g.*, McGee v. Equicor-Equitable HCA Corp., 953 F.2d 1192, 1202 (10th Cir. 1992) (construing a health-care agreement by "giving the language its common and ordinary meaning as a reasonable person in the position of the HMO participant, not the actual participant, would have understood the words"); *see also* Enercomp, Inc. v. McCorhill Publ'g, Inc., 873 F.2d 536, 548–49 (2d Cir. 1989).

90. *Id.*

standard of objectivity, and the basis for judicial decisions is unfortunately pervasive:

> . . . Race functions as an unspoken rationale in legal doctrine in the United States. The persuasive force of race is used to support doctrinal rules and principles that, in turn, structure legal argument and decision. . . By featuring the understandings and expectations of privileged white men as the standard for contract interpretation, the objective theory establishes and maintains a white, class-privileged, male norm as the governing law of contractual obligation. And, by treating that standard as "normal" and "reasonable," the objective theory treats anyone who has a different understanding or expectation as defective–ill-informed, lacking education and skill, or unreliable. It maintains hierarchies of race, class, and gender, while allowing people to believe that the law is not racist, class-biased, or sexist.[91]

The incorporation of the norms and values of white males, or Euro-American culture necessarily includes the RE. The incorporation of the RE necessarily includes hypocrisy.[92] Hypocrisy as a way of life is a major tenant of Caucasian life, values and norms: "[h]ypocritical behavior is sanctioned and rewarded in European culture. The rhetorical ethic helps to sanction it."[93] The PMR's incorporation of the "reasonable man" standard provides a doorway for the RE and hypocrisy to operate in judicial decision making. Hypocrisy should be anathema to a system of justice.

C. Solution: Using Extrinsic Evidence

The allowance of extrinsic evidence to resolve contract interpretation disputes provides a way out of the morass of hypocrisy that the PMR engenders. For example, if the court in *Coast Federal* had allowed extrinsic evidence, then the agreement that the court actually enforced would have been consistent with the parties' actual intentions at the time of contracting. In other words, Coast would have been allowed to deviate from GAAP principles in return for taking on

91. Kastely, *supra* note 89, at 293–94.

92. *Id.*

93. ANI, *supra* note 2, at 315.

the liabilities of a failed institution since the assumption of the liabilities was an undesirable task the Government contracted to avoid. Instead, because the *en banc* court precluded extrinsic evidence, the court rendered the intent of both parties null.[94] The *en banc* holding provides a typical example of injustice as judges draft and enforce a "new" contract; a new contract that the parties themselves never intended.[95] Thus, the judicial system opens itself up frequently to the critique of the judicial system substituting its intent for the parties.'

The PMR proved unfairly prejudicial to Coast Federal, as the court's decision rendered Coast contractually bound to a payment system Coast Federal neither bargained for nor agreed to.[96] The Federal Circuit panel's use of extrinsic evidence led to the discovery that Coast's negotiator, its CEO and its Chairman specifically bargained for and understood that the contract "did clearly provide that Coast would receive a *permanent addition* to Coast's *regulatory capital* in an amount equal to the cash contribution made under § 6(a)(1)(C)."[97] The focus of the acquisition was "a crucial incentive to get Coast to rescue the failing Central with $347 million in net liabilities."[98] The panel also importantly noted "absent thrifts like Coast, federal agencies would have to take over all the failing thrifts themselves and pay depositors who had lost their savings."[99] Thus, the use of extrinsic evidence not only adequately reveals the proper bargained for exchange, but it enables the Courts to prevent injustice that may lead to deleterious consequences down the road.

CONCLUSION

If justice is the end, hypocrisy has no place. The RE is a vehicle for the injection of the hypocrisy that courses through the veins of Euro-American culture. Therefore it would behoove a system of justice to remove or at least minimize hypocrisy by shifting to a more expansive usage of extrinsic evidence than the application of the PMR would allow.

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94. Coast Fed. Bank, FSB v. United States, 323 F.3d 1038, 1040–41 (Fed. Cir. 2003) (*en banc*).

95. *Id.* at 1038.

96. *Id.* at 1040.

97. Coast Fed. Bank, FSB v. United States, 309 F.3d 1353, 1358 (Fed. Cir. 2002)

98. *Id.*

99. *Id.* at 1356.