

# Codification of Trade Custom and Usage as a Viable Supplement to Construction Contracts

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*The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.*<sup>1</sup>

*It was effectively impossible to convey the sum of knowledge necessary to construct a facility in a set of plans and specifications.*<sup>2</sup>

*CUSTOM. A usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates.*<sup>3</sup>

## **I. The Challenge: Reconciling The Ghosts of Wigmore, Williston, and Corbin in The Construction Lawyer's World.**

Construction lawyers tend to spend their days and nights in the shadows of the contracts that govern their clients' survival.

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<sup>1</sup>Holmes, Oliver Wendell Jr., *The Common Law* 1 (1881).

<sup>2</sup>Bruner, Phillip L., *The Historical Emergence of Construction Law*, 34 *William Mitchell Law Review* 1, 12 (2007–2008) (citing Bruner, Philip L & O'Connor, Patrick J., 1 Bruner & O'Connor on Construction Law § 1.2 (2002 & Supps.) and Hinchey, John W., *Visions for the Next Millennium*, in 1 *Construction Law Handbook* § 2.01[A] (1999)).

<sup>3</sup>Black's Law Dictionary (10th ed. 1968).

As the day of judgment approaches for any individual contract, the shadows grow longer and darker and are haunted by the ghosts of Professors Wigmore,<sup>4</sup> Williston,<sup>5</sup> and Corbin.<sup>6</sup> Their ghosts swirl about, as they have for a 100 years or more, spawning guidance, and sometimes confusion in the guise of guidance, for courts that must reconcile expectations with reality.

Non-construction-professionals seldom fully grasp the complexity and contingencies involved in a 21st Century construction project. Multiple design disciplines and trade crafts may grapple with prototype concepts placed for pricing on a “fast track” basis, with incomplete information and often with unintended confusion over subjects ranging from the level of development of digital models to the division of work among trade contractors. Even when designs are complete and scopes clear, those outside of a particular trade cannot always understand from what has been written, and, perhaps, from that which has been left unwritten, the full detail of the bargain that has been struck.

It is not uncommon for a design chain of command to stretch across four tiers of participants. A separate, parallel construction chain of command can stretch across six tiers or more.<sup>7</sup> Each tier of both chains will be connected by a separate contract sculpted to protect separate rights and will contain separate, often conflicting, and often ultimately irrelevant, boiler plate. Even where standard form industry contracts are used, those forms are modified, not always consistently, to address the commercial interests and expectations of individual parties at individual tiers in the chain of command without regard to the most efficient and cost effective means to actually perform the overall project work.

Frequently the terms contained at the top tier of a contract chain will contradict or mean something entirely different than similar or identical terms incorporated into contracts at the low-

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<sup>4</sup>John Henry Wigmore, an American jurist and expert in the law of evidence. Dean of Northwestern Law School (1901–1929). Author of *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1904).

<sup>5</sup>Samuel Williston, an American jurist and Professor of Law, Harvard University (1895–1938). Author of the five volume treatise *The Law of Contracts* (1920).

<sup>6</sup>Arthur Linton Corbin, scholar of contract law and professor at Yale Law School (1909–1943). Author of the eight volume treatise *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law* (1950).

<sup>7</sup>. . . Hundreds, even thousands, of detailed drawings are required. Hundreds of thousands of technical specifications, requests for information, and other documents are needed. Complex calculations are used to produce the design . . . Projects were fragmented and broken into many parts. Different entities undertook different parts of a project, both for design and construction.

Bruner, *Historical Emergence*, citing *Paul Hardeman, Inc. v. Arkansas Power & Light Co.*, 380 F. Supp. 298, 317 (E.D. Ark. 1974).

est tier of the chain; and they will give rise to entirely different expectations.<sup>8</sup> Even among parties at the same tier a process described by what appears to be a “plain meaning” that works perfectly well for a supplier of materials or services at a location other than the construction site may not work at all for a supplier of materials or services to be buried in the mud at the project site or balanced in the air above it.

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<sup>8</sup>See, *Dugan & Meyers Constr. Co. v. Superior Steel, Inc.*, 2015 Ky. App. Unpub. LEXIS 3 (Ky. Ct. App., Jan. 9, 2015), *currently under discretionary review before the Supreme Court of Kentucky*, which is instructive on this point.

Five tiers of parties were connected by four separate contracts, each contract containing exculpatory, boilerplate clauses designed to protect the interests of the superior party in the project chain of command in each of the four contractual relationships.

There appears to have been no dispute that the project steel fabricator and erector (contractor tiers four and five) were directed to perform additional work and were promised to be paid additional compensation for that work. Payment was never received.

A jury awarded substantial damages and attorney fees to the fabricator and erector; but that award was overturned on appeal, *inter alia*, because all of the relevant, individual contract rights of the parties at various tiers of the contract chain were not adequately addressed in jury instructions. In theory, the conflicting contract rights of the parties in tiers one, two, and three could preclude recovery by the parties in tiers four and five—even though the parties in tiers four and five had actually performed the additional work.

The intermediate appellate court’s frustration is summed up in the words of a concurring opinion to the order vacating and remanding:

This is an extremely complex case. Although I fully agree with the majority’s decision to vacate the judgment and remand for a new trial, I can appreciate how the trial court reached most of the decisions which led to the result. In fact, it seems that the various strategies of the disparate parties shaped many of those decisions. The trial court’s ultimate result was probably fair to all parties involved. Unfortunately, the trial court’s method of reaching that result was erroneous, and that is why this matter must be tried again.

. . .

. . . I am not bringing these matters up merely to criticize the trial court. In fact, I believe all of the parties had a hand in how this case turned out.

. . .

In sum, each party to this case has remedies under its respective contract, although some contracts provide better remedies than others. The parties negotiated those contract relationships and generally should be bound by those terms. Unfortunately, the parties and the trial court deviated from the contracts both in **their course of dealings** and in this litigation. (emphasis added)

The emphasized portion of the concurring opinion, noted immediately above, is particularly relevant to the discussion of *trade custom and usage* in sections two and four of this paper. The four separate contracts connecting the five tiers of parties involved in the *Dugan & Meyers Constr. Co. v. Superior Steel, Inc.* litigation all incorporated a written, codified compilation of *trade custom and usage* that was not addressed in the context of contract interpretation at either the trial or intermediate appellate levels. Arguably, that compilation could have provided additional clarity to contract interpretation in both courts.

Compilation and codification of clear statements of *trade custom and usage*<sup>9</sup> in the construction industry and their incorporation into 21st Century construction contracts can provide balanced guidance for courts, practitioners, and industry professionals alike. This article will briefly explain the conflicting theories of evidence and contract interpretation suggested by Professors Wigmore, Williston, and Corbin (and subsequently clarified by Judge Richard Posner) as applied to the practice of construction law.<sup>10</sup> It will also explore the history and application of *trade custom and usage* in one sector of our industry.

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<sup>9</sup>The reader will find slightly different expressions characterizing the concept of *trade custom and usage* in the literature:

Professor Wigmore defines *usage or custom of a trade* as:

that usage or custom of a trade or locality, which would otherwise by implication form a part of the transaction, will equally form a part when the transaction has been embodied in a document, provided the document was not intended to cover the topic affected by the custom. Wigmore, John Henry, *Evidence in Trials at Common Law* § 2440 (James H. Chadbourn rev., Little Brown and Company, 1981).

The current edition of Professor Williston's treatise elaborates on the concept of *custom or usage*:

At common law, the requisites for incorporating a custom or usage, in order that it could be considered as entering into a contract and forming a part of it, are that it must be ancient or long-established, certain, continuous, uniform, general, notorious, reasonable, and not in contravention of law. Furthermore, persons acting within the scope of the usage's operation must acquiesce in it.

. . .

With respect specifically to usage of trade under the Uniform Commercial Code and the Restatement (Second) of Contracts . . . it must have such regularity of observance in a place, vocation or trade that it will be observed with respect to the transaction in question . . . The ancient English tests for "custom" have been abandoned under both the Uniform Commercial Code and the Restatement (Second) of Contracts. Consequently, a usage of trade need not be "ancient or immemorial," "universal" or the like. Williston, Samuel, *A Treatise on the Law of Contracts* § 34:12 (Richard A. Lord 4th ed., 1999).

The current edition of Professor Corbin's treatise appears to adopt the similar definitions of trade usage contained in the UCC and Restatement (Second) of Contracts:

Uniform Commercial Code: "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." UCC § 1-205(3).

Restatement (Second) of Contracts: "A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement." § 222.

Corbin, Arthur Linton, *Contracts* § 24.13 (2016).

For the purpose of this paper we will adopt the Corbin approach and label the concept as "*trade custom and usage*."

<sup>10</sup>One legal scholar describes construction law as a "capstone" subject—a "*towering legal edifice built out of modern statutes, 'contextual' common law principles . . . and foundational legal concepts sustaining and binding . . .*" multiple parties together on unique, individual construction projects. He suggests 13 separate, threshold legal relationships and issues interconnected within

That sector's compilation and codification of *trade custom and usage* will be suggested as a model for other sectors of the construction economy in the United States. A re-thinking of the current application of the *four corners* and *plain meaning* rules to interpretation of construction contracts in some jurisdictions will also be suggested.

## **II. Development of the Concept of Trade Custom and Usage In the Common Law; Its Application to Contemporary Construction Contracts; and Its Simplification of the Four Corners and Plain Meaning Rules of Contract Interpretation.**

### **A. Overview**

When approaching this subject we must begin at the beginning. Merchants were conducting trade and Master Builders were erecting often-magnificent structures long before means were commonly available to reduce their expectations to writing. Even where such means may have been available, a large percentage of the population was unable to read what might have been written; but commerce, and construction, advanced nonetheless.<sup>11</sup>

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that edifice, collectively spawning its own unique customs, practices, and technical vocabulary:

Like other highly complex fields of human endeavor, the construction process has spawned its own unique customs, practices, and technical vocabulary . . . Under the weight of a century of contextual experience, construction law indeed is evolving into a "separate breed of animal."

[C]onstruction contracts are a separate breed of animal; and, even if not completely *sui generis*, still . . . [the] law must be stated in principles reflecting underlying economic and industry realities. Therefore, it is not safe to broadly generalize. True, general principles of contract law are applied to construction contracts, but they are applied under different operative conditions. Care must be taken, then, not to rely too uncritically on such cases as those arising from the sale of real or personal property. And even within the larger rubric of "construction contracts" it is manifest that the law, if sensitive to the underlying realities, will carefully discriminate between, say, a contract to construct a home and a contract to construct a fifty-story office building . . . This is what one would expect *a priori*; this is, generally, what one finds when he reviews the actual development of the law.

Bruner and Phillip L., *The Historical Emergence of Construction Law*, 34 Wm. Mitchell L. Rev. 1, 12 (2007–2008).

<sup>11</sup> Here it must be remembered that in Anglo-Norman times people are still, on the whole, unfamiliar with writing, and that the chief varieties of transactions—namely those affecting land—are still practiced with oral forms; the essential, working conception is the livery of seisin, not the charter. Whatever virtue there is in the writing is testimonial only. Wigmore, § 2426.

In early English Common Law *custom*<sup>12</sup> in a locality was the controlling determinant used to resolve commercial disputes.<sup>13</sup> *Custom* appears to have differed slightly from county to county and clan to clan, with the local lord or high King becoming involved in matters that affected the region, or the kingdom as a whole. In the early days of English Common Law, *extrinsic* evidence was *required* to clearly show that it was the intent of the parties *not* to follow the custom of the locality. Common Law *dower* is a perfect example of this practice. It arose as a *custom* out of necessity; it gradually changed as the common law of contract interpretation changed across the centuries.<sup>14</sup>

By roughly the time of the Norman conquest, words used in a commercial transaction began to develop a legal meaning, a form of *legal custom*, of their own—sometimes separate from the *trade custom* of a locality. Contracts began to be governed not by the intent of the parties, or by local *trade custom*, but by a legal definition *attributed* to the words used in written contracts—a “plain meaning” attributed to the words by a circuit judge who had not been involved in the transaction and who as likely as not did not live in the community where the agreement was struck or necessarily understand the local *custom*.

By the 18th Century the English Common Law principles of contract interpretation were being applied to transactions in Britain’s commercial outposts around the world. Under those

<sup>12</sup>See Black’s Law Dictionary, (rev. 4th ed. 1968), note 3, and accompanying text.

<sup>13</sup>See <http://www.radford.edu/~junnever/law/commonlaw.htm>; [https://en.wikipedia.org/wiki/Common\\_law#\\_Records\\_and\\_literature](https://en.wikipedia.org/wiki/Common_law#_Records_and_literature).

<sup>14</sup>“Thy truth, then, be thy dower.” *King Lear*. The principle of *dower* in the law of Western Europe can be traced to the influence of the Church as an outcome of the ecclesiastical practice of exacting from the husband at marriage a promise to *endow* his wife, a promise retained in form even now in the marriage ritual of the Established Church in England. *Dower* is mentioned in an ordinance of King Philip Augustus of France (1214), and in the almost contemporaneous Magna Carta (1215); but it seems to have already become customary law in Normandy, Sicily, and Naples, as well as in England.

The history of *dower* as a *custom* adopted initially by the Common Law and later by statute is fascinating, but beyond the scope of this paper. Suffice it to say that the original *custom* of *dower* has survived multiple attempts by men to create writings that would perhaps unfairly disenfranchise spouses who, in olden times, may have divested themselves of property rights and, in modern times, may have divested themselves of other opportunities. As noted above, since not later than the 13th Century the *custom* of *dower* has been consistently codified by the sovereign and enforced by its courts. See, <https://en.wikipedia.org/wiki/Dower>; <http://womenshistory.about.com/od/glossary/g/dower.htm>

Later, in sections III and IV of this paper, we will see that in the modern era *trade custom and usage* in the construction industry has likewise been codified and is enforced as the statutory law of the sovereign.

principles, a specific legal meaning was attributed to the words used in a commercial transaction by the King’s Bench in London, regardless of the intent of the parties in the colonies. An understandable tension developed between the strict application of “*plain meaning*” as understood and set down by the Common Law in England and the evolving *trade custom and usage* made necessary by different commercial conditions in places like America. At about the time of the Revolution, we see evidence in the early legal reporters that American Common Law had begun to break from the English Common Law “*plain meaning*” definitions of the time.<sup>15</sup>

To understand the evolution of the Common Law of contract interpretation, on both sides of the Atlantic—where we are today, how we got here, and the next phase of that evolution—we will examine the progressive work of a series of scholars on the subject. The first is Professor John Henry Wigmore.

### B. Wigmore

Wigmore’s treatise on the law of evidence,<sup>16</sup> is instructive in its treatment of the history of the Common Law of contract interpretation. Wigmore indicates that the law of contracts developed in four stages from the practices of early English clans or tribal communities to the judicial system of mid-20th Century America. Across that history the judicial approach to contract interpretation appears to have evolved nearly full circle.

As previously mentioned, at its origin the law of commercial transactions was governed by unwritten, local *trade custom* (custom that was *just, simply, known* by everyone in the clan or village).<sup>17</sup> It was fair, and reasonable, and accepted by all; and if there was a dispute the clan chief or village elder referred to local custom to resolve it.

Thereafter, in Wigmore’s phase two, the Common Law of

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<sup>15</sup>Den v. Jones identifies custom as the basis of law in the United States. Den, a property case, asserts that the property law of the region emerged from the custom of designating land as assets that can be sold to pay back debts (1 N.J.L. 153, 156 (N. J. 1792)); *see also*, Wheeler v. Hughes, 1 U.S. 23, 1 Dall. 23, 1 L. Ed. 20, 1776 WL 37 (Pa. 1776), contrasting the law in England with the emerging commercial practice under development in the then-British-colony of Pennsylvania.

<sup>16</sup>See note 4.

<sup>17</sup>Williston, Samuel, A Treatise on the Law of Contracts § 34.12 Requisites for Incorporating Custom or Usage (Richard A. Lord 4th ed., 1999):

At common law, the requisites for incorporating a custom or usage, in order that it could be considered as entering into a contract and forming a part of it, are that it must be ancient or long-established, certain, continuous, uniform, general, notorious, reasonable, and not in contravention of law.

contract interpretation appears to have evolved into something that, while more orderly, perhaps was not quite so fair to all. It was not so well known or, necessarily, as readily accepted by everyone that it affected. Starting roughly at the time of the Norman conquest, separate judicial circuits were established in England. Local courts were visited at set intervals by itinerant judges appointed by the King. This evolved into what has become known as the “King’s Bench.”

It was these judges who began resolving local disputes by applying their understanding of the words used to form the contract involved, not by local chiefs or village elders applying local custom. The King’s judges would complete their circuit, return to London, and discuss these cases among themselves. In the process they developed a “common” understanding of application of certain words in transactions across the kingdom’s legal circuits.<sup>18</sup> The system worked in theory, but not always in practice.<sup>19</sup>

Wigmore’s third stage in the development of the Common Law of contract interpretation began near the end of the 18th Century. It was a period of transition.<sup>20</sup> Wigmore notes that by the middle

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<sup>18</sup>The first stage, ancient in origin, was, in Professor Wigmore’s words, likened to a “magic formula” involving something akin to superstition surrounding the use and application of specific words. *E.g.*, *He who’s name cannot be spoken!* This formalistic custom survived into the second stage of Wigmore’s history, but based upon more materialistic realities—the best interest of the King and Kingdom. *See*, Wigmore, John Henry, *Evidence in Trials at Common Law* § 2461 (James H. Chadbourn rev., Little Brown and Company, 1981); and note 13.

<sup>19</sup>[https://en.wikipedia.org/wiki/Common\\_law#Records\\_and\\_literature](https://en.wikipedia.org/wiki/Common_law#Records_and_literature). There existed a prejudice in favor of Britain’s system of heredity having its origins prior to the Norman conquest. There existed an equally strict and formalized system of legal conveyance. The concept of transferring assets as valuable as land other than by this ancient system was alien to the social and cultural mores of England’s judiciary well into the 16th Century.

Closely akin to this was the tendency of judges to keep the contents of writings out of the hands of a jury so as to better assure that the outcome would be in accordance with the established system. As Wigmore explains, the meaning and application of words in legal documents had been accumulated and controlled by a relatively small branch of the legal profession for centuries; and the pressure among lawyers and the judiciary not to disrupt this position of power is thought to have been considerable. *See*, Wigmore, § 2461.

The party ought to direct his meaning according to the law, and not the law according to his meaning; for if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance and to destroy all learning and diligence. *Throckmerton v. Tracy*, 1 Plowd. 145, 162 (1554).

<sup>20</sup>While some inroads were made in the area of applying local trade custom (i.e., *by local commercial custom a bushel was to contain seven gallons rather than the legal measure, six gallons*) in at least one notable case as late as 1821 the Chief Justice of Common Pleas conceded that “if not in a majority of wills,

of the 19th Century the extreme application of the old rule of set meanings for words regardless of the intent of the parties began to be ameliorated to a certain extent. What survived was a rule of contract interpretation that provided that when the meaning of words was “plain” by the standard of the judicial community and the “ordinary” reader, no deviation could be permitted.<sup>21</sup> According to Wigmore, there is neither in theory nor in policy any basis for an absolute rule declaring that when a word has a “plain meaning,” no other standard can be substituted.<sup>22</sup>

By Wigmore’s fourth stage, the Common Law had evolved to the point where, while *trade custom and usage* could not officially “intrude upon the document” or set up additional terms “in rivalry with it,”<sup>23</sup> it could be applied to better define words and, in limited circumstances, supply missing terms, either *expressly* or *implicitly*.<sup>24</sup> Under Wigmore’s analysis, reference to extrinsic evidence is considered *essential* to determine that a contract was a fully integrated document. According to Wigmore, “. . . the docu-

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yet certainly in a great number, the construction is contrary to the probable intent . . .” *Pocock v. Lincoln*, 3 B& B 27, 46 (1821), yet to give effect to the probable intent was felt to threaten the very “landmarks of property” and the foundations of the system itself. *Doc v. Dring*, 4 M & S 448, 455 (1816).

<sup>21</sup>The old theory was preserved to the extent the court would “legally” fix the meaning of a particular word *for* a party, however wrongly and regardless of the party’s intent, unless the wrongness was glaringly plain on the face of the case. “*Such is the rule still surviving to us in many courts from the old formalism, namely, the rule that you cannot disturb a plain meaning.*” See, Wigmore, § 2461.

<sup>22</sup>Wigmore maintains that the fallacy in this rule exists in assuming that there is, or ever can be, some, one, real, or absolute meaning of a word or turn of phrase. In Wigmore’s view, there can only be some *one person’s* meaning; and that one person, whose meaning the law should be seeking, is the writer of the document itself. Wigmore, § 2462.

Quoting *Brown v. Byrne*:

Neither, in the construction of a contract among merchants, tradesmen, or others, will the evidence [of a local usage] be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. 3 E& B. 703, 716 (1854).

<sup>23</sup>Wigmore, § 2463.

<sup>24</sup>“Where the parties have not intended to make the document embody the entire transaction upon a particular topic, its terms may be as well supplied by implied extrinsic agreement as by express extrinsic agreement. In other words, that *usage* or *custom of a trade or locality*, which would otherwise by implication form a part of the transaction, will equally form a part when the transaction has been embodied in a document, provided the document was not intended to cover the topic affected by the custom. The test is on principle the same as for express extrinsic agreements; except that in the case of the custom the ordinary presumption is in favor of its implication, because the topics covered by the writing will usually be those which do not concern some known and usual term but vary in each particular transaction [citations omitted].” Wigmore, § 2440.

ment cannot, by itself, prove its own character as a complete integration . . .”<sup>25</sup>

Wigmore concludes this section of his treatise with the following statement:

*The liberal rule . . . is today conceded practically everywhere, to permit resort in any case to the usage of a trade or locality, no matter how plain the apparent sense of the word to the ordinary reader; and some of the extreme instances are persuasive to demonstrate the fallacy of ignoring the purely relative meaning of words and the injustice of attempting to enforce a supposed rigid standard.*<sup>26</sup>

So, according to Professor Wigmore, the Common Law of contract interpretation evolved nearly full circle, from clan acceptance of *custom* as part of every transaction, through attempted expungement of *custom* by the King’s Bench, and back again to recognition of *custom* as a necessary means of interpreting contract terms.

With that history in place, we now proceed to Professors Samuel Williston and Arthur Corbin, whose different approaches to the law of contract interpretation played out over much of the rest of the 20th Century, and beyond.

### C. Williston, Corbin, “Plain Meaning” and the “Four Corners” Rule<sup>27</sup>

Much could be, and has been, written about the different approaches to contract interpretation taken by these preeminent legal scholars.<sup>28</sup> As characterized by one court, under Professor Williston’s traditional view, extrinsic evidence, such as *trade custom and usage*, may only be admitted if the language of the writing is unclear. Meanwhile Professor Corbin advanced a more expansive view: antecedent and surrounding factors that throw

<sup>25</sup>Wigmore, John Henry, *Evidence in Trials at Common Law* §§ 2430–31 (James H. Chadbourn rev., Little Brown and Company, 1981). “The document alone will not suffice . . . The conception of a writing as wholly and intrinsically self-determinative of the parties’ intent to make it a sole memorial of one or seven or twenty-seven subjects of negotiation is an impossible one.”

<sup>26</sup>Wigmore, § 2440.

<sup>27</sup>Professor Williston published his *Treatise on the Law of Contracts* in 1922 and was the reporter for the *Restatement of Contracts* in 1932. Professor Corbin published his treatise on contracts in 1950 and was the reporter for the *Restatement (Second) of Contracts* from 1960 until his retirement from failing eyesight at age 90 in 1964. *See*, notes 5 & 6.

<sup>28</sup>For an excellent analysis of the dichotomy between Williston and Corbin, and their progeny, and the impact this dichotomy has had on contract interpretation in the United States, *see*, Cunningham, Lawrence A., “*Toward a Prudential and Credibility-Centered Parol Evidence Rule*,” 68 U. Cin. L. Rev. 269, 294 (2000).

light upon the meaning of the contract may be proved by any kind of relevant evidence.<sup>29</sup>

As time has passed, the dichotomy between Williston and Corbin has narrowed somewhat, but has never completely gone away. This is demonstrated by an excerpt from the “Author’s Acknowledgements” to the Fourth Edition of the Williston treatise:

*The legal doctrines relating to the interpretation and construction of contracts and rights and liabilities of the parties have been reconsidered by the courts and commentators in the past forty years since the publication of the Third Edition of Williston on Contracts. For instance, courts have traditionally applied an objective standard of interpretation of ambiguous language in contracts; relying on standards of general or limited usage or the standard of reasonable expectation of the parties, as opposed to a mutual standard. Courts have subsequently observed that a debate has arisen between “Williston’s strict objectivist approach” and other commentators’ “subjectivist theory.” The Restatement (Second) of Contracts takes the latter approach, and while the Restatement (Second) has been cited in numerous cases, it nonetheless appears that the application of that viewpoint is limited to situations where the unusual use of language coincides with some trade usage . . . Thus, it appears that the mutual standard advocated by the Restatement (Second) of Contracts remains a minority rule, although it is slowly gaining adherents. Of course, the Uniform Commercial Code has also had a profound impact on the admissibility of evidence of trade usage . . . . While it has been traditionally held that language which is apparently clear and unambiguous will be given its plain and ordinary meaning, and parol or extrinsic evidence to alter, contradict or supplement that meaning will not be admitted, some courts now say that parol evidence may be considered when considering the extrinsic circumstances surrounding the execution of a contract in order to ascertain the parties’ intentions, regardless of whether an ambiguity exists—a view that at least emasculates the rule, if not abolishes it. Here, again, it appears that the majority of courts still follow the traditional rule.<sup>30</sup>*

The Fourth Edition author restates Williston’s *plain meaning* rule, the foundation of Williston’s position on contract interpretation.<sup>31</sup> Exceptions to the rule are acknowledged, albeit, again, begrudgingly:

<sup>29</sup>Conway v. 287 Corporate Center Associates, 187 N.J. 259, 901 A.2d 341, 346 (2006).

<sup>30</sup>Williston, Samuel, A Treatise on the Law of Contracts *Author’s Acknowledgment* (Richard A. Lord 4th ed., 1999).

<sup>31</sup>In response to the Williston position on strict contract interpretation, the editors of the current edition of the Corbin treatise take a different tack:

As usually understood, the ‘objective theory’ is based on a great illusion—the illusion that words, either singly or in combination, have a ‘meaning’ that is independent of the person who uses them . . . .

*The plain, common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to them. Sometimes an ordinary word or phrase may bear an extraordinary meaning in the locality where the contract was executed, but in most cases this is not true." (emphasis added)<sup>32</sup>*

The potential for exceptions to the Williston *plain meaning* rule is expanded a bit more, again begrudgingly, in the context of *technical terms or words of art*:

*Technical terms or words of art will be given their technical meaning. As a corollary to this principle, mercantile terms in mercantile contracts will be given the meaning ordinarily given them by merchants. Where the other primary rules of construction show a contrary meaning, however, the technical or mercantile meaning will not be attributed to the contract. Thus, if the circumstances or context show that the parties intended a meaning different from the technical or mercantile meaning, that other meaning will be honored. Likewise, the context or circumstances may require that an ordinary word or phrase be given an unusual meaning.(emphasis added)<sup>33</sup>*

This approach is applied by Williston in what he termed the “four corners” rule.<sup>34</sup> It is a “rule” that appears to have had a meaning for Professor Williston that differs from the meaning being applied by some American courts nearly a century later.

Williston’s *four corners rule* provides as follows:

*A contract will be read as a whole and every part will be read with reference to the whole. If possible, the contract will be so interpreted as to give effect to its general purpose as revealed within its four corners or in its entirety . . . To the extent possible . . . every word, phrase or term of a contract must be given effect . . .*<sup>35</sup>

Of particular significance is the fact that Williston would allow

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. . . Formalism of the kind found in plain meaning and an “objectivist” parol evidence rule is much easier to carry out than weighing context, credibility, linguistic sensibility and the many other factors that can go into an interpretation of words that may or may not mean what we think they mean. It is comforting to live in a world of plain meaning. But that is not a real world. We should always opt for a world of reality, however untidy it may be. (emphasis added) Corbin, Arthur Linton, *Contracts* § 25.4 (2016).

<sup>32</sup>Williston, § 32:3.

<sup>33</sup>Williston, § 32:4.

<sup>34</sup>While Wigmore makes reference to earlier cases in which the term “four corners” is referenced (Wigmore, John Henry, *Evidence in Trials at Common Law* §§ 2430–31 (James H. Chadbourn rev., Little Brown and Company, 1981)), Williston appears to be the first commentator to reduce the “four corners” *concept* to a formal *rule*.

<sup>35</sup>Williston, § 32:5.

*extrinsic* evidence (evidence from a source outside the “four corners” of the document) to show *circumstances or context*,<sup>36</sup> as would Corbin and Wigmore. Wigmore specifically rejects the concept that a “search for data of intent” can be limited to the *four corners* of a document.<sup>37</sup>

In articulating the *four corners* rule the Williston Fourth Edition<sup>38</sup> relies on § 202 of the Restatement (Second) of Contracts,<sup>39</sup>

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<sup>36</sup>Williston, Samuel, A Treatise on the Law of Contracts § 32:3, 4 (Richard A. Lord 4th ed., 1999). *See also* Williston § 34:11 Effect of Expressed Intent to Exclude Usage:

. . . no rule can be stated which will avoid the necessity of considering the particular contract in question in the light of surrounding circumstances including the usage and determining whether an intention has been manifested to exclude the application of the usage. It will be applicable provided the parties are chargeable with knowledge of it, unless such a contrary intention is manifested.

<sup>37</sup>Wigmore, § 2431:

It has occasionally been laid down that, in ascertaining in the first instance, the parties' intent to embody or not in the writing certain subjects of negotiation, “*the writing is the sole criterion*,” i.e., no search for data of intent can be made outside the *four corners* of the document . . .

. . .

*Such a proposition, however, is untenable, both on principle and in practice . . . (emphasis added)*

<sup>38</sup>Williston, § 32:5, n. 40.

<sup>39</sup>§ 202. Rules In Aid Of Interpretation

(1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.

(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.

(3) Unless a different intention is manifested,

(a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;

(b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.

(4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

(5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

Comment:

*a. Scope of special rules.* The rules in this Section are applicable to all manifestations of intention and all transactions. The rules are general in character, and serve merely as guides in the process of interpretation. They do not depend upon any determination that there is an ambiguity, but are

which clearly reinforces the admissibility of *extrinsic* evidence in the context of Williston's *four corners* rule.

That notwithstanding, some American jurisdictions have combined elements of Williston's *four corners* and *plain meaning* rules to create a hybrid—a short-cut to the parol evidence rule<sup>40</sup> that, arguably, was never intended by Williston; and was certainly never intended by Corbin or Wigmore. This short-cut prohibits consideration of evidence outside of the “four corners” of the doc-

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used in determining what meanings are reasonably possible as well as in choosing among possible meanings.

*b. Circumstances.* The meaning of words and other symbols commonly depends on their context; the meaning of other conduct is even more dependent on the circumstances. In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made. When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances. See §§ 209, 212. The circumstances for this purpose include the entire situation, as it appeared to the parties, and in appropriate cases may include facts known to one party of which the other had reason to know. See § 201.

<sup>40</sup>The parol evidence rule itself is the subject of considerable academic discussion; and an in-depth discussion of the parol evidence rule is beyond the scope of this paper. However, at least one comment from the current editors of the Corbin treatise is relevant to the attempted linkage between the *four corners* rule, the *plan meaning rule*, and the *parol evidence rule*.

The Corbin editors maintain that many courts mistakenly treat the *parol evidence rule* itself as a quasi-adjunct to the *statute of frauds* and use it to bar any testimony dealing with a contract that is the subject of a writing.

Professor Corbin argued strongly to the contrary referring often to the *parol evidence rule* in his writings as the “*so-called parol evidence rule*.” Corbin asserted that it was a substantive rule, not a rule of evidence; and not automatically a bar to either written or oral extrinsic evidence related to the formation or context of a written contract:

When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing . . . The use of such a name for this rule has had unfortunate consequences, principally by distracting the attention from the real issues that are involved . . . (1) Have the parties made a contract? (2) Is that contract void or voidable because of illegality, fraud, mistake or other reason? (3) Did the parties assent to a particular writing as the complete and accurate “integration” of that contract?

In determining these issues, or any one of them, there is no “parol evidence rule” to be applied. *On these issues, no relevant evidence, whether parol or otherwise, is excluded.* No written document is sufficient, standing alone, to determine any one of them, however long and detailed it may be, however formal, and however many may be the seals and signatures and assertions. No one of these issues can be determined by mere inspection of the written document. (emphasis added)

Corbin, Arthur Linton, *Contracts* § 25.2 (2016).

ument unless there is a patent ambiguity in the document that cannot otherwise be reconciled.<sup>41</sup>

The practical effect of this short-cut is that a court must apply its interpretation of contract terms without the benefit of necessarily understanding either the context in which the contract was written or the course of conduct between the parties during contract performance. The origin of this short-cut, while widespread,<sup>42</sup> is at best unclear.<sup>43</sup>

Williston and Corbin disagree on many points but they do not

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<sup>41</sup>See, West's Encyclopedia of American Law (2d ed., The Gale Group, Inc., 2008):

The term [four corners] is ordinarily included in the phrase "within the four corners of the document," which denotes that in ascertaining the legal significance and consequences of the document the parties and the court can only examine its language and all matters encompassed within it. Extraneous information that is not contained within the document's four corners cannot be considered. (emphasis added)

See also, *U.S. Department of Justice Principles of Contract Interpretation*:

Contract interpretation begins with the plain language of the contract. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); accord *Hol-Gar Mfg. Corp. v. United States*, 169 Ct. Cl. 384, 390 (1965). A court should first employ a "plain meaning" analysis in any contract dispute. *Aleman Food Services, Inc. v. United States*, 994 F.2d 819, 822 (Fed. Cir. 1993).

The intention of the parties to a contract controls its interpretation. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971). In construing the terms of a contract, however, the parties' intent must be gathered from the instrument as a whole in an attempt to glean the meaning of terms within the contract's intended context. *Kenneth Reed Constr. Corp. v. United States*, 475 F.2d 583, 586 (Ct. Cl. 1973); *Tilley Constructors v. United States*, 15 Cl. Ct. 559, 562 (1988). Contract interpretation requires examination first of the four corners of the written instrument to determine the intent of the parties. *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965). An interpretation will be rejected if it leaves portions of the contract language useless, inexplicable, inoperative, meaningless, or superfluous. *Ball State Univ. v. United States*, 488 F.2d 1014 (Ct. Cl. 1973); *Blake Constr. Co. Inc. v. United States*, 987 F.2d 743, 746-47 (Fed. Cir. 1993).

<https://www.justice.gov/usam/civil-resource-manual-72-principles-contract-interpretation>

<sup>42</sup>For an impressive empirical study of the diverse application of "textualism" and "contextualism" to contract interpretation across the United States, see, Silverstein, Joshua M., "Using the West Key Number System as a Data Collection and Coding Device for Empirical Legal Scholarship: Demonstrating the Method Via a Study of Contract Interpretation," 34 *J.L. & Com.* 203 (2016).

<sup>43</sup>An in-depth analysis of the evolution of the law in those jurisdictions that have departed from Williston's original statement of the *four corners* rule is beyond the scope of this article. However, an example of the evolution of the modified rule in one jurisdiction, Kentucky, may be illustrative.

An early version of the *four corners* rule first appears in Kentucky in an 1893 deed contest, *Philips v. Thomas Lumber Co.*, 94 Ky. 445, 15 Ky. L. Rptr. 219, 22 S.W. 652 (1893). It is stated in terms that mirror the *four corners* rule as later stated in (and perhaps serving as authority for) Williston's 1930 treatise: "the fundamental rule . . . is to give effect to the intention of the party executing the instrument and this is to be arrived at by the language used as found in the entire document."

disagree on the use of extrinsic evidence in application of the *four corners* rule—they both allow it.<sup>44</sup>

Williston and Corbin differ most significantly not on *whether* extrinsic evidence of *trade custom and usage* can be considered in implementing the *four corners* rule as part of contract interpretation; but, rather, the manner in which the parties to a contract can express their *intent to exclude trade custom and usage*. While the authors of the Fourth Edition of the Williston treatise freely recognize that application of both the Uniform Commercial Code<sup>45</sup> and the Restatement (Second) of Contracts<sup>46</sup> would lead to a different result, the Williston authors maintain nonetheless that, under the Common Law, *custom and usage* may be excluded by the parties from the terms of a contract either expressly or by *implication*.<sup>47</sup>

Corbin, the Uniform Commercial Code, and the Restatement (Second) of Contracts, all indicate that to prevent *trade custom and usage* from being applied to interpret a contract, the parties

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In 1952 Kentucky's then-highest appellate court did not rely upon *Phillips* when it applied the *parol evidence rule* to construction of a deed: "where the language of a deed is plain and unambiguous, evidence of surrounding circumstances, although proper in an action to set aside a deed, will not be considered for the purpose of construction [of the deed]." *Sword v. Sword*, 252 S.W.2d 869 (Ky. 1952).

*Phillips* was relied upon in a subsequent deed contest, *Riley v. Riley*, 266 S.W.2d 109 (Ky. 1954), in which Kentucky's then-highest appellate court applied the *four corners* rule in language identical to the language in *Phillips*: "the fundamental rule . . . is to give effect to the intention of the party executing the instrument and this is to be arrived at by the language used as found in the entire document."

In a 2000 action for partition of real estate, the Kentucky Supreme Court separately cited *Sword* and *Riley* in somewhat different language than used in their original decisions. *Sword* was cited in a *parol evidence* context: "Extrinsic evidence cannot be admitted to vary the terms of a written instrument in the absence of an ambiguous deed." *Riley* was cited in a *four corners* rule context: "The intention of the parties to a written instrument must be gathered from the *four corners* of that instrument." *Hoheimer v. Hoheimer*, 30 S.W.3d 176 (Ky. 2000). (emphasis added).

In a 2002 decision involving interpretation of a workers compensation settlement agreement, a Kentucky intermediate appellate court combined the *parole evidence* language attributed to *Sword* and the *four corners* language attributed to *Riley* to rely upon *Hoheimer* for the proposition that: "Absent an ambiguity in the contract, the parties' intentions must be discerned from the *four corners* of the instrument without resort to extrinsic evidence." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. Ct. App. 2002).

<sup>44</sup>See, notes 34 through 39, and accompanying text.

<sup>45</sup>See note 9.

<sup>46</sup>See note 9.

<sup>47</sup>Williston, Samuel, A Treatise on the Law of Contracts § 34:11 Effect of Expressed Intent to Exclude Usage (Richard A. Lord 4th ed., West Group, 1999).

must *expressly agree* that it will *not* apply—unless resort to custom and usage is *specifically and carefully negated* it can be consulted by a court at least for the purpose of showing the circumstances and context in which a contract was negotiated and executed. Under this authority, *trade custom and usage cannot be excluded by implication*.<sup>48</sup>

Corbin indicates that *trade and local usage*<sup>49</sup> are among the varieties of extrinsic evidence most frequently and most readily admitted by courts in order to discern the meaning of contract terms, as well as the meaning of the terms of offer and acceptance.<sup>50</sup> Corbin,<sup>51</sup> the UCC,<sup>52</sup> and the Restatement,<sup>53</sup> also provide that *trade custom and usage* can be applied *not only* to aid in interpretation of the meaning of words, *but also* to add a provision to the contract that the parties did not express; to fill a void; or to qualify the express terms of a contract.<sup>54</sup>

#### **D. The Common Inhibition to Use of Parol Evidence—Fear of Fraudulent Testimony**

The foregoing notwithstanding, courts across the United States have struggled mightily in their attempts to apply parol evidence in a manner that is consistent and that will fairly interpret the actual intentions of the parties. The heart of this struggle, the common denominator, has been the reluctance of judges to admit *testimony* suggesting a contrary interpretation of *written* contract terms that may, at first blush, appear to have a *plain meaning*.

This reluctance has been grounded in the fear of uncertainty and error generated by the potential for witness fraud—the potential that, through testimony, witnesses could attempt to change the circumstances surrounding their contract’s formation

<sup>48</sup>Corbin, Arthur Linton, Contracts § 24.13 (2016).

<sup>49</sup>Defined by the UCC as “any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.” UCC § 1-205(3). Defined by the Restatement (Second) of Contracts: “A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement.” § 222.

<sup>50</sup>Corbin, Arthur Linton, Contracts § 24:13 (2016).

<sup>51</sup>Corbin, § 24:13.

<sup>52</sup>Corbin, § 24:13.

<sup>53</sup>Corbin, § 24:13.

<sup>54</sup>*See also*, Rule 803 of the Federal Rules of Evidence. *Exceptions to the Rule Against Hearsay*: (17) Market Reports and Similar Commercial Publications. “Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.”

and performance after the fact to suit their own purposes.<sup>55</sup> Such testimony, if admitted, would be subjective, extrinsic evidence. It would lack credibility because of its self-serving nature.<sup>56</sup>

In the context of complex construction disputes those fears are exacerbated. Perhaps this is because most courts lack familiarity with the complexities involved,<sup>57</sup> or perhaps it is because, in the crush of myriad other disputes, and the amount of time required to untangle a complex construction dispute, many courts find it unnecessary and inefficient to take the time required to sort through the credibility of proffered extrinsic evidence, even if that evidence is otherwise objective in nature.<sup>58</sup>

Courts of general jurisdiction, in this author's experience, are often reluctant to look beyond the *four corners* of a standard form contract document (or even to look to contract drawings and specifications that form part of the overall contract) and seek guidance from *trade custom and usage*. In this context, the modified application of the *four corners* rule described previously in this section provides a convenient short-cut for judicial interpretation. Sometimes the *plain meaning* rule evolves into the "plain enough" meaning rule.<sup>59</sup>

But not all extrinsic evidence is subjective and self-serving in

<sup>55</sup>Bruner, Phillip L., *The Historical Emergence of Construction Law*, 34 William Mitchell Law Review 1, 15–19 (2007–2008); Corbin, § 25:18; Cunningham, Lawrence A., "Toward a Prudential and Credibility-Centered Parol Evidence Rule," 68 U. Cin. L. Rev. 269, 294 (2000);

<sup>56</sup>AM Intern., Inc. v. Graphic Management Associates, Inc., 44 F.3d 572, 575 (7th Cir. 1995).

<sup>57</sup>See, Bruner, *The Historical Emergence*, at 12 (citing E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas, 387 F. Supp. 1001, 1006 (S.D. Ala. 1974), *aff'd* in part, vacated in part, remanded, 551 F.2d 1026, 21 U.C.C. Rep. Serv. 1061 (5th Cir. 1977), opinion modified on reh'g, 559 F.2d 268 (5th Cir. 1977))

Like other highly complex fields of law, the litigation of construction disputes relies heavily for proof of causation upon opinion testimony of experts—a fact of life that can be frustrating to courts and mesmerizing to juries—and all too frequently results in detailed factual records of proceedings that appear "formidable" to finders of fact and reviewing judges. Some judges, overburdened by their judicial workloads, have little time for complex construction cases . . .

Being trained in this field, you are in a far better position to adjust your differences than those untrained in these related fields. As an illustration, I, who have no training whatsoever in engineering, have to determine whether or not the emergency generator system proposed to be furnished . . . met the specifications, when experts couldn't agree. This is a strange bit of logic.

<sup>58</sup>See, Bruner, *The Historical Emergence*, at 15–19.

<sup>59</sup>Said to have been invoked by overworked courts to resolve contract disputes without going through the burdensome chore of hearing evidence about the meaning of language that, on the surface, appears to have a "plain enough" meaning. Cunningham, at 294 citing Calamari & Perillo, *Contracts* §§ 3 — 10, at 167 n. 22.

nature and falls into the jaundiced category. Even the most jaundiced and harried of judges will recognize that sometimes strict application of a draconian interpretation of the *four corners* rule will lead to an untenable result. To avoid such results courts have framed varied tests for determining whether a writing is, or is not, integrated; whether its terms are, or are not, ambiguous; whether a technical interpretation should, or should not, be applied; and, depending upon the outcome of those tests, what evidence may, or may not, be admitted to elucidate the court on the circumstances under which the contract was negotiated and the course of conduct under which it was performed.<sup>60</sup>

The result has been what has been described as a tangled and less-than-coherent composite of the parol evidence rule that judges and scholars alike have attempted to untangle with “excruciating anxiety.” Prescriptions are said to have ranged from “abolishing the [parol evidence] rule to tinkering at its edges” through judicial experimentation that has “deepened rather than leavened the quagmire.”<sup>61</sup>

Into that quagmire has stepped Judge Richard Posner,<sup>62</sup> whose body of decisions applying the parol evidence rule to disputed contracts are the subject of an impressive analysis by Professor Lawrence A. Cunningham.<sup>63</sup> The combined results of the Posner decisions and the Cunningham analysis provide significant guidance for those who would draft, and those who would interpret, construction contracts.

### **E. Cunningham, Posner, and a Credibility-Centered Parol Evidence Rule**

Professor Cunningham reviews the status of the parol evidence rule prior to 1988; then examines opinions written by Judge Posner between 1988 and 1995 in which Judge Posner refines what he describes as an *objective / subjective* appraisal of parol evidence and what Professor Cunningham, in turn, describes as a *credibility-centered* parol evidence rule.

Stated simply, the more “objective” the evidence the higher its credibility. The more “subjective” the evidence the lower its credibility. Objective, “credible,” parol evidence can be admitted, even absent an ambiguity, to ascertain the circumstances under

<sup>60</sup>Cunningham, at 283.

<sup>61</sup>Cunningham, Lawrence A., “*Toward a Prudential and Credibility-Centered Parol Evidence Rule*,” 68 U. Cin. L. Rev. 269, 269–70 (2000).

<sup>62</sup>Richard Allen Posner is an American jurist and economist who is a judge on the United States Court of Appeals for the Seventh Circuit and Senior Lecturer at the University of Chicago Law School. He has been identified by *The Journal of Legal Studies* as the most cited legal scholar of the 20th Century.

<sup>63</sup>See, Cunningham, at 294.

which a contract was negotiated and the course of conduct under which it was performed. Subjective evidence that lacks credibility cannot be admitted under these circumstances.<sup>64</sup>

Objective evidence is that which can be supplied or supported by disinterested third parties rather than solely by the parties to the litigation. Included among the category of credible, objective evidence under both the Posner opinions and the Cunningham analysis are *trade usage* and course of dealing between the parties.<sup>65</sup> “This is evidence that is relatively difficult to fake . . . In contrast, subjective evidence is testimony by the parties themselves, offered without any basis of verification . . .”<sup>66</sup>

In Judge Posner’s own words:

Rules of law are rarely as clean and strict as statements of them make them seem. So varied and unpredictable are the circumstances in which they are applied that more often than not the summary statement of a rule—the terse formula that judges employ as a necessary shorthand to prevent judicial opinions from turning into treatises—is better regarded as a generalization than as the premise of a syllogism. Take the rule that if a contract is clear on its face, the court will not permit the taking of evidence to contradict that “clear” meaning. The famous contract in *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864), which we have revisited twice in recent cases, [citations omitted] was clear on its face. It called for the shipment of a specified amount of cotton from one port to another on the ship *Peerless*. Clear as a bell. Only there were two (if not more) ships *Peerless*, and it was impossible to tell which one the contract referred to. The contract was unclear because clarity in a contract is a property of the correspondence between the contract and the things or activities that it regulates, and not just of the semantic surface.

Take another example. Suppose the parties to the contract in *Raffles* had been members of a trade in which the term “cotton” was used to refer to guncotton rather than to the cotton used in textiles. The ordinary reader of English would not know about this special trade usage, and so would suppose the contract unambiguous. Again, the ambiguity is in the reference, that is, the connection between the word and the object that it denotes.

There has to be a means by which the law allows these surfaces to be penetrated, but without depriving contracting parties of the protection from the vagaries of judges and juries that they sought by reducing their contract to writing. A review of the doctrines that allow this penetration of semantic surfaces suggests that the key is the distinction between what might be called “objective” and “subjective” evidence of ambiguity. . . . By “objective” evidence we

<sup>64</sup> *AM Intern., Inc. v. Graphic Management Associates, Inc.*, 44 F.3d 572, 575 (7th Cir. 1995).

<sup>65</sup> *Cunningham*, at 275.

<sup>66</sup> *Cunningham*, at 276.

mean evidence of ambiguity that can be supplied by disinterested third parties: evidence that there was more than one ship called Peerless, or that a particular trade uses “cotton” in a nonstandard sense. The ability of one of the contracting parties to “fake” such evidence, and fool a judge or jury, is limited. By “subjective” evidence we mean the testimony of the parties themselves as to what they believe the contract means. Such testimony is invariably self-serving, being made by a party to the lawsuit, and is inherently difficult to verify. “Objective” evidence is admissible to demonstrate that apparently clear contract language means something different from what it seems to mean; “subjective” evidence is inadmissible for this purpose . . . [citation omitted]” a self-serving statement . . . that a party did not understand the contract to mean what it says (or appears to say) will not suffice”; only “an offer to show that anyone who understood the context of the contract would realize it couldn’t mean what an untutored reader would suppose it meant will [suffice].”<sup>67</sup>

Obviously *trade custom and usage*, especially *trade custom and usage* that has been compiled and codified in an unbiased manner, fits squarely into Judge Posner’s highest category of objective, credible evidence available to courts and juries to interpret the intentions of the parties when negotiating and performing complex construction contracts; and their relative rights and responsibilities.

#### F. Bruner & O’Connor

Not surprisingly, a definitive compilation of American Common Law applying *trade custom and usage* and the parol evidence rule to construction contracts can be found within the four corners of *Bruner & O’Connor on Construction Law*.<sup>68</sup> Bruner & O’Connor provides a compilation<sup>69</sup> that generally follows the expansive view championed by Professor Corbin and the Restatement (Second) of Contracts and refined by Judge Posner and Professor Cunningham.

<sup>67</sup>*AM Int’l.* at 575.

<sup>68</sup>Bruner, Philip L & O’Connor, Patrick J., 1 Bruner & O’Connor on Construction Law § 3:45 (2002 & Supps.).

<sup>69</sup>*C.f.*, Bruner & O’Connor § 3:41 Role of trade, custom and usage:

Where the contract involves a particular field of endeavor, then the technical terms and words of art regularly employed in that trade will be used to interpret the parties’ contractual language. Courts prefer an interpretation in harmony with trade custom and usage over one which is not, where the parties both (1) are knowledgeable about trade meanings and (2) contract for work involving that trade.

Unless the parties have otherwise agreed, the common usage in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know will give meaning to or supplement or qualify their agreement.

*See also*, § 3:45 Employing trade usage to give meaning where contract is silent.

Professor Bruner<sup>70</sup> writes convincingly:

*The early 1900s witnessed the emergence of a primary judicial vehicle for development of construction law principles: the modern theory of “contextual contract,” which elastically allowed the judiciary to add contractual terms, conditions, and warranties implied by the transaction’s surrounding circumstances and complexity, and to interpret express contractual language in conformance with industry usage, custom, and practice. “Contextual contract” principles led courts to recognize numerous implied conditions in construction contracts as a matter of law: the owner’s implied duty of full disclosure, the owner’s implied warranty of the adequacy of detailed design, the contractor’s implied duty of good workmanship, the contractor’s implied duty of inquiry and clarification, the mutual implied duty of cooperation, and the mutual implied duty of good faith. In addition, the judiciary fashioned “contextual contractual” principles of unconscionability, disproportionality, misrepresentation, and promissory estoppel.<sup>71</sup>*

Obviously, none of the foregoing could have been formulated into the law under the restrictive, short-cut interpretation of the *four corners* and *plain meaning* rules discussed previously.

Bruner & O’Connor cite an interesting, and relatively contemporary, application of *trade custom and usage* in the construction industry to supply a missing term where it could be argued that no ambiguity existed within the four corners of the contract document itself: *Tumlinson v. Norfolk & Western Ry.*<sup>72</sup> Evidence of *trade custom* was admitted to limit the scope of an indemnity agreement.

A truck driver, delivering stone to a railroad construction site, was injured in a collision with a train at a crossing three miles from the construction site. The driver sued the railroad, which interpleaded the site general contractor under an indemnity provision in the construction contract. The court accepted evidence of construction industry *trade practice* in railroad contracts *limiting the geographic scope of indemnity provisions*.<sup>73</sup> Under the restrictive interpretations of the *four corners* and *plain meaning* rules this evidence would have been excluded.

Bruner & O’Connor recognize that while most commentators, the Restatement (Second) of Contracts, and the UCC appear to

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<sup>71</sup>Bruner and Phillip L., *The Historical Emergence of Construction Law*, 34 Wm. Mitchell L. Rev. 1, 7–8 (2007–2008)

<sup>72</sup>*Tumlinson v. Norfolk & Western Ry. Co.*, 775 S.W.2d 251 (Mo. Ct. App. W.D. 1989).

<sup>73</sup>Bruner & O’Connor § 3:45 Employing trade usage to give meaning where contract is silent.

generally agree that introduction of extrinsic evidence of *trade custom and usage* is not dependent upon the presence of a patent ambiguity within the *four corners* of a construction contract, all American jurisdictions are not so expansive. There is significant inconsistency in application of *trade custom and usage* to interpretation of construction contracts:

There is a good deal of confusion over the role that *trade practice* plays in contract interpretation. This is due to the fact that there exists two seemingly inconsistent lines of authority on the subject. On the one hand there are those cases which hold that *trade practice and custom* must yield to the ordinary meaning of unambiguous contract language.

The other line of authority holds that courts may consult evidence of *trade practice and custom* to show that “language which appears on its face to be perfectly clear and unambiguous has, in fact, a meaning different from its ordinary meaning.” The Restatement Second, Contracts, blends the two lines of authority and expresses this concept in terms of prioritizing various types of evidence. Express terms are “given greater weight than usage of trade.” The Restatement Second, Contracts, however, permits trade usage to be introduced to interpret contract language irrespective of any ambiguity existing therein. Nor is it required that the usage of trade be consistent with the meaning the agreement would have apart from the usage. According to this theory, language of a contract is given its meaning by reference to *trade practice*.<sup>74</sup> (emphasis added)

The foregoing course through the history of contract interpretation demonstrates that application of *trade custom and usage* to interpret the terms of construction contracts in the context in which they were made and performed is not anathema to the Common Law. Rather, it is at the very heart of the Common Law. Advocacy suggesting that a court look beyond the *four corners* of a document (and beyond an individual judge’s interpretation of language) to determine the intent of the parties does not threaten the foundations of either commerce or the law.

In an effort to suggest guidance for practitioners of construction law, for courts of general jurisdiction, and for the construction industry in general, we will turn now from the history of the Common Law to the history of one segment of the construction industry. We will trace that industry sector’s efforts over the past 95 years to compile and codify its *trade custom and usage* in a

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<sup>74</sup>Bruner & O’Connor on Construction Law § 3:43 (2002 & Supps.). Role of trade practice and custom in contract interpretation: Two competing theories (2002 & Supps.). See also, Silverstein, Joshua M., “Using the West Key Number System as a Data Collection and Coding Device for Empirical Legal Scholarship: Demonstrating the Method Via a Study of Contract Interpretation,” 34 J.L. & Com. 203 (2016), and Cunningham, Lawrence A., “Toward a Prudential and Credibility-Centered Parol Evidence Rule,” 68 U. Cin. L. Rev. 269, 294 (2000).

manner that has been incorporated directly into project specifications and building codes across the United States.

That compilation satisfies the “objectivist” criteria of Williston as well as the “subjectivist” criteria of Corbin and Wigmore, and the “credibility” criteria of Judge Posner. It is “Exhibit ‘A’ ” in the argument for re-thinking the restrictive, hybrid interpretation of the *four corners* and *plain meaning* rules; and it is a model that can be adapted for use by other sectors of the construction industry.

### III. The History of the American Institute of Steel Construction and Development of Its Code of Standard Practice for Buildings and Bridges As a Statement of Trade Custom and Usage.

For nearly 4,500 years, clearly beginning not later than 20 B.C.E. when Marcus Vitruvius Pollio compiled a 10-volume treatise on *construction practice* in the Roman Empire,<sup>75</sup> “*there have existed principles of law governing the built environment and the construction process.*”<sup>76</sup> Construction materials, the construction process, and the law have evolved simultaneously, if sometimes sporadically and inconsistently, across the intervening centuries.

In about the same decade of the 18th Century in which application of *trade custom and usage* was evolving as a principle of the Common Law in the United States,<sup>77</sup> application of iron as a structural building material was evolving in the United Kingdom.

It is commonly accepted that the first load bearing structural frame built from a man-made material was Shropshire’s celebrated *Iron Bridge* over the UK’s River Severn. When *Iron Bridge* opened in 1779 it heralded an important milestone in the industrial revolution. With the successful completion of *Iron Bridge*, designers and contractors, and their imaginations, were no longer fettered by stone and timber. The material used in *Iron Bridge*, while primitive by today’s standards, was roughly four times stronger than stone and 30 times stronger than wood.<sup>78</sup>

The first successful application of iron beams in a *building* structure is attributed to industrialist Peter Cooper. Cooper rolled

<sup>75</sup>Marcus Vitruvius Pollio was chief engineer to Julius Caesar and Emperor Augustus. Bruner, *Historical Emergence*, at 2, citing 10 Marcus Vitruvius: The Ten Books on Architecture 282 (Morris Hicky Morgan trans., Dover Publications, 1960).

<sup>76</sup>Bruner and Phillip L., *The Historical Emergence of Construction Law*, 34 Wm. Mitchell L. Rev. 1, 12 (2007–2008).

<sup>77</sup>See note 15 and accompanying text.

<sup>78</sup>Gillette, Leslie H., *The First 60 Years, The American Institute of Steel Construction, Inc. 1921–1980*, American Institute of Steel Construction (1980), at 2–3; citing, Sawyer, Marc H., *World’s First Iron Bridge*, Civil Engineer (1979).

the industry's first beams at his Trenton Iron Works in 1854. They were strikingly similar in cross section to the rails he was contemporaneously selling to the B&O Railroad. Cooper installed those early beams during construction of the Cooper Union Building at the university in New York City that bears his name to this day.<sup>79</sup>

Simultaneously, the first, rudimentary elevators were under development.<sup>80</sup> Those initial elevators were slow and cumbersome, being powered by steam or screw mechanisms. When the electric motor was applied to elevator technology in the 1880's<sup>81</sup> it unleashed the era of the skyscraper, and the use of steel as a structural framing material.<sup>82</sup>

With the significantly increased building height made possible by high speed, electric passenger elevators came the realization that an alternative framing material, something other than traditional masonry, would be required to utilize elevator technology to its full potential. *"This gave rise to the idea of skeleton construction, which is among the more notable of all modern building inventions."*<sup>83</sup>

There is, among the archives of the American Institute of Steel Construction, a document written in December 1884, signed by Frederic Baumann. It appears to be an application for a patent, entitled "Improvement in the Construction of Tall Buildings." It proceeds at some length to extol the virtues of "iron" framing as a means to speed construction, to achieve greater economies and to make the construction of taller buildings practical. He notes, in part, "Structures wholly composed of iron would in this light be the most preferable, were it possible to clothe them with proper elegance, and with a proof against neighboring fires."<sup>84</sup>

Chicago is generally recognized as the birthplace of the sky-

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<sup>79</sup> Gillette, at 6.

<sup>80</sup> The first freight elevator was invented by Henry Waterman in 1850. The first passenger elevator by Elisha Graves Otis in 1857.

<sup>81</sup> While the cable elevator design remained essentially unchanged after 1857, the most obvious improvement to elevator technology in the 19th Century was the ability of elevators to run on electricity rather than steam power, a change that came about starting in the 1880s. The electric elevator was patented by Alexander Miles in 1887, though one had been built by the German inventor Werner von Siemens in 1880. <http://www.todayifoundout.com/index.php/2014/05/history-elevator/>

<sup>82</sup> Gillette, at 6.

<sup>83</sup> Mujic, Francisco, History of the Skyscraper, Archaeology and Architecture Press, (1929).

<sup>84</sup> Gillette, Leslie H., The First 60 Years, The American Institute of Steel Construction, Inc. 1921-1980, American Institute of Steel Construction (1980), at 6.

scrapers,<sup>85</sup> evolving through construction of the Home Insurance Building in 1883–84, the Tacoma Building in 1887–88, and the Rand McNally Building, designed by the heralded Chicago architects Burnham & Root and completed in 1889.<sup>86</sup> The Rand McNally Building was the world's first all-steel framed skyscraper.<sup>87</sup>

Contemporaneously (between 1881 and 1891) Burnham & Root also designed the *north* half of Chicago's Monadnock Building. Thereafter (1891–93) the architectural firm of Holabird & Roche designed the *south* half of the Monadnock Building. Combined, the Monadnock Building was the largest office building in the world and the subject of much attention in the commercial and construction sectors of the economy.

A comparison of the structural framing systems of the two halves of the Monadnock Building is instructive. The building reflects the transition taking place in skyscraper design in the last two decades of the 19th Century—a transition from traditional load-bearing masonry walls to steel frame construction.

Both halves of the Monadnock Building were 17 stories in height. The *north* half of the building utilized a traditional load bearing masonry structural system, which accumulates the vertical load from top to bottom through the mass of the masonry itself. This requires the lower-story masonry walls to be thicker than the upper story masonry walls to accommodate the accumulated vertical load, top to bottom.

The *south* half of the Monadnock Building utilized an integrated steel framing system in which the load is transferred through the masonry and accumulated in the skeletal frame. The *north* half of the building required lower-story masonry walls six feet thick, the *south* half required no increase in wall thickness, top to bottom. The steel skeletal system also afforded larger expanses of

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<sup>85</sup>Mujic. *See also*, Peet, Gerard, The Origin of the Skyscraper, CTBUH JOURNAL, Issue 1 (2011).

<sup>86</sup>Burnham and Root was one of Chicago's most famous architectural companies of the nineteenth century. It was established by John Wellborn Root and Daniel Hudson Burnham. During their 18 years of partnership, Burnham and Root designed and built extensive residential and commercial buildings and were pioneers of both the skyscraper and the urban office block floor plan as we know it today. Their success was crowned with the coordination of the Chicago World's Columbian Exposition (World's Fair) in 1893. [https://en.wikipedia.org/wiki/Burnham\\_and\\_Root](https://en.wikipedia.org/wiki/Burnham_and_Root).

<sup>87</sup>Mujic and Peet. Based on the combined use of passenger elevators and steel framing elements, the Home Life Building is considered the world's first "embryo" skyscraper and the Rand McNally Building is considered the world's first "modern" skyscraper. For a more detailed description of the Home Life Building and its place among early skyscrapers, *see*, Tallmadge, Thomas E., The Origin of the Skyscraper, The Alderbrink Press (1939).

glass and faster, less expensive construction. The south half of the building cost 15% less to build, weighed 15% less when built, and had 15% more rentable space than the north half.<sup>88</sup>

By the early 20th Century, the American economy was expanding rapidly, accompanied by an expansion in office and commercial construction in metropolitan areas. However, while, as shown in the example of the Monadnock Building, steel technology allowed for construction of much taller and more cost effective structures with much more innovative design elements, application of that technology was limited.

Application of steel frame technology to its full potential was limited by a lack of uniformity in the material itself, a lack of uniformity in the process of designing and building in that material, and the absence of a clear compilation of commonly accepted *trade custom and usage* in the steel construction industry.<sup>89</sup> Application of steel technology was also limited by a lack of public understanding of the material, its use in high rise structures, and the very notion that human beings might be expected to occupy high rise structures.<sup>90</sup>

The Carnegie Company (later to become United States Steel Corporation) published the first technical manual on the use of steel in construction in 1876. This was followed by subsequent

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<sup>88</sup>[https://en.wikipedia.org/wiki/Monadnock\\_Building](https://en.wikipedia.org/wiki/Monadnock_Building); <http://www.monadnockbuilding.com/the-building.html>.

<sup>89</sup>These same factors come into play when examining the dichotomy between the potential of 21st Century BIM technology and the current contract and specification provisions utilized to apply that technology to the construction industry. Some would argue that legal and contract concerns are inhibiting utilization of BIM technology to its full potential. *See* note 118 and accompanying text.

<sup>90</sup>From the decade of the 1890's through the decade of the 1920's a significant segment of the community of architects in the United States, as well as a significant segment of the general public, opposed construction of high rise structures both on aesthetic grounds and on public health and safety grounds. Gillette, Leslie H., *The First 60 Years, The American Institute of Steel Construction, Inc. 1921–1980*, American Institute of Steel Construction (1980), at 8. *See also*, Freitag, Joseph Kendall, *Architectural Engineering*, John Wiley & Sons (1895):

The continued development, however, of this centralization of business operations is attended by many vexing difficulties, the attempted solution of which has caused a number of clauses of restriction to appear in the municipal building laws. Considerable discussion has been going on about the sanitary aspect of this question; the damp, unwholesome, and microbe-laden air which must lurk in the deep valleys or streets between mountainous structures on each side; the dark and uninviting offices of the lower stories, which would soon become vacant; and the congested condition of our sidewalks when our vertical carrying capacity is greater than our horizontal or street capacity—all are considerations of grave importance.

The referenced “clauses of restriction” included legislation attempting to ban or significantly limit construction of high rise structures. Gillette, at 10.

Carnegie updates and preparation of similar handbooks by competing steel producers through the decades of the 1880's and 1890's. Each of these handbooks contained different, and sometimes contradictory, technical information. Early structural building codes were essentially copies of the formulas and specifications appearing in various of the producer handbooks. By the start of the third decade of the 20th Century there was little impetus for individual producers to update the sometimes confusing and inefficient information contained in handbooks that had been published in the latter decades of the 19th Century.<sup>91</sup>

Commentary from the early 1920's reveals that there was no recognized authority that compiled commonly accepted technical specifications and trade practice in the fabricated structural steel industry. No two building codes were alike. Design formulas, load tables, connection details, and technical data related to structural shapes varied widely in dimensions and properties with the catalogs published by the individual steel mills. Architects, engineers, and manufacturers lacked a clear understanding of what constituted reliable technical information and accepted trade practice.<sup>92</sup>

In 1921 the fabricated structural steel industry came together to form the American Institute of Steel Construction (AISC) in an effort to bring uniformity to the structural steel product itself, to bring uniformity to the process of designing and building in structural steel, and to compile and codify a common understanding of *trade custom and usage* for efficient design and construction of steel structures. Among AISC's early goals were to establish a single authority that would be recognized among engineers and building code officials across the United States, to establish through its publications clear and uniform statements of technical information and trade practices, and to undertake a program to advance the study of steel construction among students at American colleges of engineering.<sup>93</sup>

AISC accomplished these goals through publication of a series of technical standards and codified trade practices that were quickly accepted by building code officials, the design profession, the construction industry, and the producing mills.<sup>94</sup> Shipments of fabricated structural steel, an accurate measure of its applica-

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<sup>91</sup> Gillette, at 10.

<sup>92</sup> Gillette, at 18–19.

<sup>93</sup> Gillette, at 14–15.

<sup>94</sup> New York's iconic Empire State Building is an example of the stature that AISC had achieved by the close of the decade of the 1920's. AISC publications and research were instrumental in development and construction of the Empire State Building. These included formulating economic feasibility studies

tion in the construction industry across the United States, nearly tripled between 1921 and 1930.<sup>95</sup>

Steel frame buildings started springing up across the country; and a high rise building boom was underway in our great metropolitan cities.<sup>96</sup> AISC received high praise from then Secretary of Commerce Herbert Hoover for its “*splendid progress in simplification and standardization of [its] products and practices.*”<sup>97</sup>

Prominent among the first AISC publications was its 1924 “*Code of Standard Practice for Buildings and Bridges*” (the Code), which has been continually updated over the intervening decades. The most recent update, published in 2016, reconciles and harmonizes the trade practices set out in the Code with digital design and construction—making its standards equally applicable to two-dimensional drawings and multi-dimensional digital models.<sup>98</sup>

The Code is maintained by a balanced committee of industry professionals including architects, structural engineers, erectors, detailers, fabricators, general contractors, construction owners, building code officials, and construction lawyers. All segments of the industry, and the general public, are represented in this process. No segment of the industry is advantaged at the expense of another segment of the industry by the provisions in the Code.

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that were applied to the Empire State Building site at 350 Fifth Avenue, between 33rd and 34th Streets, to reduction of the design weight of the structure by revision of the New York City Building Code to increase the allowable design stress in steel members from 16,000 *ksi* to 18,000 *ksi*, and to subsequent installation of a “vertical collimator” in the Empire State Building to assuage public fears concerning movement of a high rise structure in heavy winds. Tauranac, John, *The Empire State Building—The Making of a Landmark*, St. Martin’s Griffin (1997), pp. 128, 202, 244.

<sup>95</sup> Gillette, at 32.

<sup>96</sup> Gillette, Leslie H., *The First 60 Years, The American Institute of Steel Construction, Inc. 1921–1980*, American Institute of Steel Construction (1980), at 10.

<sup>97</sup> Gentlemen,

It gives me pleasure to congratulate you and the members of the American Institute of Steel Construction on your splendid progress in simplification and standardization of your products and practices. Voluntary cooperation of industry, the engineering profession, and the consuming public in these matters not only helps eliminate waste, but strengthens employment, and opens the door to greater prosperity for all concerned. I assure you of the continued interest and cooperation of the Dept. of Commerce in the furtherance of your constructive efforts.

Yours faithfully,

/S/

Herbert Hoover

<sup>98</sup> This is believed to be the first codification of digital practice of its kind in the United States.

The Code is formulated using established consensus procedures.<sup>99</sup> Over the last two decades the Code committee has applied American National Standards Institute (ANSI) due process, consensus protocol to all matters under review. The 2016 edition has been accredited by ANSI as an American National Standard.<sup>100</sup> The Code is a copyrighted document that has been incorporated into nearly all steel construction specifications, public and private, in the United States.<sup>101</sup> Portions of the Code have also been adopted into the International Building Code.<sup>102</sup> The

<sup>99</sup> [www.aisc.org/consensusprocedures](http://www.aisc.org/consensusprocedures).

<sup>100</sup> In 1916, the American Institute of Electrical Engineers (now IEEE) invited the American Society of Mechanical Engineers (ASME), the American Society of Civil Engineers (ASCE), the American Institute of Mining and Metallurgical Engineers (AIME) and the American Society for Testing Materials (now ASTM International) to join it in establishing an impartial national body to coordinate standards development, approve national consensus standards, and halt user confusion on acceptability. These five organizations subsequently invited the U.S. Departments of War, Navy and Commerce to join them as founders the American National Standards Institute. [https://www.ansi.org/about\\_ansi/introduction/history.aspx?menuid=1](https://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1).

Comprised of government agencies, organizations, companies, academic and international bodies, and individuals representing the interests of more than 125,000 companies and 3.5 million professionals, ANSI oversees the creation, promulgation and use of thousands of norms and guidelines that directly impact businesses in nearly every sector of the American economy. ANSI is also actively engaged in accreditation—assessing the competence of organizations (organizations such as AISC) determining conformance to standards. [https://www.ansi.org/about\\_ansi/overview/overview.aspx?menuid=1](https://www.ansi.org/about_ansi/overview/overview.aspx?menuid=1).

Although ANSI itself does not develop American National Standards (ANSs), it provides all interested U.S. parties with a neutral venue to come together and work towards common agreements. The process to create these voluntary standards is guided by the Institute's cardinal principles of consensus, due process and openness and depends heavily upon data gathering and compromises among a diverse range of stakeholders. The Institute ensures that access to the standards process, including an appeals mechanism, is made available to anyone directly or materially affected by a standard that is under development. Thousands of individuals, companies, government agencies and other organizations, such as labor, industrial and consumer groups voluntarily contribute their knowledge, talents and efforts to standards development. [http://www.ansi.org/standards\\_activities/overview/overview.aspx?menuid=3](http://www.ansi.org/standards_activities/overview/overview.aspx?menuid=3).

ANSI standards are frequently cited as authority in published appellate opinions throughout the United States. *E.g.*, Cellular Phone Taskforce v. F.C.C., 205 F.3d 82, 30 Env'tl. L. Rep. 20402 (2d Cir. 2000).

<sup>101</sup> Most commonly the Code is incorporated into standard Structural Steel Specification 05120 or into general notes in structural steel drawings, or their digital equivalent.

<sup>102</sup> Chapter 22 of the International Building Code (IBC) incorporates AISC 360 (IBC 2205.1) and AISC 341 (IBC 2205.1) for design and construction requirements in structural steel. Similarly, IBC Chapter 17 (IBC 1705) refers to these same two documents for inspection requirements. AISC 360 and 341, in turn,

AISC Code of Standard Practice is intended to be, and is, recognized as the statement of *trade custom and usage* in the fabricated structural steel industry in the United States.<sup>103</sup>

The point of the foregoing is that the codified design assumptions and statement of *trade custom and usage* initially compiled and published by AISC in the early 1920's created a common understanding and a level playing field that continues to be universally applied to construction projects across the United States today. Nearly a 100 years of competition and innovation later, the per square foot weight, labor hours, cost,<sup>104</sup> and impact on the environment<sup>105</sup> of steel frame structures have decreased significantly, while their strength, serviceability, and adaptability have significantly increased—all to the benefit of the construction industry and the general public. The extent to which the increase in efficiency of steel frame structures over the past 100 years may be related to the standardization initiated by AISC in the 1920's is a matter of conjecture. The fact that it happened is not.

It is suggested that the protocol developed by AISC for compiling and codifying *trade custom and usage* in the fabricated structural steel industry can serve as a role model for the rest of the construction industry. As a corollary, it is also suggested that it is time for those American jurisdictions that have not already done so to take another look at their application of Williston's

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incorporate specific sections of the AISC Code of Standard Practice, AISC 303-16. For specific Code requirements incorporated into the IBC see [www.aisc.org/303IBC](http://www.aisc.org/303IBC). See also, notes 110, 115, and 117 and accompanying text.

<sup>103</sup>See *Meredith v. U.S.*, 779 F.2d 51, n.2 (6th Cir. 1985) (COSP incorporated and applicable); *Weigand Const. Co., Inc. v. Stephens Fabrication, Inc.*, 929 N.E.2d 220, 227–229 (Ind. Ct. App. 2010); *Martens v. MCL Const. Corp.*, 347 Ill. App. 3d 303, 282 Ill. Dec. 856, 807 N.E.2d 480, 483 (1st Dist. 2004) (COSP incorporated and court noted it was “recognized in the industry as authoritative.”); *Nicholson v. Turner/Cargile*, 107 Ohio App. 3d 797, 669 N.E.2d 529, 537–538 (10th Dist. Franklin County 1995); *Coffey v. Derby Steel Co., Inc.*, 291 Md. 241, 434 A.2d 564, 573 (1981); *Bethlehem Steel Co. v. Turner Const. Co.*, 2 N.Y.2d 456, 161 N.Y.S.2d 90, 141 N.E.2d 590, 592–593, 63 A.L.R.2d 1331 (1957).

<sup>104</sup>Adjusted for inflation.

<sup>105</sup>When the Empire State Building was built it weighed about 365,000 tons. Of that weight roughly 57,000 tons were the structural steel that formed the skeleton of the building. To produce that steel it took 684,000 man hours of labor at the mills. This does not include fabrication, just material production. The Empire State Building has not been redesigned using today's stronger steel or modern design approaches, but a rough estimate would be that the steel in a new Empire State Building would be somewhere around 41,000 tons. Today, instead of 684,000 man-hours to make that steel it would only take 24,600 man-hours and the CO<sub>2</sub> emissions would be reduced from 165,300 tons of CO<sub>2</sub> in the late 1920's to 37,000 tons of CO<sub>2</sub> today. The 41,000 tons of steel would typically be recycled from approximately 30,000 shredded automobiles, 5,000 tons of curbside recycling waste, and 7,000 tons of industrial scrap.

*four corners* and *plain meaning* rules. The intent of contracting parties can be better achieved, and the overall cost-efficiency of industry performance can be enhanced, if *trade custom and usage* is accurately compiled and codified by the industry, and applied by the courts, in the manner suggested by Judge Posner's parol evidence construct.

#### **IV. Application of Trade Custom and Usage in Conjunction with The Posner Extrinsic Evidence Construct**

Other than on the most rudimentary, modern-day construction projects, *no one contract is ever intended to be the sole document governing all of the rights and responsibilities involved*. To the contrary, construction contracting—by design—involves sometimes-multiple, parallel contract chains-of-command, each of which is intended to break out specific downstream responsibilities for specific components of the overall project work. While the *four corners* of any one of those contracts may address certain issues between the two parties to that particular contract, they do not and cannot address *all* of the issues that may impact those parties or any of the other parties that are necessary to complete the overall project work.<sup>106</sup>

The weight of scholastic literature suggests that construction contracts are better read in the credible context in which they were formulated and are to be performed—the *Posner construct*. Compilation and codification of *trade custom and usage* in the construction industry under ANSI consensus, due process protocol, and specific incorporation of those compilations into contract specifications, would facilitate application of the *Posner construct*, significantly reduce confusion over Williston's *four corners* and *plain meaning* rules, and more clearly address the rights and responsibilities of the parties actually engaged in the construction process.<sup>107</sup>

Reference to codified, consensus standards of *trade custom and usage* is nothing new. It has centuries of support in the Common Law. It not only provides clear guidance to courts tasked with interpreting the rights and responsibilities of parties involved in complex construction projects, but it also provides a highly valuable reference resource for commercial entities unfamiliar with the nuances of *custom and usage* among multiple, specialized construction trades.

<sup>106</sup>See Bruner, Phillip L., *The Historical Emergence of Construction Law*, 34 William Mitchell Law Review 1, 12 (2007–2008), note 2, and accompanying text.

<sup>107</sup>A properly codified statement of *trade custom and usage* incorporated into technical specifications will arguably take precedence over contrary general provisions in commercial contracts and subcontracts. Williston, Samuel, *A Treatise on the Law of Contracts* §§ 30:25, 32:10 (Richard A. Lord 4th ed., 1999).

Adherence to *trade custom and usage* generally provides the most efficient and cost effective approach to construction, and the fewest claims. Departure from established *trade custom and usage* (especially where masked in the haze of often-contradictory, multi-tiered contracts and subcontracts),<sup>108</sup> can lead to unintended results: increased cost; decreased efficiency; and increased claims.

Commendable; but what about situations where the parties have good reason to depart from *trade custom and usage* on an individual construction project? When is it appropriate to depart from *trade custom and usage*? What are the appropriate means for parties to memorialize their intentions to depart from *trade custom and usage*?

Again, the industry, and the legal profession, would be well-served to take their lead from Professor Corbin.<sup>109</sup> When it is appropriate to depart from *trade custom and usage*, that fact should be *clearly and specifically stated* so that all involved are aware of that departure; thus the potential consequences of that departure can be quantified and evaluated before the fact rather than after the fact.

Issuance of instructions in project *technical specifications* contrary to *trade custom and usage* should only be undertaken upon exercise of sound *engineering* judgment. Commercial terms that modify *trade custom and usage* and that have not been developed through a *bona fide* consensus process are *inappropriate* for inclusion in *technical specifications*.

By way of example, if engineering considerations on an individual project so warranted, it would be appropriate for an engineer to specify a tolerance, surface coating, or other engineering requirement in *technical specifications* that differed from codified, *technical, trade custom and usage*, so long as such requirements do not violate the building code or other applicable law.<sup>110</sup>

Again by way of example, it also would be appropriate for parties in the *contractor* chain-of-command to agree, with specificity, upon a commercial provision in their contract that differed from *trade custom and usage*, such as the sequence of the shop fabrica-

<sup>108</sup>See, Dugan & Meyers Constr. Co. v. Superior Steel, Inc., 2015 Ky. App. Unpub. LEXIS 3 (Ky. Ct. App., Jan. 9, 2015), *currently under discretionary review before the Supreme Court of Kentucky*.

<sup>109</sup>Corbin, Arthur Linton, Contracts § 24.13 (2016), note 48, and accompanying text.

<sup>110</sup>The AISC Code of Standard Practice specifically allows issuance of provisions that are contrary to its provisions so long as the contrary provisions do not violate the building code or other legal requirements, AISC Code of Standard Practice, Section 1.1. The specificity guidelines of Corbin and the Restatement would also apply. Corbin, § 24.13 (2016); *see also*, notes 102, 115, and 117 and accompanying text.

tion and field erection processes, so long as such requirements did not violate the building code or other applicable law.<sup>111</sup>

But it would *not* be appropriate for an engineer, who is *not* in the contractor chain-of-command, to insert, in project *technical* specifications, a *commercial* provision that differs from *trade custom and usage*, advantaged the engineer, and intruded upon the contractual relationships of the *contractor* chain-of-command.<sup>112</sup>

In the example of the fabricated structural steel industry, the AISC *Code of Standard Practice* is intended to state *trade custom and usage* as it has evolved in practice in the United States over the past 95 years in a manner that is fair and balanced and does not advantage any one segment of the industry over any other segment of the industry. Knowledgeable practitioners recognize that the Code provides a common understanding of a complex subject matter that protects owners, designers, contractors, and the general public alike.

Three important legal distinctions exists between the AISC compilations of *trade custom and usage* and the *trade custom and usage* generally referenced by Wigmore, Williston, and Corbin. They are illustrative in suggesting application of codified compilations of *trade custom and usage* to the Posner construct.

First, the AISC compilations are nearly always, intentionally, incorporated directly into contracts by specific reference in the project structural specifications. In contrast, in nearly every example cited by Wigmore, Williston, and Corbin the *trade custom and usage* referenced is extrinsic to the contract and appears to rely upon witness testimony.<sup>113</sup>

Second, unlike standard form industry contracts published by other professional organizations, the Code is not intended to be a template. When appropriate, provisions contrary to the Code can

<sup>111</sup> AISC Code of Standard Practice, Section 1.1.

<sup>112</sup> To build upon the previous example, it would not be appropriate for an engineer to include a *commercial* provision in its *technical* specifications giving the engineer effective control over the sequence of the shop fabrication and field erection processes in a manner that provided a commercial advantage to the engineer. A strong argument can be made that this would amount to a conflict of interest in violation of most codes of professional responsibility for licensed engineers and an unauthorized interference in contractual relationships among members of the contractor chain of command in violation of §§ 766 to 74 of the Restatement (Second) of the Law of Torts.

<sup>113</sup> Not so Bruner & O'Connor, which makes specific reference to the published codes of The American Society of Mechanical Engineers, the American Welding Society, and the American Institute of Steel Construction, among others. Bruner, Philip L & O'Connor, Patrick J., 1 Bruner & O'Connor on Construction Law § 3:47 (2002 & Supps.) **Establishing Trade Usage**; see also Bruner & O'Connor, *supp.*, n. 2.

be included in technical specifications and contract documents,<sup>114</sup> but the published language of the Code itself cannot be modified other than through the ANSI process or through formal exceptions to the building code in force in a particular jurisdiction.<sup>115</sup>

The Code has been drafted as a unified document. Its provisions are intended to work, and be read, together. In the author's experience, many attempts to issue instructions contrary to select Code provisions are often incomplete and do not correlate with other Code provisions. This leads to ambiguities and very possibly unintended consequences that do not benefit any of the parties involved, least of all the party that initiated the contrary provision and created the ambiguity.

An example from real life: let's assume that a specifier directs that the AISC Code provisions on tolerances will *not* apply on a particular project. But let's further assume that the specifier does not specify replacement tolerance requirements for *all* elements of work required on the project, only for *some* elements of work. So what is the tolerance for one of those unspecified work elements? Is it zero—no tolerance; or is it whatever tolerance is convenient for the contractor? Who will bear whatever cost may be involved if the tolerance *needs* to be something other than what the engineer or contractor *believed* it to be when code tolerances were excluded and the contract was executed?<sup>116</sup>

Finally, as indicated previously, certain provisions in AISC *Code of Standard Practice* have been incorporated into the International Building Code and most jurisdictional building codes and are not subject to modification other than through the protocol provided by the building code.<sup>117</sup>

While these legal distinctions might not currently apply to

<sup>114</sup>See, note 110.

<sup>115</sup>See, notes 102, 110, and 117 and accompanying text.

<sup>116</sup>Where ambiguities are created by unartful attempts to issue a technical specification that are contrary to a provision in the Code, it can be argued that the Code remains relevant as a source of *trade custom and usage* to fill the void even if there has been an attempt to exclude it. Williston and some courts could have difficulty with this. Corbin, Bruner, and Judge Posner likely would not.

<sup>117</sup>See, note 103. See also, International Building Code § 104.10 Modifications:

Where there are practical difficulties involved in carrying out the provisions of this code, the *building official* shall have the authority to grant modifications for individual cases, upon application of the *owner* or the owner's authorized agent, provided that the *building official* shall first find that special individual reason makes the strict letter of this code impractical, the modification is in compliance with the intent and purpose of this code and that such modification does not lessen health, *accessibility*, life and fire safety or structural requirements. The details of action granting modifications shall be recorded and entered in the files of the department of building safety. (emphasis original)

*trade custom and usage* in other sectors of the construction economy, the path to that status runs through the ANSI certification process. That path is well defined, and it is certainly achievable by other specialized trade sectors willing to develop and maintain a viable ANSI consensus process.

## V. Conclusion—Codification of Trade Custom and Usage; and Reassessment of The Four Corners and Plain Meaning Rules

Specialized industry trade contractors and their professional engineering counterparts would do well to establish balanced industry/professional/user committees to compile, codify and publish statements of *trade custom and usage* under ANSI due process, consensus standards. Consensus standards, appropriately supplemented as necessary for project-specific requirements and incorporated into project specifications, are invaluable in clarifying the relative rights and responsibilities of parties contracting for complex and comprehensive construction services.

Sector-specific statements of *trade custom and usage* could be especially helpful in the emerging challenge of incorporating rapidly-improving Building Information Modeling (BIM) technology into construction contract specifications. There are currently no viable, sector-specific technical statements of *trade custom and usage* available in that subject area.<sup>118</sup>

All of the foregoing brings a construction lawyer around again full circle to the point of beginning and the ultimate question: when disputes arise, how are the rights and responsibilities of two parties that have contracted for specialized construction services best interpreted; and by what standard?

A 1,000 years or more of Common Law and 4,000 years or more of construction history would favor incorporation of codified statements of *trade custom and usage*, and abandonment of the hybrid application of Williston's *four corners* and *plain meaning* rules currently being adopted by some courts. That history, and the current reality of the construction industry, favors incorporation

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*C.f. ICC REFERENCED STANDARDS GUIDE*, International Code Council, 2006, p.3:

. . . a standard becomes law to the extent to which it is referenced in a model code. When a standard that is referenced in the code (first-tier reference) in turn references another standard (second-tier reference), the second-tier referenced standard is equally applicable, again, to the prescribed extent of the reference to it in the first-tier reference. This trail of applicability extends throughout all tiers of references.

<sup>118</sup>The tremendous work undertaken by AIA, ConsensusDocs, the BIM Forum, and others to deal with this subject is recognized and applauded. But there is much more work to be done; and the consensus ANSI/AISC protocol may be the most effective way to do it.

CODIFICATION OF TRADE CUSTOM AND USAGE

of objective *trade custom and usage* under the Common Law model advanced by Professors Corbin, Bruner, and Cunningham, as applied to resolve real world disputes by Judge Richard Posner.



Construction contract types are usually defined by the way the disbursement is going to be made. It details other specific terms, like duration, quality, specifications, and several other items. These major contract types can have many variations and can be customized to meet the specific needs of the product or the project. Lump Sum or Fixed Price Contract Type. Unit pricing contracts are another type of contract commonly used by builders and in federal agencies. Unit prices can also be set during the bidding process as the owner requests specific quantities and pricing for a pre-determined amount of unitized items. By providing unit prices, the owner can easily verify that they're being charged with un-inflated prices for goods or services being acquired. Such commonality is derived from international instruments of various kinds, such as conventions and model laws, and from codifications of international trade usage adopted by contract, as exemplified by the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce and the Model Arbitration Rules issued by the United Nations Commission on International Trade Law (UNCITRAL). Legislative guides of the kind published by UNCITRAL and UNIDROIT are also contributing to the process of harmonization at international level. So too are "soft law" restatements, such as the UNIDROIT Principles of International Commercial Contracts... The Codification is updated via Accounting Standards Updates (ASUs). These are assigned a number that corresponds to the year of the ASU's issuance and its sequential order (e.g., the first ASU issued in 2010 was 2010-01). ASUs replace accounting changes that historically were issued as FASB Statements, FASB Interpretations, FASB Staff Positions, or other types of FASB standards. ASUs contain a background and basis for conclusions as well as a marked draft of any changes to existing guidance. The new guidance is labeled "Pending Content" in the Codification, and the superseded guidance will not be removed until the guidance in the ASU is effective for all entities. ASUs are available in PDF format on the FASB's Web site. This guide summarises the general approach taken by the English Courts to contractual interpretation. It considers the legal rules and key principles of interpretation, including the general approach to construing express terms and the tools of construction that the courts have at their disposal to assist them in reaching a just outcome between the parties. Construction of Contracts. The courts often have to construe terms of commercial contracts. Most cases before the Commercial Court concern construction of such contracts. Incorporation of trade custom and usage (express, implied, statutory codification?) So far we have considered the incorporation of trade custom and usage into the law via contract. Statutory codification of custom and usage is also a form of incorporation; although in most cases the custom and usage will have already been recognised by the courts before codification. c) National law. Primary and secondary legislation play an important role in the regulation of commercial transactions.