

***POLYGON v. AMERICAN NATIONAL FIRE INS. CO.
IS BOEING v AETNA DEAD OR DYING?***

A. Synopsis.

On April 7, 2008, Division I of the Washington Court of Appeals decided *Polygon v. American National Fire Ins. Co.*, 143 Wn. App. 753, 189 P.3d 777 (2008).¹ The court held that settlement proceeds specifically allocated as Polygon's liability for the underlying plaintiff's litigation expenses did not fall within the meaning of "costs taxed" under the supplementary payments provisions of the primary insurer's policy. The *Polygon* court declined to look to standard English language dictionary definitions of the disputed policy terms to assist in its task of interpreting² the policy. In *Boeing v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 784 P.2d 507 (1990), the court had approved the process of referring to dictionary definitions. This paper reviews the general rules applied by Washington courts in interpreting insurance policies, and discusses the extent to which the *Polygon* case may represent either an aberration or a trend in the way future courts will apply the rules of policy interpretation.³

¹ As with many insurance coverage cases, some practitioners familiar with the litigation from its inception may refer to it as "Sammamish Point," the name of the condominium project and plaintiff owners association who commenced the underlying construction defect case against Polygon, who was the defendant in the underlying litigation and the plaintiff in the insurance coverage lawsuit. The case name in the reported decision reflects an additional anomaly that neither party named in the appeal caption was a party to the appeal. Accordingly, some practitioners familiar with the appellate case refer to it as "Great American," the excess insurer who was the primary appellant. In this paper, that level of familiarity with the procedural history will not be assumed, and the appellate decision will be referred to as "Polygon."

² Many reported decisions use the terms "construe" and "construction" almost interchangeably with the terms "interpret" and "interpretation" in describing the judicial task of determining the meaning or intent of words used in a written document such as a contract (including an insurance policy) or a statute. In this paper, the latter terms will be used.

³ The *Polygon* decision contains other interesting holdings that are significant to insurance practitioners, but which are not discussed in this paper.

B. General rules of policy interpretation.

Polygon recites the following summary of the Washington rules for interpreting insurance policies, some or all of which are routinely cited in appellate decisions:

Insurance policies are construed as a whole and "given a fair, reasonable, and sensible construction." *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998) (quoting *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 65, 882 P.2d 703, 891 P.2d 718 (1994)). "A policy is considered as a whole so that the court can give effect to every clause in the policy." *Kitsap County*, 136 Wn.2d at 575, 964 P.2d 1173. "If terms are defined in a policy, then the term should be interpreted in accordance with that policy definition." *Kitsap County*, 136 Wn.2d at 576, 964 P.2d 1173. If terms are not defined, then they are to be given their "plain, ordinary, and popular meaning." *Kitsap County*, 136 Wn.2d at 576, 964 P.2d 1173 (quoting *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990)).

Polygon, 143 Wn. App. at 785. Although the *Polygon* court quoted from *Boeing*, it did not include in its quotation from *Boeing* the following additional language:

To determine the ordinary meaning of an undefined term, our courts look to standard English language dictionaries. See, e.g., *Safeco Ins. Co. of Am. v. Davis*, 44 Wn. App. 161, 165, 721 P.2d 550 (1986) ("entitle"); *Transport Indem. Co. v. Sky-Kraft, Inc.*, 48 Wn. App. 471, 487, 740 P.2d 319, 328 (1987) ("performance"); *Miebach v. Safeco Title Ins. Co.*, 49 Wn. App. 451, 454 n. 1, 743 P.2d 845 (1987), ("actual") review denied, 110 Wn. 2d 1005 (1988); *Sperry v. Maki*, 48 Wn. App. 599, 602, 740 P.2d 342 ("motor vehicle") review denied, 109 Wn.2d 1014 (1987).

Boeing, 113 Wn.2d 511. As discussed below, the *Polygon* court did proceed to distinguish *Boeing*, and to justify its rejection of dictionary definitions. Before discussing the use or non-use of dictionary definitions, further discussion of the rules of policy interpretation is helpful.

C. Other rules of interpretation.

It goes without saying that a court is only called upon to interpret policy language when the insured and the insurer (or their assigns) disagree as to the meaning of the

disputed language. At different times, Washington courts have articulated different and at times inconsistent expressions of how the parties' interpretation of the policy should be evaluated.

1. Ambiguity and consideration of extrinsic evidence.

"If the policy language is clear and unambiguous, we must enforce it as written." *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Where the language used is plain and unambiguous, there is nothing for the court to interpret or construe. *Hamilton Trucking Service. v. Auto. Ins. Co.*, 39 Wn.2d 688, 692, 237 P.2d 781 (1951). Courts do not create ambiguity where none exists. *Quadrant*, 154 Wn.2d at 171. Ambiguity exists "when, reading the contract as a whole, two reasonable and fair interpretations are possible." *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 670, 865 P.2d 560, 562 (1994) "We ask not whether there are two or more possible interpretations, but whether there are two or more *reasonable* interpretations of the language *on its face*. (emphasis by the court). *Spratt v. Crusader Ins. Co.*, 109 Wn. App. 944, 951, 37 P.3d 1269 (2002); *citing, Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244, 1246 (1997). Where the interpretation advanced by one party is not reasonable, no ambiguity exists. *Spratt*, 109 Wn. App. at 951-52 (insurer's interpretation not reasonable); *Panorama Village Condo Assoc. v. Allstate Ins. Co.*, 99 Wn. App. 271, 291, 992 P.2d 1047 (2000) (insured's interpretation not reasonable), *reversed*, 144 Wn.2d 130, 137, 26 P.3d 910 (2001).

In most cases, Washington courts recite that if the disputed language is ambiguous, the ambiguity must be resolved in favor of the insured. *Hammonds*, 72 Wn. App. at 664; *Peasley*, 131 Wn.2d at 670; *Shotwell v. Transamerica Title Ins. Co.*, 91

Wn.2d 161, 167-68, 588 P.2d 208 (1978). However, some cases describe as an intermediate step consideration of extrinsic evidence of the parties' intent to resolve the ambiguity. *Panorama Village*, 144 Wn.2d at 137, quoting, *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665-66, 15 P.3d 115 (2000), in turn quoting, *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998).

a. *Weyerhaeuser v. Commercial Union.*

Of these cases, only the dissent in *Weyerhaeuser* purports to actually analyze the impact of extrinsic evidence.⁴ In that case, Justice Madsen first suggested the court should take judicial notice “of Weyerhaeuser’s business sophistication and ability to fend for itself while making arm’s length insurance contracts with equally sophisticated insurance companies.” *Weyerhaeuser*, 134 Wn.2d at 706 (Madsen, J., dissenting). Justice Madsen also noted that Weyerhaeuser employed a Director of Insurance, worked with a national insurance broker, and purchased its insurance in multiple layers.

Weyerhaeuser's decision to place its insurance coverage in layers *above* the Commercial Union coverage reveals the relevant commercial context. It would be absurd in such a setting to construe the Commercial Union policy to provide unlimited property damage coverage when Weyerhaeuser sought property damage coverage in layers *above* the Commercial Union policy. [Emphasis by Justice Madsen].

Id. at 707 (Madsen, dissenting). The *Weyerhaeuser* majority recited that extrinsic evidence is admissible to resolve an ambiguity, *id.* at 666; but did not comment on the dissent’s analysis or refer to any other extrinsic evidence.

⁴ Weyerhaeuser faced liability for hazardous waste cleanup of more than 130 sites. Commercial Union’s excess policy provided \$1.5 million per occurrence for property damage liability. The policy also had a \$1.5 million aggregate limit “separately in respect of Product Liability and separately in respect of Personal Injury.” *Weyerhaeuser*, 142 Wn.2d at 666. In a 5-4 decision, the court affirmed summary judgment that this aggregate limit clause did not apply to property damage liability and that only the per occurrence limit applied. *Id.* at 667-68.

b. *Lynott v. National Union Fire.*

The most thorough analysis of the use of extrinsic evidence to interpret an insurance policy is contained in *Lynott v. Nat. Union Fire Ins. Co.*, 123 Wn.2d 678, 871 P.2d 846 (1994). In that case, the issue was whether a stock purchase transaction between the insured, Tacoma Boatbuilding Company (TBC), and 21 investors assembled by Midland Capital who collectively acquired a 61% interest in TBC, fell within the exclusion in a directors and officers policy for claims arising out of “any merger, acquisition or divestiture.” First, the court addressed the clarification of general contract interpretation law announced in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

First, the special and specific rules of interpretation governing the interpretation of insurance policies, some of which are discussed hereafter, were not changed by the *Berg* holding. Second, the holding of *Berg v. Hudesman, supra*, was no revolutionary change in the principles of contract interpretation. * * *

We held in *Berg* that ambiguity in the meaning of contract language need not exist before evidence of the circumstances surrounding the making of the contract could be admissible. However, we carefully noted the substantial limitation on the purpose and use of such evidence. * * *

* * * [P]arol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed.

Lynott, 123 Wn.2d at 683.

The court then observed that it is unusual for the terms of an insurance policy to be specifically negotiated. However, where such negotiations actually occur, extrinsic evidence of the negotiations is properly considered. *Id.* at 684. Since such negotiations

had occurred in issuance of the policy in question, the court addressed the impact of that evidence.

The extrinsic evidence considered by the trial court (which had granted summary judgment to the insurer) and by the Court of Appeals (which had reversed with directions to grant summary judgment to the insured), consisted of one face-to-face meeting and two telephone calls that occurred prior to issuance of the D&O policy between representatives of National Union and Corroon and Black, the broker for TBC. There were no direct communications between TBC and National Union. *Id.* at 687. The evidence established that the broker and the underwriter for National Union discussed pending negotiations between TBC and Midland Capital regarding an equity investment in TBC. The broker knew very little about the TBC/Midland transaction, but provided documents to the underwriter that National Union requested. The underwriter's declaration testimony was that the broker described the transaction as an "acquisition" and as a "merger." The broker's notes listed exclusions "to come" including a "mergers, acquisitions and divestiture exclusion." After the policy was issued, a letter in the broker's file referred to the transaction as a merger, and a report from Midland's accountant referred to it as an acquisition. *Id.* at 687-88.

In a 5-4 decision, the *Lynott* court held that the claims brought by the 21 investors did not fall within the mergers and acquisitions exclusion and were therefore covered under the National Fire policy. The court considered the following extrinsic evidence as significant: (1) the underwriter and the broker never discussed that the Midland transaction would be specifically excluded, (2) National Union had a form endorsement specifically excluding claims arising out of a merger or acquisition

involving a particular entity, *id.* at 688, (3) in deciding to issue the policy, National Union relied heavily on financial information TBC provided, but could not produce that information because it had misplaced its underwriting file, *id.* at 689, and (4) the premium charged for the policy was \$145,500, replacing a policy issued by a different insurer that did not contain a mergers and acquisition exclusion where the premium charged was \$8,645. *Id.* at 690.

The court analyzed at length the dictionary definition of the term “acquisition” and concluded that it could mean either “ownership” or “control.” *Id.* at 691-94. Since no single investor purchased sufficient stock in TBC to constitute ownership or control, *id.* at 694, the court held the term acquisition was ambiguous, and resolved the ambiguity in favor of the insured. *Id.* at 697. The court further rejected the argument that the investors acted in concert, even though they were parties to a voting trust agreement, which the court characterized as terminable based on events beyond the control of the investors, and therefore inconsistent with a “more permanent connotation” that should be ascribed to the term “acquisition.” *Id.* at 696.

The *Lynott* dissent applied the same extrinsic evidence to the same dictionary definition of “acquisition” to reach the opposite conclusion – that the policy unambiguously excluded the claims of the investors. The dissent also referred to additional extrinsic evidence not addressed by the majority: (1) a stock purchase agreement whereby all 21 investors acquired their shares simultaneously, (2) TBC’s bylaws, which established the investors collectively had the right to control TBC’s board of directors, (3) the terms of the voting trust, which was irrevocable by the individual investors and gave two trustees absolute power to vote all 61% of the shares, and (4) a

confidential memorandum authored by Midland Capital describing its purchase of “control” of TBC. *Id.* at 699-701 (Guy, J., dissenting).

The dissent also criticized the means by which the majority extended the definition of “acquisition” to include “ownership” by reference to Black’s Law Dictionary instead of a standard English dictionary.

Consequently, the majority inappropriately created an ambiguity by importing a legal meaning into the “plain, ordinary, and popular” meaning of the word “acquisition.” If ownership is removed from the majority’s definition, acquisition is defined as control, and the evidence overwhelmingly supports the conclusion that the investors controlled TBC.

Id. at 702, (Guy, J., dissenting).

c. *Spratt v. Crusader.*

In *Spratt v. Crusader Ins. Co.*, 109 Wn. App. 944, 949, 37 P.3d 1269 (2002), the court, citing *Lynott*, held that where there had been no actual negotiations between the insured and the insurer (or any representatives of either), extrinsic evidence is not admissible unless it shows the situation of the parties or the circumstances under which the policy was executed. The *Spratt* court held it was error for the trial court to have considered the affidavit of an English professor as to the meaning of applicable policy language.⁵ *Spratt*, 109 Wn. App. at 950.

d. *St. Paul v. Hebert Construction.*

In *St. Paul Fire and Marine Ins. Co. v. Hebert Constr., Inc.* 450 F.Supp.2d 1214 (W.D. Wa. 2006), the federal court, applying Washington law, analyzed whether a three

⁵ The court determined the error was not sufficiently prejudicial to require reversal on that ground alone, because the trial court indicated it did not give the testimony a great deal of weight, and instead appeared to have relied more on its own interpretation of the average person’s understanding of the policy’s terms. *Id.* at 950. The court did reverse the trial court, because it concluded only the appellant’s interpretation of the applicable policy language was reasonable. *Id.* at 951.

year “community association package” policy provided coverage for the construction defect liabilities of the developer who formed the condominium association and who procured the policy on behalf of the association. Both the association and the developer were named insureds under the policy. The extrinsic evidence included a declaration from the broker who assisted the developer with all its insurance needs. Prior to issuance of the package policy, which identified only one condominium project as an insured location, the developer had been insured under a one year commercial general liability policy also issued by St. Paul that identified all of the developer’s pending construction projects (including the condominium project in question) as insured locations. When St. Paul advised the broker it was no longer going to write or renew construction defect risks, the broker replaced the developer’s multiple location coverage (which continued to include the condominium project in question) through Admiral Insurance Company. Although there was a significant disparity in the premiums charged under the three policies, the premium under the package policy represented an undifferentiated aggregate for property, general liability, directors and officers, and umbrella coverages. The association paid the monthly financed premium for the package policy from the point in time the developer transferred control of the association. *Hebert*, 450 F.Supp.2d at 1219-20.

The court determined that the plain language of the package policy was ambiguous as to coverage for the developer’s construction liabilities. *Id.* at 1224. The court determined that the effect of the extrinsic evidence hinged on whether the broker was the agent of the developer, and therefore charged with the broker’s knowledge of St. Paul’s underwriting intent. *Id.* at 1225. The court concluded there was an issue of

fact whether the broker acted as agent for the developer or for the insurer at the time the package policy was issued, and therefore denied both parties' motion for summary judgment on the issue of coverage. *Id.* at 1229.

e. *Aetna of Hartford v. Kent*

In *Aetna Ins. Co. of Hartford v. Kent*, 85 Wn.2d 942, 540 P.2d 1383 (1975), the court did not acknowledge that it was considering extrinsic evidence, but nonetheless did so in concluding there was no coverage under a contractor's general liability policy for an accident involving a heavy boulder that rolled out of the contractor's pickup truck, striking the occupant of a following vehicle. The court compared the "loading and unloading" language contained in the exclusion section of the general liability policy with identical language in the coverage section of the same contractor's automobile liability policy. *Kent*, 85 Wn.2d at 946-47. The court also considered that the premium charged for the general liability policy was \$41 for \$250,000 protection per occurrence, but \$1,294 under the automobile policy for only \$25,000 protection per occurrence. *Id.* at 947. The court held that the premium disparity constituted evidence that the parties intended the two policies to be mutually exclusive and to not provide duplicative coverage. *Id.* at 947-48.

f. *Takeaway on extrinsic evidence.*

Although insurance cases sometimes recite that extrinsic evidence is only considered where there is an ambiguity, *Weyerhaeuser*, 142 Wn.2d at 666, *Panorama Village*, 144 Wn.2d at 137, *Lynott's* recitation of the general contract interpretation rules of *Berg v. Hudesman* would suggest that extrinsic evidence may be considered without regard to existence of an ambiguity. *Lynott*, 123 Wn.2d at 683. Accordingly,

practitioners should consider the importance of conducting discovery in coverage cases before bringing (or before the opposing party brings) a summary judgment motion.

An interesting issue presented by the use of extrinsic evidence (but to the author's knowledge never addressed in a Washington decision) is whether a jury question may be presented where the extrinsic evidence presents a material issue of fact. Courts routinely recite that interpretation of an insurance policy is a question of law. See, *Polygon*, 143 Wn. App. at 766; *Alaska Nat'l Ins. Co. v. Bryan*, 125 Wn. App. 24, 30, 104 P.3d 1 (2004). Although the court in *Hebert* found an issue of fact on the issue of agency, agency was merely a threshold issue to the court's weighing of the extrinsic evidence presented.⁶

2. Insurer as drafter of policy language.

Under the common law, a general rule of contract interpretation is the doctrine of *contra proferentem*, whereby ambiguities are construed against the drafter of the contract or the particular phrase in question (in Latin literally "against (*contra*) the one bringing forth (the *proferens*)."). In recognition of the fact that insurance policies are usually standard form, "take it or leave it" contracts, various articulations of this rule are frequently invoked against insurers.

It is a matter of common knowledge that insurance companies prepare their own contracts of insurance. The language of the policy is their language. They do not permit the insured to have a voice in the drawing of his contract; nor does he [*sic*] negotiate with reference to its terms in the sense that negotiations are carried on before agreements are reached in ordinary contracts. Policies of insurance are invariably complex and are understood by laymen with difficulty, and as a result the insured generally

⁶ The author of this paper was lead trial counsel in the *Hebert* case. At trial, the court ultimately determined as a matter of law that the broker acted as the developer's agent, and accordingly also determined as a matter of law there was no coverage under the package policy.

makes a request for the kind of insurance he desires and then signs “on the dotted line” upon a formidable appearing printed form with the provisions of which the average assured has slight, if any, acquaintance. The policies are prepared by skilled lawyers retained by the insurance companies, who through years of study and practice have become expert upon insurance law, and are fully capable of drawing a contract which will restrict the scope of the liability of the company with such clearness that the policy will be free from ambiguity, require no construction, but construe itself. Because of reasons such as these, whenever the contract of insurance is so drawn as to be ambiguous, uncertain and to require construction, the courts of this country resolve the doubt in favor of the insured and against the insurer, in accordance with the rule *contra proferentem*. [Internal citation omitted].

Labberton v. General Cas. Co. of America, 53 Wn.2d 180, 182-83, 332 P.2d 250 (1958); quoting, *Montana Auto-Finance Corp. v. British & Fed. Fire Underwriters*, 232 Pac. 198, 200 (Mont. 1924).

The insurer, as drafter of the policy, is primarily responsible for defining the scope of coverage and ordinarily will not be allowed reformation, especially when to do so would result in denial of coverage.

Pemco v. Mucklestone, 111 Wn.2d 442, 444, 758 P.2d 987 (1988).

Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.

Emter v. Columbia Health Services, 63 Wn. App. 378, 384, 819 P.2d 390 (1991), review denied, 119 Wn.2d 1005 (1992). “[T]he meanings and construction most favorable to the insured must be employed, even though the insurer may have intended otherwise.” *Shotwell*, 99 Wn.2d at 167-68.

3. Purpose of insurance is to insure.

Courts often articulate that language which describes the coverage is to be interpreted broadly whereas language which purports to reduce or exclude coverage is

to be construed narrowly. The rationale for these rules is that the very purpose of insurance is to protect the insured. Matters that are not clearly excluded from the scope of the policy are presumed to be included within it. *Dautel v. United Pac. Ins. Co.*, 48 Wn. App. 759, 762, 740 P.2d 894 (1987). After all, “the purpose of insurance is to insure, and the contract should be construed so as to make it operative rather than inoperative.” *Aetna Cas. & Sur. Co. v. M&S Indus. Inc.*, 64 Wn. App. 916, 923, 827 P.2d 321 (1992). Inclusionary clauses must be liberally construed to provide coverage whenever possible. *Ross v. State Farm Mut. Auto Ins. Co.*, 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997). Conversely, because coverage exclusions “are contrary to the fundamental protective purpose of insurance,” courts are to construe them strictly against the insurer and are not to extend them “beyond their clear and unequivocal meaning.” *Stuart v. Am. States Ins. Co.*, 134 Wn.2d 814, 818-19, 953 P.2d 462 (1998).

D. Standard English dictionary definitions versus technical legal definitions.

In *Polygon*, the court relied on language in *Boeing* to justify its decision not to refer to dictionary definitions of the disputed policy terms.

As Assurance points out, Great American greatly deemphasizes aspects of the actual rule referenced in *Boeing* – namely, that “the language of insurance policies should be interpreted in accordance with its ordinary meaning rather than in a technical sense, *unless it is clear* that the parties to the contract intended that the language have a technical meaning.” *Thompson*, 61 Wn.2d at 688, 379P.2d 983 (emphasis added). See, *Boeing*, 113 Wn.2d at 882, 784 P.2d 507 (citing *Thompson*).

Polygon, 143 Wn. App. at 787. It is perhaps an overstatement for the *Polygon* court to have described the use of technical meanings as “the actual rule” of *Boeing* as opposed to an exception to the rule. The *Boeing* court expressed the issue as:

[B]efore an insurance company can avail itself of a legal technical meaning of a word or words, it must be clear that *both* parties to the contract intended that the language have a technical meaning. *Thompson v. Ezell*, 61 Wn.2d 685, 688, 379 P.2d 983 (1963). Otherwise the words will be given their plain, ordinary meaning. *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976).

Boeing, 113 Wn.2d at 688.

Thompson in turn cited the above proposition as a “basic maxim” of policy interpretation, even though neither party advocated what could be characterized as a “technical” meaning in support of their respective positions (the primary issues were whether the defendant pilot had permission of a named insured to use the aircraft, and whether exclusions barring coverage where the aircraft was operated in violation of certain CAA (predecessor to FAA) regulations applied to the pilot’s general negligence). The cases cited in *Thompson* in support of the above statement include *Kane v. Order of United Commercial Travelers of America*, 3 Wn.2d 355, 100 P.2d 1036 (1940), where the issue was whether the insured’s death from pneumonia fell within an exclusion for “infection” in a life insurance policy. The court determined that a layman would not associate pneumonia with infection even though a person trained in medicine possibly would. In applying the general rule that the ambiguity must be resolved in favor of the insured, the *Kane* court observed:

In *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 110 P. 36, 40, 140 Am.St.Rep. 863, this court stated: “The rule of construction must be that the word used is to be construed in its ordinary signification. The legal signification may have been understood by the insurance company when it employed this word, but in order to avail itself of such legal signification, it must appear that the other contracting party also understood it.”

Kane, 3 Wn.2d at 361.

The *Polygon* court relied on one case where the court actually read an undefined policy term in accordance with its technical meaning.

If parties to an insurance contract use words having a specific legal meaning, they will be presumed to have intended that those words be construed in accordance with established rules of law.

Polygon, 143 Wn. App. at 788, quoting, *Bernhard v. Reischman*, 33 Wn. App. 569, 577, 658 P.2d 2 (1983). In *Bernhard*, a boundary dispute arose when the course of a stream changed. The legal description in one neighbor's deed included a call to a non-navigable stream, which under established surveying rules of construction means to the center of the stream. The legal description issue impacted not only resolution of the boundary dispute but also the insurance coverage dispute between the defendant and his insurer.

The language employed in the Ness-Forbes deed and in the exception to coverage provision of Safeco's policy carries a specific legal meaning; as we have stated, it means that the disputed property is owned by Reischman. Thus, the property is excluded from Bernhard's title insurance policy. Safeco's duty was to defend only suits concerning the insured property. It breached no duty to defend in connection with litigation over the disputed parcel.

Bernhard v. Reischman, 33 Wn. App. at 577. Notably, the term whose meaning was in dispute in *Bernhard* was "center of the stream," which was contained in the legal description for the insured property, as distinguished from language contained in a "boilerplate" clause or a negotiated endorsement of the policy itself. Neither party advocated for a standard dictionary definition of the disputed term.

E. Did *Polygon* fail to follow *Boeing*?

Having reviewed the general rules of insurance policy interpretation, we can finally turn to the thesis of this paper, whether the *Polygon* court was warranted in

ignoring the standard English dictionary definition rules of *Boeing* in favor of technical legal definitions.

1. *Boeing*.

The issue in *Boeing* was whether Boeing's liability to reimburse the federal government under CERCLA for "response costs" to combat the effect of contaminated property caused by Boeing's generation and transportation of hazardous materials was covered under standard policy language that the insurer shall pay "all sums that the assured shall become obligated to pay as *damages* because of personal injury or property damage to which this insurance applies." The insurers argued that response costs were analogous to equitable restitutionary or injunctive relief that prior cases had held were not covered in other contexts. The word "damages" was not defined in the policy. The court quoted the dictionary definition as "the estimated reparation in money for detriment or injury sustained." *Boeing*, 113 Wn.2d at 877, quoting *Webster's Third New International Dictionary* 571 (1971)⁷ The court noted that neither standard English dictionary definitions nor definitions contained in "the insurers' own dictionaries" supported any distinction between sums awarded on a legal claim as opposed to an equitable claim. *Boeing*, 113 Wn.2d at 877-78, quoting, Merit, *Glossary of Insurance Terms* 47 (1980); Rubin, *Barrons Dictionary of Insurance Terms* 71 (1987).

The four member dissent was convinced that the policy language unambiguously covered only "compensatory" damages, not claims for restitutionary CERCLA response cost liability. *Boeing*, 113 Wn.2d at 893 (Callow, C.J., dissenting). Interestingly, the

⁷ For whatever reason, Washington courts most commonly cite Webster's Third International as the most authoritative standard English dictionary.

dissent also believed the dictionary definition relied upon by the majority supported a distinction between compensatory and restitutionary remedies.

Of course, no dictionary explicitly defines damages as “not equitable relief.” Dictionaries define what a word means, not everything a word does not mean. But standard dictionaries' definitions of “damages” do establish that the “plain, ordinary, and popular meaning” of “damages” is reparation for detriment or injury sustained. Because CERCLA response costs are not reparation for detriment or injury sustained, they do not fall within the “plain, ordinary and popular meaning” of damages. [Emphasis in original].

Id. at 896 (Callow, C.J., dissenting).

2. *Polygon*.

In *Polygon*, the issue was whether Polygon’s liability for litigation costs was covered under the supplementary payments provision of the policy issued by Assurance Company of America, one of Polygon’s primary insurers. The Assurance policy contained standard language found in almost all liability policies stating Assurance would pay “all costs taxed against the insured in the ‘suit.’”⁸ Because the word “suit” appears in quotes throughout the opinion, it was apparently a term defined in the Assurance policy, although the court does not provide the policy definition in its opinion. The words “costs” and “taxed” were apparently not defined in the policy. Remarkably, the opinion does not include any dictionary definitions of the disputed words. Instead, the court relies on *Thompson v. Ezell [discussed supra]*, to conclude the parties intended that the legal or technical meaning of the disputed term should apply (recall that *Thompson* did not actually involve a disputed policy term having a legal or technical meaning).

⁸ It was undisputed the litigation costs were covered under the general insuring language of the Assurance policy. However, because coverage under a supplementary payments provision is in addition to the policy limit, the issue affected the allocation of Polygon’s total liability for the underlying settlement between the primary and excess insurers. *Polygon*, 143 Wn. App. at 784.

Upon careful examination of the insurance agreement, we conclude from both its text and context that the parties intended the phrase “costs taxed against the insured in a ‘suit’ ” to refer to “taxable costs” as that term is commonly used in Washington legal parlance. Assurance and Polygon, as sophisticated business entities, would not have an understanding of a term specifically referring to a legal proceeding that is completely divorced from its standard and well-established legal usage. Further, the items included under the supplementary payments provision of its policy specifically refer to the legal process in one way or another. None arise if the insured is not involved in a lawsuit or other legal proceeding. This being the case, Great American's attempt to read the individual words “costs” and “taxed” in isolation from the surrounding provisions, giving those words the dictionary definitions most favorable to their case, wrongly ignores the text of the supplementary payments provision itself.

Polygon, 143 Wn. App. at 786. In further discussing the placement of the language within the “context” of the policy as a whole, the court distinguished *Boeing*, where the disputed term “damages” was “sandwiched into the general coverage provisions,” whereas the supplementary payments provision of the Assurance policy was isolated from the general promises to indemnify and defend, “and is clearly subsidiary to the overarching obligations of the contract.” *Id.* at 788.

The court also commented on what it perceived to be the expectations of both Polygon and Assurance based on their mutual “sophistication.”

It would be surprising indeed for a sophisticated commercial insurer like Assurance and a sophisticated builder like Polygon to have memorialized a bargain providing blanket coverage for plaintiffs' reasonable attorney fees – routinely collectible under both the Condominium Act and the Consumer Protection Act, the bases for most condominium construction defect claims – with the abbreviated phrase “costs taxed against the insured.” Rather, it would be expected that, had Assurance contracted to pay all conceivable awards of attorney fees, it would have clearly said so in the insuring agreement.

Id.

Finally, the court distinguished case from other jurisdictions that had interpreted similar “costs taxed” language to include litigation expenses on the basis the

substantive laws of those states specifically provide that reasonable attorney fees are allowed as taxable costs. *Id.* at 789, citing, *Mutual of Enumclaw v. Harvey*, 115 Idaho 1009, 772 P.2d 216 (1989); *Ins. Co. of North Am. v. Nat'l Am. Ins. Co.*, 37 Cal.App.4th 195, 43 Cal.Rptr.2d 518 (1995); *Liberty Nat'l Ins. Co. v. Eberhart*, 398 P.2d 997 (Alaska 1965). The *Polygon* court also declined to follow the federal court decision of *Hebert* [discussed supra], applying Washington law, on the basis the court in *Hebert* had erroneously concluded that *Harvey*, was “directly on point,” since *Harvey* was based on a policy interpretation specific to Idaho law. *Polygon*, 143 Wn. App. at 789, fn. 12.

3. Critique of Polygon.

The *Polygon* court's attribution of intent based on the sophistication of the particular parties involved fails to recognize that virtually identical language appears in the policies purchased by unsophisticated purchasers of automobile and homeowners insurance. The court's approach also flies in the face of a specific rejection of the same argument by the Supreme Court in *Boeing*.

In any event, on the facts of this case, it is questionable whether these standard rules of construction are no less applicable merely because the insured is itself a corporate giant. The critical fact remains that the policy in question is a standard form policy prepared by the company's experts, with language selected by the insurer. The specific language in question was not negotiated, therefore, it is irrelevant that some corporations have company counsel. Additionally, this standard form policy has been issued to big and small businesses throughout the state. Therefore it would be incongruous for the court to apply different rules of construction based on the policyholder because once the court construes the standard form coverage clause as a matter of law, the court's construction will bind policyholders throughout the state regardless of the size of their business.

Boeing, 113 Wn.2d at 883. The assumptions of the *Polygon* court regarding sophistication of the insuring parties also fails to recognize that for perhaps the most sophisticated category of insureds – those whose operations extend across multiple

jurisdictions – the same language would mean different things in each jurisdiction. Under the same abbreviated phrase “costs taxed,” Polygon would have coverage beyond policy limits for litigation expense liability in Alaska, California and Idaho, but not Washington.

The *Polygon* court’s analysis of the location within the policy where the disputed language occurs also seems suspect. The court reasons that not only “costs taxed” but other items covered in the supplementary payments section of the policy only arise if the insured is involved in a lawsuit or other legal proceeding. However, the same can be said of virtually every aspect of a liability insurance policy. The fundamental purpose of a liability insurance policy is to defend and indemnify the insured from *liabilities*, which, unless the insurer and the claimant agree to settle at an early stage, can only be established as a result of “suits” or other forms of litigation. Indeed, the supplementary payments language itself describes both “claims” and “suits,” and states, for example, that the insurer will pay, “with respect to any claim or ‘suit’ we defend: all expenses we incur.” *Polygon*, 143 Wn. App. at 785. Under the court’s own analysis, the terms “claim,” “defend,” and “expenses,” may each have legal or technical meanings that could well differ from the dictionary definition of each such term.

The court’s characterization of the supplementary payments coverage as “ancillary to the overarching obligations of the contract” ignores the reality that although the insurer’s “right and duty to defend” is expressed elsewhere in the policy, the primary benefit to the insured that arises from the duty to defend is the insurer’s agreement to pay all expenses the insurer incurs associated with that defense. This is particularly true in the construction defect arena, where almost all cases are defended under a

reservation of rights, and there are typically significant limitations on the insurer's duty to indemnify the insured.

The court's expectation that "had Assurance contracted to pay all conceivable awards of attorney fees, it would have clearly said so in the insuring agreement" is contrary to the typical articulations that (1) language describing coverage will be interpreted broadly, and (2) if the policy language is ambiguous, the ambiguity will be construed against the insurer as the drafter of the policy. This should be particularly true given the court's acknowledgement that "costs taxed" means different things in different jurisdictions. However, the court did not recite, much less purport to apply, the rules of interpretation that govern when the disputed policy language is ambiguous. In fact, the words "ambiguous" or "ambiguity" do not appear in a word search of the *Polygon* decision.

Finally, the *Polygon* court is simply wrong in its purported distinction of at least one decision from other jurisdictions (the Idaho case of *Harvey*), and therefore in its disapproval of *Hebert*, (which relied on *Harvey* in applying Washington law). The *Polygon* court purported to distinguish *Harvey* on the basis that attorney fees are not recoverable as taxable costs under Washington law, RCW 4.84.010, but that Idaho law "specifically provide[s] that reasonable attorney fees are allowed as taxable costs." *Polygon*, 143 Wn. App. at 789. However, Idaho Stat. §12-120 provides that attorney fees may be allowed to the prevailing party as part of the costs of the action only in limited circumstances described in two subsections of that statute: (3) in actions based on a commercial (as distinguished from a personal or household) transaction, and (4) in actions for personal injury, where the amount of the plaintiff's claim does not exceed

\$25,000, the plaintiff makes written itemized demand at least 60 days prior to commencing suit, and the defendant fails to tender at least 90% of the amount awarded to the plaintiff. *Harvey* was a claim for property damage and therefore did not fall within the terms of the statute.

In *Harvey*, the court conducted no analysis of whether attorney fees constitute “costs” under Idaho statutory law. The court simply looked to the dictionary definition of the word “costs” and determined the “plain, ordinary and popular meaning of ‘costs’ is the expense of litigation which includes attorney fees.” *Harvey*, 772 P.2d at 1013. Interestingly, the court did not even find the word “costs” ambiguous, and instead simply construed it as a matter of law.

Though the word “costs” as a legal term of art may be ambiguous, it is not so from the perspective of the ordinary person unfamiliar with the jargon of the legal and insurance professions standing in the position of the insured. An insurance policy must be interpreted from that perspective. Similarly, where the policy language is clear and unambiguous, there is no occasion for construction, and coverage must be determined according to the plain meaning of the words employed. [Internal citations omitted].

Id.

4. Other observations regarding *Polygon*.

As noted at the outset of this paper, there are several other issues discussed in great detail in *Lynott* that are completely separate from and beyond the scope of the policy interpretation issues presented here. Those issues include the effect of insolvency by one excess insurer on the “drop down” requirements of the other excess insurers, equitable subrogation and/or contribution claims among the various insurers, allocation between insured and insurers of amounts recovered against subcontractors, and other issues. The total dollar amount of the “costs taxed” issue was only \$743,000

as compared to \$2,000,000 under the “insolvency / drop down” issue, and \$3,000,000 under the equitable contribution issue. The parties devoted only a small portion of their respective appeal briefs to the “costs taxed” issue and virtually none of their oral argument time before the panel that decided *Polygon*.⁹ It is somewhat remarkable that the only petition for review to the Washington Supreme Court was on the “costs taxed” issue, particularly considering that the dispute was exclusively among insurance companies. Even though Great American “lost” \$743,000 as a result of the *Polygon* decision (compared to its result in the trial court), one would assume that its benefit in other cases from leaving the law “settled” for the time being in favor of insurers would outweigh over time any recoupment of its trial court victory before the Supreme Court.

F. Conclusion

It is this author’s opinion that *Polygon* was poorly reasoned and wrongly decided, and therefore reflects an aberration and not a trend in how future courts will apply settled rules of insurance policy interpretation. The *Polygon* court did not even consider whether or not the disputed policy term “costs taxed” was ambiguous, yet the court purported to consider (by way of inference or judicial notice rising to the level of extrinsic evidence) the level of sophistication of the particular insured litigant. In doing so, the court ignored *Boeing’s* prohibition against this approach when the policy terms are not specifically negotiated. The *Polygon* court did not even consider the dictionary definitions of the disputed terms, and instead concluded the parties must have intended that the words be given their legal technical meaning, based on the location of the

⁹ The author read those briefs and attended that argument with interest, since *Polygon* affected the outcome and settlement value of a then pending appeal of various aspects of the *Hebert* decision and subsequent judgment on jury verdict in which he was appellate counsel.

words and their context within the policy as a whole. In doing so, the court ignored the even broader context that the purpose of insurance is to defend and indemnify the insured from liabilities asserted or established against the insured in lawsuits and other legal proceedings. Given the underlying litigation backdrop against which insurance coverage disputes almost always arise, a technical legal meaning could be ascribed as intended to apply to virtually every undefined word in a policy. However, Washington courts have rejected this approach on numerous occasions. Finally, the *Polygon* court mischaracterized the holding of at least one outside jurisdiction, and in doing so, improperly discounted the persuasive authority of a federal court's decision applying Washington law.