WHERE NO MINDS MEET: INSURANCE POLICY INTERPRETATION AND THE USE OF DRAFTING HISTORY

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INTRODUCTION

Nearly all lawyers engaged in breach of contract disputes, in more reflective moments, must have felt a strong dissonance between the way they were taught to think of contracts and the way in which those contracts really work. Lawyers still quote all the old first-year aphorisms—"meeting of the minds," "plain meaning of the contract," "offer and acceptance"—but the kinds of transactions with which they deal do not seem to fit these images. Although most judicial decisions about contracts continue to be expressed in an essentially Langdellian vocabulary,[1] voices in academia have been expressing doubts about the very core notions of contracts for years.[2] These doubts arise from the reality that many types of "contracts" do not fit comfortably into the contract paradigm learned in the first year of law school.[3]

The traditional assumptions about the nature of contracts imply methods of interpreting their terms where they are in dispute. Those interpretive methods, however, are increasingly both inappropriate and internally inconsistent, especially when applied to certain types of contracts. What has happened is that we have been trapped by the picture of a simple handshake bargain,[4] however:

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1. The term "Langdellian" is derived from Christopher Columbus Langdell, the first dean of Harvard Law School, and is intended to evoke the classic nineteenth century notion of contract, abstracted from the details of actual transactions and transformed into the keystone concept of private law. "Law . . . considered as a science, consists of certain principles or doctrines," which can be "classified and arranged" to be studied "systematically." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 531-32 (1973) (quoting, CHRISTOPHER COLUMBUS LANGDELL, LAW OF CONTRACTS at vi-vii (1871), Langdell's first casebook on contracts).

2. *See, e.g.*, GRANT GILMORE, THE DEATH OF CONTRACT 4 (1974).

3. The contracts that do not fit the old paradigms include, not only the standardized insurance policies discussed in this article, but also the typical construction contract and many types of sales contracts.

4. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 136 (G.E.M. Anscombe trans., 3d ed. 1958) ("But this is a bad picture."). Just as Wittgenstein argued that many philosophical problems resulted from being trapped by a bad picture of our language, many legal problems result from a bad picture of the events to which the law applies.

> [W]e should not think of contract law as "about" *one* central paradigmatic type of conduct, but about clusters of typical *situations*. So we are looking for situations rather than simple transactions. There are *families* of situations, related to each other, much as there are "family" resemblances among games, in Wittgenstein's famous example.[5]

For example, insurance contracts have a family resemblance to construction contracts because they are also often based on standard forms within an industry. The similarities among and differences between these family members cannot be determined a priori. Each individual type of contract must be examined to ascertain its unique characteristics.

This article examines interpretive disputes for one type of contract bought by businesses—the standardized comprehensive general liability insurance policy. It almost surely did not strike the reader as odd that the previous sentence referred to *buying* a contract for insurance. Moreover, it would not be unusual to talk about that contract for insurance as a *product*. Examining the problems that obsolete views about the nature of contracts specifically present for the resolution of insurance coverage disputes may shed light on the inadequacy of the traditional contract paradigm.

I. THE CATASTROPHIC COVERAGE CASE AND DRAFTING HISTORY

Much of the theoretical structure upon which courts have relied to interpret the insurance policy contract was derived from a paradigm of contract that fails to reflect the way the relationship between the insurer and the insured is established and functions. This paradigm rests upon a meeting of the minds, a private agreement then reduced to simple, declarative, written sentences in the form of a contract.[6] Very little of this paradigm is reflected in the functioning of the insurance market. Although there is a writing, it is more like a product assembled in the

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5. P.S. ATIYAH, ESSAYS ON CONTRACT 5 (1986) (referring to WITTGENSTEIN, *supra* note 4, § 67).

6. As one treatise of classical contract law states, a meeting of the mind is "the concurrence of several persons in a declaration of intention whereby their legal relations are determined." WILLIAM MARKBY, ELEMENTS OF LAW 79 (6th ed. 1905).

seller's factory than an expression of mutual intent. Depending on a consumer's bargaining power, this product may be customized by the addition or deletion of standard form clauses. It is, nevertheless, a far cry from the meeting of the minds paradigm.

A look at how the insurance market functions illuminates the disparity between that market and the paradigmatic contract. A large group of insurance industry representatives draft policy forms which are copied and sold by individual brokers to particular buyers for years thereafter. When it is time for the insurance company to pay claims, claims technicians usually interpret the policy without consulting the form drafters or the brokers. Although this process is incongruent with the contract paradigm, it may be the most efficient way to run the insurance market.

Policy coverage disputes have always been a by-product of insurance policies, but "catastrophic coverage," a new breed of coverage, adds new dimensions to these disputes. Catastrophic coverage disputes have brought many new issues to the courts for resolution and have challenged traditional ways of thinking about interpreting insurance policies.

Traditionally, disputes concerning the scope of insurance policy coverage turned on single, discrete events.[7] Over the last decade, however, various businesses and their insurers have been faced with new potential liabilities. For example, they have been confronted with many toxic tort claims: tens of thousands of alleged asbestos victims have come forward, claiming that they have developed life-threatening diseases from their exposure to asbestos fibers;[8] building owners have claimed that asbestos-containing materials installed in their buildings have rendered the buildings unsafe;[9] and dozens of other chemical products have been implicated as "time bombs" that have injured or will injure large numbers of people.[10] Many of these claims involve a process of injury over an extended period of time, raising questions concerning which policies in which years provide coverage

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7. *See, e.g.*, Liverpool & London Globe Ins. Co. v. Kearney, 180 U.S. 132 (1901).

8. *In re* Joint E. & So. Dist. Asbestos Litig., 129 B.R. 710, 745-46 (Bankr. E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992); *see* Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, FORBES, Feb. 18, 1991, at 75 (detailing skyrocketing asbestos litigation).

9. Lee S. Siegel, Note, *As the Asbestos Crumbles: A Look at the New Evidentiary Issues in Asbestos-Related Property Damage Litigations*, 20 HOFSTRA L. REV. 1139, 1171 (1992).

10. *See* James Podgers, *Lawscope: Toxic Time Bombs*, 67 A.B.A. J. 139 (1981) (detailing chemicals that are potential sources of mass tort litigation).

for these claims. In other words, the question of what events at which time trigger coverage under each policy—the "trigger of coverage" issue—is of central significance in catastrophic coverages cases.[11]

In addition to toxic tort claims, catastrophic coverage disputes also arise in the area of pollution and hazardous waste claims. The most significant of these have been the claims arising when an insured is identified as a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund").[12] In addition to the trigger of coverage issues, these claims also raise questions about what is expected or intended[13] by the insured and, most notably, whether the so-called "pollution exclusion" applies.[14]

One of the most contentious issues in catastrophic coverage cases is whether an insurance policy's "drafting history" is discoverable and admissible.[15] Courts have reached strikingly different conclusions concerning drafting history issues, and thus they have articulated inconsistent theories concerning the interpretation of disputed policy provisions.[16] Nearly all of these theories are derived from the same, frequently cited precedents, demonstrating that the traditional interpretive theories are subject to manipulation.[17]

Due to the nature of catastrophic coverage cases, the drafting history of the policies is more significant than the particular negotiation of the insurance contract between the policyholder and the insurance company. All catastrophic coverage claims are essentially general claims covering a class of individual events. For example, the insured seeks to determine what asbestosis

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11. *See, e.g.*, American Home Prod. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1493-94 (S.D.N.Y. 1983) (The issue of "trigger of coverage" is really one of "when was the 'occurrence'?"), *aff'd*, 748 F.2d 760 (2d Cir. 1984); *see also infra* notes 129-32 and accompanying text.

12. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991). A PRP is the party who is liable for the cleanup of the particular waste site.

13. This is the key exclusionary language in most policies. ROBERT F. CUSHMAN ET AL., PROSECUTING AND DEFENDING INSURANCE CLAIMS § 5.8, at 138 (1st ed. 1989).

14. *See infra* note 72 and accompanying text (pollution exclusion attempts to exclude at least some environmental liabilities from coverage).

15. Drafting history, as used in this article, refers to the testimony and documents evidencing the process of drafting various portions of standardized insurance policies.

16. *See infra* part I.

17. *See infra* part II.

coverage is provided in general, not whether one particular asbestosis claim is covered. Similarly, the final resolution of the coverage issue for one Superfund site will resolve the coverage issue[18] for any other Superfund claims that the insured may face.

The interpretation of policy terms is generalized beyond the claims of a single insured to the entire market for that policy. There is an "occurrence" definition common to most policies issued by most insurers from 1966 until quite recently.[19] Similarly, there is standard wording for the "pollution exclusion" common to nearly all policies in recent years,[20] as well as standard wording for the still more recent "absolute pollution exclusion."[21] Of course, this standard wording is not an accident. Insurance companies send representatives to trade associations such as the Insurance Services Office ("ISO") and its predecessors, and committees of these trade associations consider and draft the standard forms for policies.[22] The language of these policy forms is developed to provide commercially saleable, uniform responses to court decisions concerning the language of earlier forms that also had been drafted by trade association committees.[23]

The policies, therefore, were not written in the manner envisioned by the quaint paradigm of classical nineteenth century contract law. The policy is presented as a completed product for the consumer to purchase; only the annual premium and the

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18. For example, what was an insurer intending to cover when the insurance policy only extended coverage to the "sudden and accidental" dispersal of pollutants.

19. The policy provides coverage for an occurrence during the policy period. *See* S. MILLER & P. LEFEBVRE, 1 MILLER'S STANDARD INSURANCE POLICIES ANNOTATED, General Liability Forms, form GLSP, § 91a, ¶ C12 (1973).

20. *Id.* form GLCGL, § 91b, ¶ 1Gf (1973).

21. *See* Time Oil Co. v. Cigna Property & Casualty Co., 743 F. Supp. 1400, 1408-09 (W.D. Wash. 1990) (interpreting both pollution exclusions, finding the *absolute* exclusion unambiguous and inescapable for the insured, but finding the *standard* exclusion ambiguous).

22. In fact, ISO copyrights its policy forms. Most of the cases cited in this article arose from cases litigating the 1973 copyrighted forms. *See* S. MILLER & P. LEFEBVRE, *supra* note 19, General Liability Forms, forms GLSP and GLCGL, §§ 91a-91b. Policy forms for excess and umbrella coverage (coverage that supplements the primary coverage) are also standardized. The excess policies are usually much shorter and simpler than primary policies, agreeing to follow most of the provisions of the primary policy, with specific exceptions.

23. *Cf.* ATIYAH, *supra* note 5, at 1 ("Only with the aid of the law itself can we know what contract law is about, and what a contract is.").

limits of coverage are negotiated.[24] The specific product purchased, moreover, is generally bought sight unseen, since the policy is often not issued until after coverage actually begins. Indeed, the insured often does not receive its policy until months after receiving a binder evidencing coverage.

On the other hand, the insured is not buying a pig in a poke. Its broker usually knows the standard policy provisions and can convey this to the insured.[25] These standard provisions will have been developed over time by the insurance industry, discussed throughout the industry, and publicized in trade journals during development.[26] Brokers, as representatives of the buyers, are offered an opportunity to comment on draft policy forms. These brokers are also familiar with the events leading to the drafting of new policy language, especially judicial decisions interpreting these policies. Moreover, the insurance industry is a highly regulated one, and draft policies are often submitted to various regulatory bodies for approval.[27] It is this public process that is cumulatively called the drafting history.

Policyholders litigating claims have, for discovery purposes, relentlessly pursued drafting history from both their own insurers and the ISO. The insurers, however, have opposed that discovery just as vigorously, resulting in protracted and expensive discovery battles. Furthermore, when discovery has been allowed, the litigants have become engaged in the procedurally consequent battle to determine the admissibility of drafting history into evidence. As with discovery, the policyholders have persistently sought to introduce the evidence, while the insurers have ardently resisted its admission. Only by questioning the traditional theories of policy interpretation will the courts and litigants progress beyond this impasse.

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24. The limits of coverage set parameters for a claimant's ability to obtain relief. In other words, if a policy provides a $1,000,000 limit "per occurrence and in the aggregate," that policy will pay no more than $1,000,000 for any one claim and no more than $1,000,000 in any given year.

25. *See* Metropolitan Denver Sewage v. Continental Casualty Co., Civ. No. 89-C-895, slip op. at 2-3 (D. Colo. Mar. 12, 1991) ("The policies at issue contain standard, industry-wide definitions, terms, conditions and exclusions, most of which were drafted by national insurance policy drafting committees. . . . These provisions are usually non-negotiable.").

26. *See infra* note 125 (listing trade journals).

27. *See* 15 U.S.C. §§ 1011-1015 (1988).

I. THE TRADITIONAL PRINCIPLES OF POLICY INTERPRETATION

The traditional principles of policy interpretation can be reduced to maxims familiar to anyone who has finished the first year of law school. The traditional view of the law of contract is "fundamentally about what parties *intend*, and not about what they do."[28] This mutual intention is determined through the parties' objective manifestations of intent.[29] The objective manifestations of intent found in publicly available and observable behaviors is used to determine the meaning of the parties' agreement, and, more fundamentally, whether there was such an agreement at all.[30] This principle laudably rewards convenient enforceability and thus promotes stability by encouraging parties to clearly articulate their binding agreements. This emphasis on the objective manifestations of intent has resulted in the rule that examining the written contract is always the first step, and often the only step, needed to determine the parties' contractual obligations.

The second fundamental principle is that the clear language of the contract must be enforced without straining to create ambiguities in that language.[31] This can be seen as a corollary to the first principle because the clear language agreed upon by the parties is the best evidence of the parties' intent. Moreover, the second principle is often used to foreclose the introduction of any other evidence.[32] This makes the writing not just the *best* evidence of intent, but the *only* evidence of intent.[33] As such, this construction of the second principle reflects the policy judgment that using the written contract to resolve a dispute

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28. ATIYAH, *supra* note 5, at 13.

29. *See* RESTATEMENT (SECOND) OF CONTRACTS § 202 (1979) (discussing manifestations of intent) [hereinafter CONTRACTS]; *see also* J.B. Watkins v. Petro-Search, Inc., 689 F.2d 537, 538 (5th Cir. 1982) ("[I]t is objective, not subjective, intent that controls.").

30. *Watkins*, 689 F.2d at 538.

31. *See, e.g.*, United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 33 (6th Cir. 1988) (Do not use "tortured logic to find ambiguity where in fact none exists.").

32. *See, e.g.*, James Graham Brown Found. Inc. v. St. Paul Fire & Marine Ins. Co., No. 85-CI-06677, slip op. at 10 (Cir. Ct. Ky. 9th Div. Feb. 17, 1988) ("The parol evidence rule clearly prohibits the consideration of extrinsic evidence in construing contract language which is not ambiguous."). The language this court found to be clearly unambiguous was the sudden and accidental language in the pollution exclusion, which many courts have found to be ambiguous. *See infra* notes 71-77 and accompanying text.

33. *Brown*, No. 85-CI-06677, slip op. at 10.

promotes contract stability.[34] Furthermore, it is a common rule of construction that a contract be read as a whole and that all its parts be given meaning.[35] Therefore, one part should not be read in a way that renders another part redundant.

A third principle that has long been emphasized in the interpretation of insurance policies is the rule of *contra preferentem*.[36] The *Restatement (Second) of Contracts* instructs that "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."[37] Within the scope of this article, this rule means that insurance contracts are to be interpreted against their drafters, who are usually members of insurance trade association committees. The *contra preferentem* rule, dear to the hearts of policyholders' counsel, is the linchpin of the interpretive struggle in insurance coverage disputes.[38]

Recently, questions have developed concerning the application of this rule. Perhaps the most vexing is whether or not the rule applies to large, sophisticated businesses who buy insurance from companies that may be smaller and less sophisticated than the insureds. The Court of Appeals for the Second Circuit noted in *Schering Corp. v. Home Insurance Co.*:

> [T]here is an unresolved question whether the rule of *contra preferentem* is even applicable in a situation involving a large, sophisticated, counselled entity such as Schering [the insured], since a number of courts have recognized that in cases involving bargained-for contracts, negotiated by sophisticated parties, the underlying

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34. This judgment resurfaces with the extrinsic or parol evidence rule, generally considered a rule of substantive contract law, not simply a rule of evidence. *See, e.g.*, Chavez v. Director, Office of Workers Compensation Programs, 961 F.2d 1409, 1413-14 (9th Cir. 1992); Advanced Medical, Inc. v. Arden Medical Sys. Inc., 955 F.2d 188, 195 (3d Cir. 1992).

35. CONTRACTS, *supra* note 29, § 202(2).

36. Literally, "[a]gainst the party who proffers or puts forward a thing. As a rule of strict construction, 'contra preferentem,' requires that [the] contract be construed against [the] person preparing terms thereof." BLACK'S LAW DICTIONARY 327 (6th ed. 1990).

37. CONTRACTS, *supra* note 29, § 206.

38. This rule is extremely old. *See* Liverpool & London Globe Ins. Co. v. Kearney, 180 U.S. 132, 136 (1901) ("[W]here a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer.").

> adhesion contract rationale for the doctrine is inapposite.[39]

The Second Circuit's analysis has two components. First, the court assumes that a corporation is large and well-counselled, and second, that the contracts are negotiated by sophisticated parties.[40] Other courts, however, have found no need for the second component, because the "insurance policies of large, skilled corporations—and here, I venture to suggest [that the insured] Johnson & Johnson is larger than its insurers—would be treated as ordinary contracts."[41] One might argue that although Johnson & Johnson is a large business, its business is not insurance. The practical response, however, to such an argument is that Johnson & Johnson is large enough to hire insurance professionals from insurance brokerage houses to help it buy insurance.[42]

Taken to its logical extreme, the "large and sophisticated insured" exception to *contra preferentem* forces courts to take seemingly untenable positions.[43] Using *McNeilab, Inc. v. North River Insurance Co.* as supporting authority, the district court in *Ethicon, Inc. v. Aetna Casualty & Surety Co.* concluded that:

> The fact that Ethicon claims that no negotiations actually took place over the details of the terms of the insurance policies at issue . . . has no bearing on the Court's view of this matter. Johnson & Johnson had the market power to negotiate with its insurers on an even field. The fact that it chose not to do so will not affect that Court's determination of the proper reading of the policies at issue.[44]

The *Ethicon* court did not examine whether there was anything

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39. Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983) (citing Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1976), *cert. denied*, 431 U.S. 967 (1977)).

40. *Id.*

41. McNeilab, Inc. v. North River Ins. Co., 645 F. Supp. 525, 546 (D.N.J. 1986), *aff'd*, 831 F.2d 287 (3rd Cir. 1987).

42. *Id.*

43. *See id.*

44. Ethicon, Inc. v. Aetna Casualty & Sur. Co., 737 F. Supp. 1320, 1327 n.7 (S.D.N.Y. 1990) (citation omitted).

relevant to the dispute over which to negotiate. Even the *Schering* court recognized that sometimes the policy terms being offered are so standard that there is no negotiation over which market power can exert its force.[45] The question is not whether negotiation occurred, but whether anyone negotiated in anticipation of catastrophic claims.

Several courts suggest applying a different standard when the insured is a large, sophisticated corporate entity.[46] Rather than construing all ambiguities against the insurer, extrinsic evidence should be used.[47] The rationale for this suggestion is that because these corporate insureds retain expert brokers and have substantial bargaining power, the policies issued to them are not adhesion contracts.[48] However, two concerns arise from this suggestion. First, it requires a threshold determination of how large and sophisticated a corporate insured must be for extrinsic evidence to be admitted. Second, unlike the rule of *contra preferentem*, this approach is not predicated on the peculiarly oppressive bargaining power of the insurer over the insured.[49] The startling sameness of standardized catastrophic coverage policies confirms the belief that little real bargaining occurs over key policy clauses and definitions. Undoubtedly, the parties bargain over price and limits, as well as over the inclusion or exclusion of a particular pre-written, standardized endorsement. Beyond these provisions, however, little opportunity for bargaining exists. Of course, manuscript policies exist, the disputed terms of which are actually negotiated.[50] Although *contra preferentem* is inapplicable in disputes over manuscript policies, catastrophic coverage cases rarely involve manuscript policies. Rather, the catastrophic coverage case usually involves a huge number of uniform claims potentially covered by large numbers of essentially uniform policies.

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45. *Schering*, 712 F.2d at 10 n.2.

46. *See id.* at 4; Fenwick Mach., Inc. v. A. Tomae & Sons, 401 A.2d 1087 (N.J. 1979).

47. *Schering*, 712 F.2d at 10.

48. *See, e.g.*, *Fenwick*, 401 A.2d at 1088 (Insurance brokers are charged with superior knowledge and "cannot take advantage of whatever deficiencies might be uncovered in the policy language when viewed from the perspective of an unschooled and unwary policyholder.").

49. *Cf.* CONTRACTS, *supra* note 29, § 206 cmt. a ("The rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position, but it is not limited to such cases.").

50. *See infra* notes 92-110 and accompanying text.

Other questions arise concerning the rule of *contra preferentem*. Does it really mean that when a court can find two or more possible meanings to a clause, the policyholder wins? How ambiguous must the clause be? Must it be ambiguous in the abstract, or in the context of the claim at issue? Is ambiguity to be determined by referring to the expectations of the policyholder or by examining the historical behavior of the parties?

Although *contra preferentem* addresses the central interpretive dilemma in insurance contract disputes, that of what to do when the written language is not clear, it is not the only rule of interpretation to do so. The parol evidence rule and its exceptions also address this issue.[51] Often called a rule of substantive law, not evidence,[52] the parol evidence rule generally forbids the use of extrinsic evidence when interpreting a written document, *except when a term is ambiguous*.[53] Only when a contract's terms are ambiguous—or "indefinite"[54]—may extrinsic evidence be used to establish the meaning of the disputed term. The numerous variations of this interpretive rule[55] all conflict, to some degree, with the rule of *contra preferentem*. In its strictest form, the parol evidence rule requires that extrinsic evidence be admitted only after a finding of ambiguity.[56] This form of the rule clearly conflicts with *contra preferentem*, which construes ambiguous contract terms against the drafter. Under *contra preferentem* there is no need to use extrinsic evidence to clarify ambiguous contract provisions, for the provision will be interpreted in the policyholder's favor.

Less strict versions of the parol evidence rule exist,[57] but these also conflict with *contra preferentem* to some degree. One weaker version of the rule suggests that finding ambiguity is not that difficult.[58] Some courts refer to contracts as "not wholly unambiguous," implying that they are merely somewhat ambiguous.[59] Additionally, courts label contracts as "not free from

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51. *See generally* 9 JOHN H. WIGMORE, WIGMORE ON EVIDENCE §§ 2400-2478 (1981).

52. *Id.* § 2400, at 4.

53. *See, e.g.*, United States v. Vahlco Corp., 720 F.2d 885, 891 (5th Cir. 1983).

54. Gregg v. U.S. Indus., Inc., 715 F.2d 1522, 1531 (11th Cir. 1983), *cert. denied*, 466 U.S. 960 (1984).

55. WIGMORE, *supra* note 51, § 2400(3), at 5.

56. *Id.* § 2461, at 193.

57. *Id.* § 2400, at 5, 8-9.

58. *Id.* § 2470(3), at 236.

59. Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 169-70 (D.C. Cir. 1981).

ambiguity," recognizing that ambiguity is common and difficult to eradicate.[60] Finally, courts note that contracts may be "facially unambiguous" but alternative reasonable interpretations may exist.[61] The courts may hold that reasonable alternative explanations, even if foreign to a judge's "linguistic background," should be considered in light of extrinsic evidence.[62] Although ambiguities may be latent, when one has to look hard for the ambiguity, reliance solely on *contra preferentem* may be inappropriate.[63]

Finally, the weakest form of the parol evidence rule adopted by some courts allows admission of extrinsic evidence to establish the existence of, as well as to resolve, an ambiguity.[64] Courts using such a liberal rule look beyond the four corners of the contract to determine whether the provisions are ambiguous, noting:

> It is the responsibility of the court to determine as a matter of law whether or not the meaning of the contract is ambiguous. This determination shall not result from a 'four corners' examination of this contract, as the court, in relying on its own experiences and knowledge, may be unaware of reasonable alternative meanings, such as trade uses, which differ from the court's perspective.[65]

After all, what may seem clear at first blush could be open to variant interpretations once one is aware of the background of the transaction. Although using extrinsic evidence to unearth ambiguities does not conflict with *contra preferentem*, using such

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60. Sanchez v. Maher, 560 F.2d 1105, 1108 (2d Cir. 1977).

61. *In re* Beverly Hills Bancorp v. Hine, 649 F.2d 1329, 1335 (9th Cir. 1981) (citing Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644 (Cal. 1968) (en banc)) (As a general proposition of California law, "parol evidence is admissible to construe a facially unambiguous contract if the proffered interpretation is one to which the written agreement is 'reasonably susceptible.'"); *see also* WIGMORE, *supra* note 51, § 2472(1), at 243.

62. Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1010 (3d Cir. 1980).

63. Zim v. Western Publishing Co., 573 F.2d 1318, 1323 (5th Cir. 1978) (parole testimony should be admitted to clarify a latent ambiguity, not to create one).

64. Cathbake Inv. Co. v. Fisk Elec. Co., 700 F.2d 654, 656 (11th Cir. 1983); Sawyer v. Arum, 690 F.2d 590, 593 (6th Cir. 1982); *see also* WIGMORE, *supra* note 51, § 2470, at 236.

65. Colt Indus., Inc. v. Aetna Casualty & Sur. Co., No. CIV.A.87-4107, 1989 WL 147615, at *2 (E.D. Pa. Dec. 6, 1989).

evidence to resolve ambiguities does conflict with the weakest form of the parol evidence rule.

Contra preferentem, like the parol evidence rule, can be subject to strict and liberal applications. The strict rule of *contra preferentem* may seem too mechanical when the ambiguity itself is far from obvious. In *Schering*, the Second Circuit stated that "*contra preferentem* is used only as a matter of last resort, after all aids to construction have been employed but have failed to resolve the ambiguities in the written instrument. . . . To conclude otherwise would require every ambiguously drafted policy to be automatically construed against the insurer . . . ."[66] Strict *contra preferentem* proponents might argue that admitting extrinsic evidence without giving at least some weight to an insured's expectations or to the insurer's failure to write clearly opens the door to more litigation and uncertainty, while discouraging succinct policy drafting. These concerns notwithstanding, a great number of courts apply *contra preferentem* only when there is an ambiguity that cannot be resolved by resorting to extrinsic evidence.[67]

Another significant interpretive theory relevant to catastrophic coverage policies emphasizes the purchasers' expectations, rather than the drafters' intent. This theory operates under the premise that the public interest is best served by determining and enforcing the insureds' reasonable expectations of coverage.[68] Interpretive reliance on the insureds' expectations of coverage is a more recent outgrowth of existing themes. Special emphasis on the rule of *contra preferentem* and the public drafting history of policies favor breadth of coverage. Considering the insurers'

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66. Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (citation omitted).

67. *See, e.g.*, Playboy Enter. v. St. Paul Fire & Marine Ins. Co., 769 F.2d 425, 428 (7th Cir. 1985); Pacific Indem. Co. v. Linn, 766 F.2d 754, 761 (3d Cir. 1985); Poland v. Martin, 761 F.2d 546, 548 (9th Cir. 1985); Gulf Tampa Drydock Co. v. Great Atl. Ins. Co., 757 F.2d 1172, 1174 (11th Cir. 1985); FSC Paper Corp. v. Sun Ins. Co., 744 F.2d 1279, 1282 (7th Cir. 1984).

68. The doctrine of reasonable expectations was first articulated by Professor Robert E. Keeton of Harvard Law School. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970); *see also* ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW (1971). It has been adopted to some extent by a number of courts, most notably in Minnesota. *See, e.g.*, Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 278 (Minn. 1985) (en banc); *see also* Avondale Indus., Inc. v. Travelers Indem. Co., 697 F. Supp. 1314, 1319 (S.D.N.Y. 1988), *aff'd*, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 496 U.S. 906 (1990) (interpreting the policy from the perspective of "the reasonable expectation and purpose of the ordinary businessman").

dominant role in policy drafting, protecting the insureds' reasonable expectations of coverage also reflects an attempt to be fair.

Often this emphasis on the insureds' reasonable expectations is only hortatory. As a rule, after all, it is very open-ended, very dependent on the facts, and extremely subjective.[69] The more specific rules of interpretation described above, however, are also open-ended, since they require a determination of which writings are clear and which are ambiguous—a determination not easily made. The difficulty of this determination results from both poor drafting of individual clauses and from the conjunction of clauses drafted at different times by different trade association committees.

A number of courts have tried to apply these interpretive principles to catastrophic coverage cases, particularly using them to describe the potential role of drafting history in litigation.[70] Courts deciding whether drafting history ought to be discoverable have reached a variety of conclusions for a number of different reasons, illuminating the inadequacy and inconsistency of these traditional principles.

II. TRYING TO APPLY THE TRADITIONAL PRINCIPLES

As to whether drafting history and other extrinsic evidence should play a role in litigation, the simplest response is that they are unnecessary. If the court finds the language clear and unambiguous, then the coverage determination is moot. Conversely, the court may find the language obviously ambiguous and, relying on *contra preferentem*, endorse the insured's version. Courts have taken both positions in interpreting the sudden and accidental language contained within catastrophic coverage policies.[71] The standard pollution exclusion clause states:

> [This policy does not apply] to bodily injury or property damage arising out of the discharge, dispersal, release or

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69. It has the potential, however, to be a maxim of substantial importance. *See infra* note 105 and accompanying text.

70. *See infra* part II.

71. *See* Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989); Allstate Ins. Co. v. Freeman, 443 N.W.2d 734, 761 (Mich. 1989); Kipin Indus., Inc. v. American Universal Ins. Co., 535 N.E.2d 334, 338 (Ohio Ct. App. 1987); Broadwill Realty Serv., Inc. v. Fidelity & Casualty Co., 528 A.2d 76, 84 (N.J. Super. Ct. 1987) (usually the insured's position is that sudden means unexpected and can cover gradual emissions of pollutants).

> escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is *sudden and accidental*.[72]

In other words, the policy will only cover liability from pollution where the discharge of pollution is sudden and accidental. Every policyholder seeking coverage for Superfund liabilities, for example, hopes to get under that three-word umbrella.

When discussing the pollution exclusion, a number of courts have brusquely dismissed the insureds' arguments that sudden and accidental means "unexpected and unintentional."[73] These courts hold sudden and accidental in the exclusion "means what it says"—that is, taking place quickly, abruptly, and accidentally.[74] These courts, refusing to torture logic to find an ambiguity where none exists,[75] cite the parol evidence rule and refuse to consider any form of extrinsic evidence.[76] Other courts appear to rely solely on the clear language of the exclusion, but in passing refer to some unspecified drafting history for support—presumably that which the insurers found favorable.[77]

Another rule of interpretation requires that a policy be read as a whole and that its terms not be redundant.[78] In light of this rule, courts considering the pollution exclusion[79] may be

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72. *See* MILLER & LEFEBVRE, *supra* note 19, form GLCGL, § 91b, ¶ 1Gf (emphasis added).

73. Claussen v. Aetna Casualty & Sur. Co., 754 F. Supp. 1576, 1579 (S.D. Ga. 1987); *see, e.g.*, American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423, 1428 (D. Kan. 1987); International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758 (Ill. App. Ct. 1987); Techalloy Co. v. Reliance Ins. Co., 487 A.2d 820, 826-27 (Pa. Super. Ct. 1985).

74. *Claussen*, 754 F. Supp. at 1579.

75. United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 31 (6th Cir. 1988).

76. *See, e.g.*, James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., No. 85-CI-06677, slip op. at 10 (Cir. Ct. Ky. 9th Div. Feb. 17, 1988).

77. *See, e.g.*, Waste Management of Carolinas v. Peerless Ins. Co., 340 S.E.2d 374, 381 & n.5 (N.C. 1986); *see also* American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987).

78. *See supra* note 35 and accompanying text.

79. *See, e.g.*, *International Mineral*, 522 N.E.2d at 765; Peppers Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541 (S.D. Fla. 1987); Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189 (S.D. Fla. 1985).

even more tempted to rule against the insureds.[80] The best argument to use when resisting that temptation is that policies drafted in bits and pieces over different years by different committees quite naturally are redundant. In fact, most policies contain clearly duplicative sections, thus the insureds may actually expect redundancy.

Many courts are uncomfortable simply holding that the pollution exclusion "means what it says," thereby ignoring the insistent demands from insureds that extrinsic evidence will vindicate their position. Usually, but not always, the insurers resist both the discovery and the admission of extrinsic evidence. When resisting production, insurers often argue that drafting history is irrelevant, because it was written for intra-industry purposes. Some insurers have argued that drafting history is not helpful even where the language of the policy is ambiguous, as it is an "uncommunicated unilateral intent."[81] Courts accepting this argument hold that no extrinsic evidence is relevant (except for that always non-existent interpretive assistance found in the policy's actual negotiation).[82] Other courts, however, have refused to accept the insurers' argument, noting that the insurers' unilateral intent could not bind the insured, but that:

> [D]ocumentation of a carrier's subjective intent or mental reservation, whether at the drafting stage or in presenting a proposed standard form policy to a state regulatory body may be a party admission as to what the language means. If the insured has acquiesced in the interpretation, a meeting of the minds may be established.[83]

Moreover, some insurers have argued affirmatively to introduce the history of the pollution exclusion and the intention of the

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80. After all, the insureds' proposed interpretation tends to make the word sudden synonymous with accidental, which can be construed to comport with the unexpected and unintended language used elsewhere in the policy, where it states that only occurrences unexpected and unintended from the standpoint of the insured are covered.

81. *See, e.g., Discovery Requests Denied in Schering's N.J. Coverage Suit*, Litig. Rep.: Ins. (Mealey's) 16, 18 (Aug. 22, 1989).

82. Schering Corp. v. Evanston Ins. Co., No. 97311-88 (N.J. Super. Ct. Aug. 4, 1988).

83. Borg-Warner Corp. v. Liberty Mut. Ins. Co., No. 88-539, slip op. at 11 (N.Y. Sup. Ct. Tompkins County June 20, 1990). One must ask this court, is this meeting of the minds nothing more than a coincidence?

insurers, unilateral or not.[84] This argument collapses the *parties'* intentions into *one party's* intentions, and further, *one party's* intentions into the *earlier form drafters'* intentions. Implicit in this argument is the realization that drafting history can help the insurers, not just hinder them.[85]

In response to the constant pressure from insureds to allow the discovery of drafting history, courts often order disclosure, but with little or no expressed analysis of why.[86] In fact, at least one court allowed discovery of the drafters' deliberations, but refused to order discovery of state regulatory filings.[87] Although this suggests a compromise was molded during a discovery dispute, the court did not provide any analysis of what use the discovered information would have.[88] After all, the "private drafting history" made subject to discovery was truly unilateral, while the state regulatory filings could be described as a publicly made commitment affecting the insured's coverage expectations. The compromise reached by the *Ulrich* court, ironically, seems to deny the more useful discovery.[89]

The most obvious reason for courts to allow discovery of drafting history and perhaps, its admission as evidence, is a belief that the policy's language is ambiguous and that the drafting history can help resolve that ambiguity.[90] One must ask what principles of interpretation, if any, these courts believe they are using. For example, one court ruling on a dispute concerning the timing of an occurrence said, "[B]ecause the policy in question is not susceptible of only one reasonable interpretation, the Court may look to extrinsic evidence of the parties' intent and their communications, as well as rules of construction, to discern the contract's meaning."[91] The court spoke of the parties' intent and

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84. *See, e.g., Waste Management of Carolinas*, 340 S.E.2d at 381.

85. *See infra* notes 134-43 and accompanying text (discussing how the insurers should be able to make some use of drafting history).

86. *See, e.g., Claussen*, 380 S.E.2d at 689.

87. Ulrich Chem. Inc. v. American States Ins. Co., No. 73C01-8901-CP-016 (Ind. Shelby Cir. Ct. July 31, 1990).

88. *Id.* The court gave no reason for allowing one type of discovery but denying the other.

89. *See* part III.B (discussing the relative value of "public and private" drafting history.)

90. *See* City of Northglenn v. Chevron USA, 634 F. Supp. 217 (D. Colo. 1986); *Kipin Indus.*, 535 N.E.2d at 338; *Broadwell Realty Services*, 528 A.2d at 76; Shapiro v. Public Serv. Mut. Ins. Co., 477 N.E.2d 146 (Mass. Ct. App. 1985).

91. Champion Int'l Corp. v. Liberty Mut. Ins. Co., 129 F.R.D. 63, 67 (S.D.N.Y. 1989).

of communication, yet the evidence in question concerned the drafting of a form used by most of the industry, not the negotiation of a manuscript policy.[92] Moreover, as the *Champion* court later recognized, there were excess insurers whose policies followed form to, and whose liability depended on, that of the underlying carrier.[93] An unresolved question is whether the excess insurers' liability should be determined by the widely known and jointly drafted standard forms rather than by some undisclosed side deals between the insured and its primary insurer.

Other courts, though still failing to articulate an interpretive theory that would justify the use of drafting history to resolve an ambiguity, have at least recognized the nature of drafting history evidence—that the disputed policies contain standard, non-negotiable terms relevant to the "derivation, meaning, and intent of clauses in the defendant's contract."[94] The question raised, however, is *whose* intent? Do the courts mean the drafters' intent? If so, does this bind subsequent retailers of the product (insurers) and purchasers? If the terms are non-negotiable, does the rule of *contra preferentem* appear more reasonable, as the contracts are adhesionary?

Some courts have allowed discovery of drafting history, but have chosen to defer deciding whether the disputed policies are ambiguous.[95] Indeed some of these courts have further deferred

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92. *Id.* at 64.

93. *Id.* at 70. In ruling on the Motion for Reargument and Clarification, the court stated that "there appears to be no sound reason to require drafting history documents from the excess carriers whose policies typically follow the form of the primary carrier and whose liability is dependent upon that of the primary carrier." *Id.* The excess carriers therefore would be vulnerable to any weaknesses in the primary carrier's internal discussions of the policy in question.

94. Metropolitan Denver Sewage v. Continental Casualty Co., Civ. No. 89-C-895 (D. Colo. Mar. 12, 1991); *see also* Nestle Foods Corp. v. Aetna Casualty & Sur. Co., Civ. No. 89-1701 (CSF), 1990 WL 191922, at *4 (D.N.J. Nov. 13, 1990) (The insured should be allowed to argue ambiguity by "explor[ing] the creation of the language in the policies and the question of whether the intent of the drafters is consistent with the application of that language."); *accord* Leksi, Inc. v. Federal Ins. Co., 129 F.R.D. 99, 110-13 (D.N.J. 1989).

95. *See, e.g.*, Fourth Nat'l Bank of Tulsa v. Federal Ins. Co., No. 90-C-173-C (N.D. Okla. Sept. 13, 1990) (allowing the discovery of drafting history because the trial judge might later find the clause ambiguous and might then allow extrinsic evidence to help resolve the ambiguity); *see also In re* Texas E. Transmission Corp., PCB Contamination Ins. Coverage Litig., No. MDL 764, transcript at 9 (E.D. Pa. July 26, 1989).

> Therefore, it is impossible to presently decide or to even predict whether any portion or a wording of any of the policies will be held to be ambiguous and thereby permit admission of extrinsic evidence as to the intended meaning.

ruling on which interpretive theory would resolve that ambiguity. One judge, who allowed discovery into drafting history, wrote "I also decline to rule whether the policies in question are or are not ambiguous and, respectively, whether extrinsic evidence may or may not be admitted to aid in their interpretation."[96] Although the judge declined to rule on the issue, at least he recognized the difficulty presented. Underlying many of these judicial opinions is the theme that in resolving a policy's ambiguities, the focus ought to be on what the people who wrote it meant—what was meant by the industry trade association committees who helped write and edit it, and who voted on adopting it, even if that intent was *not* communicated to the buyer of the insurance. Attorneys who argue on behalf of the insureds contend that drafting history "reveal[s] the insurance industry's collective intent to cover environmental liabilities that were caused unintentionally."[97] Although the truth or relevancy of this observation appears uncertain, it has yet to be determined why. On the other hand, some insurance industry representatives appear to believe that the drafter's intent is totally determinative—if the insurers originally meant what they now say they did, that settles the matter, despite their failure to communicate that intent to future customers.[98]

Other courts have focused on the effect of the insurance industry's publication of their deliberations rather than on the effect of the insurance industry's internal deliberations. Courts have thus focused on the distinction between public and private drafting history. This distinction is most obvious in the discussions concerning the regulatory filings, a precursor to the adoption

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> For the purposes, therefore, of deciding the present discovery motion, the only logical way to proceed is to assume that extrinsic evidence may eventually be appropriate.

In re Texas E. Transmission Corp., No. MDL 764, transcript at 9.

96. *Leksi*, 129 F.R.D. at 104; *see also Nestle*, 1990 WL 191922, at *5 ("Because the existence of ambiguity in the policies, the admissibility of extrinsic evidence, and the applicable law are issues as yet unresolved," the court allowed discovery into drafting history.).

97. Richard W. Fields, *Discovery: An Insured's Best Weapon*, Litig. Rep.: Ins. (Mealey's) 19 (Mar. 28, 1989).

98. *See, e.g.*, *American Motorists*, 667 F. Supp. at 1423. The court cited an article avowedly written by representatives of the insurance industry describing what the insurance industry believed it meant by the pollution exclusion, and ruled that the pollution exclusion meant what the insurance industry now claimed it meant all along. *Id.* at 1429-32.

of the standardized pollution exclusion.[99] The purpose of these filings was to obtain approval from state regulators for new policy language. In these filings, most notably with the West Virginia Department of Insurance, the insurers appear to have claimed that "sudden and accidental" is essentially synonymous with "unexpected or unintentional."[100] Thus, sudden does not mean happening quickly, but happening without warning. In cases where coverage would not be extended to unintentional pollution caused by the insured, courts have been reluctant to say that the insurer is estopped from claiming that the clause has only a temporal sense. At least the courts have considered refusing to allow insurers to take a position inconsistent with what the industry claims when selling the Comprehensive General Liability ("CGL") policy to the public.[101] In fact, one court has even decided that public regulatory filings are a part of the policy.[102] The court reasoned that statutes in effect at the time of a policy's issuance are a part of the interpretive background against which the policy must be understood, and that these statutes require both regulatory filings and conformity with those filings.[103]

However, when ruling on the discovery or admissibility of either public or private drafting history, ambiguity is not a condition precedent. A number of courts, recognizing the difficul-

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99. Numerous cases have noted the regulatory filings in West Virginia concerning the pollution exclusion. *See, e.g.*, Ogden Corp. v. Travelers Indem. Co., 740 F. Supp. 963, 968 (S.D.N.Y. 1990), *aff'd*, 924 F.2d 39 (2d Cir. 1991); Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493, 497 (W. Va. 1992); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392, 403 (Mich.) (Levin, J., dissenting), *reh'g denied*, 503 N.W.2d 442 (Mich. 1991). These cases demonstrate that the policyholder does not always win, even when these regulatory filings are taken into account.

100. *Ogden*, 740 F. Supp. at 968.

101. *Union Oil Cites Drafting History in Reconsideration Motion*, Litig. Rep.: Ins. (Mealey's) 11 (1988). After a California state court judge ruled that CERCLA response costs were not covered "damages," Protective Nat'l Ins. Co. of Omaha v. Union Oil Co., No. C-514-463 (Cal. L.A. County Super. Ct. Nov. 10, 1987), the insured moved for reconsideration on the basis of "newly discovered" drafting history which had been produced in the *Asbestos Insurance Cases* then on trial before Judge Ira Brown. The insured suggested this drafting history showed the insurers intended that cleanup responses were damages. The insured argued that the insurers ought not be allowed to take a position "inconsistent with what the industry claimed when selling the CGL policy to the public." *Union Oil, supra*. That position, of course, assumed that the drafting history in question was in fact part of communications to the public, and not just private deliberation.

102. Great Horizons Dev. Corp. v. Massachusetts Mut. Life Ins. Co., 457 F. Supp. 1066, 1072 (N.D. Ind. 1978), *aff'd*, 601 F.2d 596 (7th Cir. 1979).

103. *Id.*

ty of interpreting apparently unambiguous policy language in catastrophic coverage cases, have looked to drafting history "to ascertain the meaning of a seemingly unambiguous provision, or to assist the Court in understanding the intent of the parties and the usage that words have acquired in a given industry."[104] The question then is not only whether the policy provision is ambiguous, but whether the insured's purported expectation of coverage was reasonable under the circumstances. Moreover, "if the insurance company's expectation of coverage [as expressed in the drafting history] were consistent with the insured's expectation, then that evidence is relevant to the issue of whether or not the insured's expectations were objectively reasonable."[105] Courts have given no consistent answer to whether drafting history, public or private, is discoverable or admissible. More precisely, courts have found no adequate or consistent set of interpretive principles to explain why such evidence is either discoverable or admissible. The question, however, will not go away. What we must do is look beyond the paradigm of mutual intent and the simple principles utilized to determine that intent, and seek for new ways to satisfy the justifiable expectations of all who are a part of this very public financial market of insurance.

III. PRINCIPLES OF COMMUNITY RELIANCE

Recognizing that the nineteenth century paradigm of contract is inapplicable to the insurance market is the first step in resolving the difficult interpretative problems inherent in catastrophic coverage cases. The insurance policy is both a private agreement[106] and a public document, creating public expectations regarding the extent and value of coverage. This public document must be interpreted to encompass the reasonable reliance of all market participants.

Brokers, insureds, the insurance companies, and the commu-

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104. E.I. DuPont De Nemours & Co. v. Admiral Ins. Co., CIV. A.89C-AU-99, 1992 WL 9302, at *1 (Del. Super. Ct. Jan. 13, 1992); *see also* Haeberle v. Texas Int'l Airlines, 738 F.2d 1434 (5th Cir. 1984); Smith v. Melson, Inc., 659 P.2d 1264, 1266 (Ariz. 1983).

105. Bituminous Casualty Corp. v. Tonka Corp., No. 4-87-392, slip op. at 7 (D. Minn. Sept. 19, 1991). The court was ruling on a motion to compel drafting history discovery, and it relied heavily on Minnesota's adoption of the reasonable expectations doctrine.

106. In every case in which the author has represented a litigant, insurers have argued in discovery disputes that the identities of their insureds are confidential—and those insureds would agree.

nity of policy readers, need a predictable and uniform understanding of key policy terms and clauses. A broker purchases dozens of CGL policies with no information other than that they are all identical. Insurance companies issue excess coverage policies that mimic the lead insurers' policies. This is the only practical way of doing business, as there is no room for individualized, particular meanings for standard form terms in insurance policy contracts.

A. Types of Ambiguity

In the context of insurance coverage disputes, another oversimplified paradigm—ambiguity—engenders an interpretive dilemma. It can refer to written terms that are ambiguous in that they have more than one referent. The *Peerless* case, a staple in any course on contracts, illustrates ambiguity in its strongest sense, a rare occurrence indeed.[107]

Other ambiguities present less evenly balanced alternative meanings. Weak ambiguities, more prevalent than strong ones, present a dilemma in interpreting insurance policies, especially catastrophic coverage disputes. Generally, one interpretation dominates and one common meaning of the disputed term will most likely be chosen. Thus, in deciding whether the "sudden and accidental" exception to the pollution exclusion means "abrupt, quick, and accidental" or "unexpected and accidental," a plain meaning determination invariably results in the temporal choice. Other interpretations may be reasonable, but are not the first to come to mind.

In complex documents attempting to articulate general concepts about how a variety of unanticipated future events should be handled, a common form of ambiguity is not really a matter of ambiguity at all—just a lack of clarity concerning how the concept is to apply to particular events. A clause may be unclear for a multitude of reasons. In part, the problem results from a failure to draft the policies coherently. Policies are not written as a uniform whole: new clauses are added and old ones deleted; new exclusions are added; and new forms are added to

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107. *See* Raffles v. Wichelhaus, 2 H. & C. 906, 133 Rev. Rep. 853 (1864). This case is usually taught to exemplify mutual mistake as a justification for voiding a contract. Query the result, however, if the party who had drafted the contract, aware that more than one ship with the same name existed, had not been specific about which ship was intended.

old forms and clauses. Furthermore, individual policies are assembled from a mixture of assorted pre-written forms.

The most important reason why it is unclear how to apply a policy provision to certain claims, however, is that those claims have totally unanticipated features. Thus, the question becomes not which of two alternative meanings to choose, but what meaning should be ascribed to a clause that in the present circumstances really has no meaning.

The current dispute over trigger of coverage for occurrence policies exemplifies the way in which a clause can be unclear. Trigger of coverage disputes concern the issue of which policies in which year provide coverage for delayed manifestation claims.[108] Asbestosis claims illustrate this dilemma. Which policy in which year covers the liability for the inexorable damage to claimant's lungs, where the claimant was first exposed to asbestos many years ago and also may have suffered from continued exposure since the initial occurrence? The key to resolving this dispute depends on how the following insurance agreement is interpreted. The company will pay liabilities for personal injury or property damage caused by an occurrence; the term occurrence is defined as "an accident, including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[109]

Although the drafting, word choice, or even the entire occurrence-based approach may be criticized, the clauses are not truly ambiguous. What is unclear is how these clauses apply to the situations now facing the insureds, insurers, and courts. It is incumbent on the courts to decide whether a product assembled from mass-manufactured parts to cover unanticipated emergencies should apply to particular emergencies; and if so, how? To view the problem as a matter of the parties' intent is inapposite. The better inquiry is to question the intentions of the policy drafting committees.

Interpreting the varieties of ambiguity is necessarily more complicated than the mutually inconsistent, overly simple maxims suggest. In fact, the cliches around which courts build their opinions belie the complexity of their travail. The older maxims of interpretation do reflect valid insights, but require more

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108. *See supra* note 11 and accompanying text.

109. MILLER & LEFEBVRE, *supra* note 19, form GLSP, § 91a, ¶ C12.

thorough development and justification if they are to properly resolve policy disputes. Courts should describe not only the rules of decision, but what evidence can be used, and how it can be used to make the proper interpretive choice. This knowledge will, in turn, guide the practical choices made in managing the coverage litigation in which the interpretive question arises.

B. Kinds of Drafting History

In providing the framework for interpreting disputed policy language, courts should take note and describe the kinds of extrinsic evidence that may be proffered as well as the ways in which the standard form policy language is ambiguous.

If the dispute were over manuscript terms[110] particularly negotiated between an underwriter and a broker,[111] discovery into the discussions would prove insightful. Conversely, it would be inappropriate to allow any evidence of the particular discussions between the insured and insurer concerning the meaning of the disputed standard terms. The meaning of a standardized term by implication cannot be varied by side arrangements. The question to be decided is what reasonable expectations of coverage were created by the very terms of the policy rather than a hypothetical "meeting of the minds."[112] In the typical catastrophic coverage case, several layers of coverage exist in any given year. Moreover, many of the excess policies "follow form" to the lead policy,[113] using forms known to the entire industry. Chaos would ensue if the excess policies unknowingly followed form to a private arrangement.

The task of properly resolving the interpretive dilemma presented by standard form policies may be assisted by resort to two kinds of extrinsic evidence: private and public drafting history. The records of the drafters' internal deliberations, such as the committee meeting minutes from the ISO committees that

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110. "Manuscript" terms are drafted for a particular policy. These are not standardized form terms. They usually are very similar to the manuscript terms which may be in other contracts, as there is no reason to reinvent the wheel every time a contract is written.

111. For instance, whether a certain subsidiary that is improperly named on a corporation's insurance policy was intended to be covered would be a typical dispute.

112. *See supra* note 6 and accompanying text.

113. To "follow form" is to refer to the lead policy and incorporate its terms, conditions, and exclusions wholesale, except where specific exception is taken.

drafted and criticized the disputed policy language, constitute private drafting history. This extrinsic evidence has nothing to do with the negotiations between the insurer and the insured. Indeed, it may have nothing to do with the particular insurance company involved in the dispute, who may have adopted the form wholesale without having been represented on the drafting committees.

Public drafting history, on the other hand, is information to which the community of policy readers as a whole has been exposed. It can be further divided into two sub-categories; one which is highly publicized and the other most often ignored. The more publicized type of public history is the regulatory filings.[114] As a regulated industry, insurance policy forms are subject to approval by state regulatory agencies.[115] Owing to the regulatory approval process, policy language tends to become standardized across the spectrum of the insurance industry. Even while drafting the policy, however, the ISO committees release information about their deliberations to the public. By soliciting the comments of leading brokerage houses, the insurers are effectively inviting them to participate in the deliberations about the proposed terms. Not enough emphasis is placed on this fact in insurance coverage cases, especially by the insurers.[116]

When the insurance industry collaborates on drafting standardized forms, it does so in a fishbowl. Insurance professionals such as claims analysts, underwriters, and brokers throughout the country are aware that new forms are being drafted. In addition, they are often aware of what is being drafted, comment upon the drafts, and expect comment back from the drafters. Although important in catastrophic coverage cases, public comment in the form of regulatory filings has predominantly been ignored. Access to public comment is not dependent on a production of documents request during discovery, but can be readily obtained through insurance industry publications.[117] Thus, any lawyer disputing the meaning of a standardized form should investigate the old Fire, Casualty & Surety Bulletins and

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114. Regulatory filings are extensively discussed in the pollution exclusion cases. *See supra* note 27 and accompanying text (discussing the requirements for regulatory filings).

115. *See* Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 574-75 (Wis. 1990) (a decision intelligently using of all forms of public drafting history).

116. *Id.*

117. *See infra* note 125 (listing trade journals).

other trade periodicals to see what public comment in fact took place—and do so very early in the case.

C. Using Extrinsic Evidence to Show Community Expectations

As a first principle, when the meaning and application of the relevant terms of the policy are clear, these terms should be enforced. This principle, however, cannot be justified as the parties' "meeting of the minds." It could be difficult to imagine such a psychological moment given the nature of the insurance market.[118] Reliance on the writing's terms, when the terms are clear, reinforces the stability and predictability of the relationship. Courts accept the product as sold and purchased, because the product was designed to provide both parties with objectively reasonable expectations about the allocation of risks.

If the terms are clear, efficiency requires that the court not allow extrinsic evidence, especially when chasing the myth of mutual intent.[119] Yet here a complexity arises: courts must never assume that the terms of a policy are clear. Policy terms can be unclear in any number of ways. Despite the courts' "linguistic background,"[120] the insurance market creates its own understandings—trade usages. The insurers' public pronouncements, or even the insureds' or their brokers' public concessions, can be drastically different from a court's objective translation. Therefore, the terms of the policy must be placed in context to be appropriately understood.

Given the frequent need to be open to what lies beyond the four corners of the document, when should courts allow discovery of drafting history? When should courts allow it to be introduced into evidence? It bears mentioning that such disclosure would entail an extraordinary increase in the costs of coverage litigation. Insurers' concerns that policyholders seeking such discovery have merely embarked on burdensome "fishing expeditions" cannot be entirely dismissed. Further, such discovery may have a chilling effect on the drafting process. Trade association committees, when drafting the policies, may be disinclined to candidly

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118. *See supra* notes 6-27 and accompanying text.

119. No justification other than efficiency seems reasonable, especially for insurance policies. Insurance policies rarely contain an explicit agreement that they are "integrated," a fact patently obvious in any liability policy.

120. *See supra* note 62 and accompanying text.

communicate with each other, at least on paper, and even less likely than they would be otherwise to take a self-critical look at their work.

Discovery and introduction of extrinsic evidence is unnecessary no matter how clear the disputed policy terms may appear. When the terms of a policy seem clear on their face, the policyholder should be required to propose and support a reasonable alternative range of application. It is important to underscore the ways in which policy terms can be unclear, as various failures of meaning can result in a different range of reasonable application.

The strongest type of ambiguity occurs when a term has more than one denotative referent.[121] This can be easily shown by the policyholder, owing to the extremely unusual circumstances in which it arises. For example, the terms may seem clear to the court, until it learns that two different ships named Peerless exist.[122] Once a strong ambiguity is proposed as a reasonable alternative to the court, the dispute should end. Extensive extrinsic evidence should not be allowed—the drafters who fail to indicate what they mean should suffer for this failure. Thus, the rule of *contra preferentem* should prevail. This kind of ambiguity, however, is not what afflicts the standard form insurance policy.

A greater amount of extrinsic evidence, however, might be needed to resolve the issue of a weak ambiguity.[123] A weak ambiguity occurs when more than one possible meaning for a key adjective exists. The design of a financial product intended to plan for a universe of unpredictable events requires a high level of abstraction and, inevitably, opens the door to weak ambiguities. *Contra preferentem* is insufficient to provide the best interpretation, one that serves the objectively reasonable expectations of the insured and creates objectively reasonable commitments, when the insured's proffered interpretation is the one less likely to be

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121. *See supra* note 107 and accompanying text. Certain parts of the standardized policy contain blanks to fill in; for example, the names of the insured entities. A strong ambiguity could conceivably arise in those situations. However, this kind of dispute is not responsible for making insurance coverage litigation a billion dollar legal industry for the 1990s.

122. *See supra* note 107 and accompanying text.

123. In this article, the author assumes that the weaker alternative is the one supported by the insured. The author does not believe it is controversial to assume that, should it be the insurer who proposes the less likely meaning for a term (being judged "less likely" in the abstract without any extrinsic evidence), there would be no question that the insured should prevail without the need to introduce any extrinsic evidence.

chosen by an impartial observer. Take, for example, the case where the insured claims the adjective sudden in the standard pollution exclusion is ambiguous.[124] To justify exploration of any extrinsic evidence concerning the allegedly ambiguous clause, the policyholder needs to provide more than the creative wordplay of their attorneys.

Extrinsic evidence should be allowed when a weak ambiguity is established because the insured needs more than the bare possibility of multiple meanings to prevail. For example, the bare possibility may be evidenced by multiple definitions provided in widely accepted dictionaries. There is no principled justification for a court to reject the dictionary as an interpretive tool, or as evidence that a proposed alternative is reasonable.

The effectiveness of extrinsic evidence in resolving ambiguity depends on what kind of extrinsic evidence the insured uses. Discovery of the drafting history for a standardized contract may be probative of the reasonableness of a party's interpretation. However, discovery of the drafting history should not be allowed to demonstrate mutual intent. As some courts have noted, the unilateral, uncommunicated intent of the drafters cannot show mutual intent. The insured, moreover, cannot claim to have relied on that history as the insured never knew of it.

Drafting history might also show that the insured's alternative is so reasonable that the insurer was itself aware of it. It might further show that the drafters accepted that interpretation. If the drafter was an employee of the insurer, this history would be an admission. Even where the drafter was not an employee, the views of the drafter that the insured's alternative is reasonable significantly strengthens the insured's interpretation. Once the insured has established that its alternative is an interpretation of which the drafters were aware, the public policy that favors the protection of the insured and requires exclusions to be clear and publicly ascertainable necessitates a rebuttable presumption that the term be interpreted against the insurer.

Private drafting history, on the other hand, may be of no use to the insured. It may show a consistent agreement by the drafters that the term means what the insurer claims—the court-recognized dominant alternative. The insurer should not need this evidence to prevail, however, since its interpretation is the

124. *See supra* notes 71-77 and accompanying text.

linguistically dominant alternative.

Public drafting history is by definition information that was available to all the parties in forming their expectations of coverage. This history ought to be available to the insured to strengthen its proposed alternative. The insurer also desires access to underscore the propriety of the linguistically dominant alternative; however, the insured carries the burden of establishing some basis of support for its proposed alternative. Unless and until that occurs, the insurer can rely on the clear meaning of the policy. Whoever introduces public drafting history evidence which actually supports their alternative has carried the day.

Similarly, if the insured can provide public statements, or reports of public statements, by those involved in the design of the disputed term, further extrinsic evidence discovery is again justified.[125] These statements may demonstrate the reasonableness of the parties' interpretation.[126] At the very least, these public statements show that the insured's alternative was not an after-the-fact word game.

It is very likely, however, that the drafting history will shed no light on the drafters' intent. Unless the insured demonstrates some other type of extrinsic evidence[127] to justify reliance on the weaker interpretation, its claims will be rejected.

The goal of the court in interpreting an unclear clause is somewhat different. Resolution of an unclear clause is significantly different from the resolution of a weakly ambiguous one. In the former, when faced with a clause susceptible to a potentially vast array of applications in the unforeseen situation, the court must narrow the choices to only the more reasonable ones. These more reasonable alternatives support the public's—specifically, the interested community of policy readers—expectations. Once the alternatives are narrowed to the truly reasonable, the court must recognize that the community could rely on any or all of them. Any further narrowing is arbitrary.

The extensions of the language, the ways in which it applies to the disputed situation, will be resolved on a case by case basis.

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125. The public statements in question can be found in insurance industry publications often read by brokers as well as underwriters. *See, e.g.*, *Fire, Casualty & Surety Bulletins*, *Business Insurance*, and *Best's Reports*.

126. *See* Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 575 (Wis. 1990).

127. It is beyond the scope of this article to speculate what precisely that sort of extrinsic evidence might be.

The most likely reason for a lack of clarity is that the particular situation in dispute was never contemplated by the designers, sellers, or buyers of the insurance product.[128] The court needs to narrow the possible interpretations to those upon which the insured could reasonably rely.

The private drafting history may clarify the unclear clause just as it may resolve the weakly ambiguous clause. For example, in catastrophic coverage disputes, many of the policies involved use the 1966 or 1973 ISO policies' standard coverage parts that pay "damages because of [injuries or damage] . . . caused by an occurrence . . . ."[129] Occurrence means caused by "an accident, including continuous or repeated exposure to conditions, which results [during the policy period,] in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[130] The prose notwithstanding, the definition, in the abstract, is not ambiguous. There are not two dictionary definitions creating two sets of criteria for coverage. However, the lack of clarity surrounding the term occurrence arises when attempting to apply the term to different kinds of claims, such as delayed manifestation claims.

Different thresholds of application to disputed occurrence language have been proposed. Although some insureds have suggested a continuous trigger, some courts have endorsed an "injury in fact" trigger based on when the bodily injury (or property damage) in fact took place.[131] In addition, some insurers have proposed exposure to the toxic substance as the triggering event,[132] while others have supported manifestation of the resulting disease as the trigger.[133] One could characterize the varying interpretations as indicia of ambiguity that the policy's

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128. In these disputes, it often may be argued that one or all of the parties should have foreseen and addressed the manner of handling the now disputed claim. This article takes the position that blaming anyone for this lack of foresight is irrelevant to the proper interpretation of the applicable policy language that may apply.

129. *See* MILLER & LEFEBVRE, *supra* note 19, form GLCGL, § 91b, ¶¶ 1a-1D.

130. *See id.* form GLSP, § 91a, ¶ C12.

131. *See, e.g.*, American Home Prod. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1497 (S.D.N.Y. 1983), *aff'd*, 748 F.2d 760 (2d Cir. 1984). This construction, however, is more a restatement of the question than an answer.

132. *See, e.g.*, Porter v. American Optical Corp., 641 F.2d 1128, 1144 (5th Cir. Apr.), *cert. denied*, 454 U.S. 1109 (1981), *reh'g denied*, 455 U.S. 1009 (1982).

133. *See, e.g.*, Eagle-Picher Indus. Inc. v. Liberty Mut. Ins. Co., 523 F. Supp. 110, 114-15 (D. Mass. 1981), *reh'g denied*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

language means both exposure and manifestation. That characterization, however, misses the point. The dispute concerns how to apply the language to situations for which the drafters appear to have inadequately planned.

In the effort to clarify what the terms mean, private drafting history may be helpful. This history can not be introduced into evidence by the insurers because it was unilaterally determined and was not communicated to the relevant insurance community to help produce their expectations of coverage. If the insured could produce evidence suggesting the insurer was aware of the insured's interpretation and expressed concern about it, then such evidence is probative of the insurer's interpretation. For example, in one of the largest insurance coverage disputes in history, the *Asbestos Insurance Coverage Cases*, the trade association committees considered and rejected alternative meanings of the term occurrence that clearly would have reflected both a manifestation and an exposure trigger.[134] The insured rebutted this with other evidence that in the late seventies and early eighties, representatives of the industry met in various committees to discuss redrafts of the occurrence definition. In those committees, a new manifestation trigger was proposed to replace the prior occurrence language which a reported majority of the committee members considered to be open to interpretation as triggering multiple years.

Drafting history evidence, however, should be critically examined. Its mere existence does not, in and of itself, prove either party's case. The evidence, however, should be allowed in order to bolster the parties' arguments that their suggested application is a reasonable alternative.

Public drafting history can also be useful to the insurer in further narrowing the range of alternatives. Public statements may include trade publications[135] as well as the statements made to state regulatory bodies as a part of the filing process.[136] This public history provides the most appropriate context within which to judge the four corners of the document, since the parties can rely on what is public when forming their expectations.

Regulatory filings that are part of the drafting history should

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134. Asbestos Ins. Coverage Cases, No. 1072 (Cal. S.F. County Super. Ct. Jan. 24, 1990).

135. *See supra* note 125 (listing trade journals).

136. *See supra* note 99-100 and accompanying text.

always be discoverable. If an insurer has filed a regulatory submission in order to get state approval for its new policy forms, that insurer should not be allowed to disavow any interpretive commitments made therein. To wit, if the insurer made the public statement via a regulatory filing, and the interpretation therein is consistent with the insured's construction of the disputed clause, then the insurer must live with that interpretation.[137] This interpretation is offered as the quid pro quo for approval and is binding in all later interpretive disputes.

Interpretation of regulatory submissions are more complicated if they are not made by the insurer, or a group representing that insurer, in the dispute. An insurer could properly contend that it has the right not to be bound by the actions and representations of others. However, the regulatory submission was proffered to obtain consent for the policy language now in dispute, the industry has relied on standardized language, and all insureds are relying on a consistent application of that language. At the very least, the regulatory submission is powerful evidence that the insured's alternative is reasonable and one that the insured had the right to rely on in forming coverage expectations.[138]

This suggested approach is found implicit in many opinions examining the proper construction of standard insurance policy catastrophic event clauses. For example, in *Just v. Land Reclamation, Ltd.*, the Wisconsin Supreme Court construed the pollution exclusion and the sudden and accidental language, the central words of dispute.[139] Focusing on the real point of contention, the meaning of the word sudden, the court began its analysis by referring to several dictionaries in order to establish that sudden has more than simply a temporal meaning. To underscore this point, the court suggested such phrases as "sudden storm" and "sudden death."[140] The court also pointed to a contemporaneous public speech by an influential member of

137. Regulatory filings submissions are commitments or promises by an insurer that it will apply a certain clause in a particular manner; one would normally expect these to favor the insureds.

138. Only evidence of industry-wide dissent opposing the pro-insured submission could possibly rebut the virtually irrebuttable presumption that the insured's proffered interpretation is appropriate.

139. *Just*, 456 N.W.2d at 570.

140. *Id.* at 573 (quoting Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989)).

an insurance industry drafting committee,[141] regulatory filings,[142] and "excerpt[s] from The Fire, Casualty & Surety Bulletin used by insurance agents and brokers to interpret standard insurance policy provisions."[143] Although not exactly articulating how this evidence is to be used, the *Just* court, in ruling for the insured, used public drafting history to establish that the insured's proposed alternative was a reasonable basis for an expectation of coverage.

CONCLUSION

After all the private and public drafting history has been explored, it is possible—maybe even probable—that nothing definitive can be found there. The courts, however, cannot disregard the disputed language. The courts must decide what the policy means as applied to the claims in dispute. The manner in which the courts resolve these disputes must reflect the reasonable expectations of the relevant community of policy readers.

There may be grounds to quarrel with the specifics of the approach outlined above, however, a few key principles emerge as required points of departure for any attempt to resolve this interpretive dilemma. When interpreting the standard form insurance policy, courts should decline to search for the parties meeting of the minds or their mutual intent. Even if that intent were determinable, it would be irrelevant: there can be no side deals between one insurer and the insured.

In the case of the weak ambiguity—where one meaning is dominant and another meaning is, at best, possible—the courts should rely on the dominant meaning. On the other hand, with unclear clauses, all the courts can do is narrow the clause in question's range of application to a set of reasonable possibilities—possibilities that the community of policy readers would expect to be the way in which the clause applies to the new and

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141. *Id.* at 574 (quoting George Pendygraft et al., *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability & Insurance Coverage Litigation*, 21 IND. L. REV. 117, 141 (1988)).

142. *Id.* at 575 (noting the West Virginia Insurance Commissioner's statement that approval of the exclusion on the basis that it is "merely [a] clarification[] of existing coverages as defined and limited in the definitions of the term 'occurrence'" (quoting James T. Price, *Evidence Supporting Policyholders in Insurance Coverage Disputes*, NAT. RESOURCES & ENV'T, Spring 1988, at 17, 48)).

143. *Id.*

unforeseen claims. Beyond narrowing the possibilities, however, the court should refrain from arbitrarily choosing any one application of the clause. To do so is to violate wantonly community expectations. In all instances, the meaning of the standard forms is derived from a conversation involving a wide variety of participants, necessarily including the courts. Policy drafters react to judicial decisions. Although the drafters must accept the judicial interpretations of the disputed clauses, the development of new language is not foreclosed.

Market pressures will often lead the drafters to consider whether their customers will accept variations in the expectations founded on the courts' interpretations. If it is true that the courts are part of this conversation about what policies mean, after enough litigation the issues raised by unclear clauses must be considered settled. No matter how the courts' interpret a clause, the consensus of the courts' interpretations becomes a given in the community's ongoing conversation about what coverage is offered and what coverage is not. Therefore, the courts must not only be sensitive to extrinsic evidence but also to the weight of precedent—irrespective of the persuasiveness of that precedent—no matter the jurisdiction of the earlier courts.

The standardized form insurance policy contract is not simply a private document between two parties, but a part of a larger family relationship that depends on uniformity and stability of expectations. In order to resolve the interpretive dilemmas inherent in the form contract, the courts must determine what objectively reasonable expectations of coverage any insured could form upon obtaining insurance from any insurer using standardized forms.