Resolving Ambiguities in Insurance Policy Language: The Contra Proferentem Doctrine and Use of Extrinsic Evidence

BY SCOTT G. JOHNSON

UNDER THE DOCTRINE of *contra proferentem*, ambiguities in contract language are construed against the drafter, typically the insurer.[1] At one time, the existence of an ambiguity in an insurance contract resulted in a presumption of coverage for the insured. But this is no longer the case.

Indeed, in most jurisdictions today, the determination that an ambiguity must be construed against the drafter comes at the *end* of a court's inquiry, not at the beginning. Before applying the doctrine of *contra proferentem*, courts first attempt to remove the ambiguity by considering certain extrinsic evidence of the parties' intent. Only if the ambiguity remains after the extrinsic evidence is considered will that ambiguity be construed against the drafter. Thus, the current application of the *contra proferentem* doctrine has done away with a presumption of coverage in cases of ambiguous policy language, in favor of a fair and impartial examination of all proffered evidence.

This article discusses the development of the *contra proferentem* doctrine and the modern application of the rule; the types of extrinsic evidence that courts consider in trying to resolve ambiguities; and application of the *contra proferentem* doctrine in cases where the insured (or its broker) drafts the insurance contract.

The *Contra Proferentem* Doctrine

In noninsurance contract litigation, the *contra proferentem* doctrine is often used as a last resort to resolve ambiguous contract language or, as one commentator put it, as "a late-inning tiebreaker, one used when the more probative and obvious methods have failed."[2] But although the *contra proferentem* rule is usually a construction tool of last resort in ordinary contract litigation, it has been used as an interpretive rule of first resort in insurance contract disputes.[3]

This was not always the case. Insurance contracts used to be construed much as other business contracts,[4] but this changed when insurance policies became mass-marketed. Unlike a negotiated business contract, these insurance policies used standardized language drafted by the insurer and effectively became "contracts of adhesion."[5] Policyholders typically had no bargaining power and no effective means of changing the terms of the insurance contract. The courts' logical reaction to this was to place the onus of ambiguous terms on the insurers, because they had the better bargaining position and were in a better position to avoid the ambiguity.[6]

The Modern Rule

After insurance policies were mass marketed, the existence of an ambiguity in an insurance contract resulted in a presumption of coverage in favor of the insured.[7] Although this is still the rule in a small number of jurisdictions, it is not the majority rule.[8]

Thus, instead of automatically construing ambiguities against the drafter, many courts today adopt an approach that considers the primary standards of interpretation—examining the language of the clause, public policy, and the purposes of the transaction as a whole—and extrinsic evidence relating to the parties' negotia-

tions, knowledge, and shared understanding of disputed ambiguous terms.[9] If the parties' intent can be ascertained from this analysis, that intent is enforced. But if consideration of the extrinsic evidence does not resolve the ambiguity, the *contra proferentem* rule is applied as an interpretative rule of last resort.[10]

Resolving Ambiguities

Mutual Intent

The fundamental rules of contract interpretation are based on the premise that the interpretation must give effect to the "mutual intention" of the parties.[11] Thus, the primary purpose of interpretation is to discover that intent and to make it effective.[12]

Whenever possible the parties' intent is found solely in the contract's written provisions.[13] In ascertaining the parties' intent, courts will look to the plain meaning of the words as viewed in the context of the contract as a whole.[14] But equally important are "the requirements of reasonableness and context."[15] Contract terms are interpreted using the ordinary and popular meaning a layperson would use.[16] If the parties use language intended to have a special meaning or required in a technical sense, this usage or meaning will control.[17]

When an insurance provision is unambiguous, the court will go no further; it must construe the language according to its plain and ordinary meaning.[18] For ambiguous insurance contract language, a different analysis is required.

Language

Insurance policy language is not considered ambiguous simply because the insurer and the insured disagree about its meaning.[19] If that were the case, as Judge Posner noted, a written contract would provide no protection for either party: "The fact that parties to a contract disagree about its meaning does not show that it is ambiguous, for it if did, then putting contracts into writing would provide parties with little or no protection."[20]

Thus, an insured cannot create an ambiguity merely by urging a conflicting interpretation of the policy. Similarly, language is not ambiguous just because courts have interpreted the language differently.[21] Nor is policy language ambiguous because a relevant term is not defined in the policy.[22] An ambiguity exists where the language is susceptible to two or more *reasonable* interpretations[23]—only where reasonable persons can fairly and honestly differ in their interpretation of that language. If the insured's proffered interpretation is not reasonable, there is no ambiguity.[24]

Newport Associates Development Co. v. Travelers Indemnity Company of Illinois illustrates these principles.[25] The insured owned and operated a marina that included various buildings, docks, berths for boats, and a breakwater. The breakwater, located 120 feet from the end of the dock, was designed to limit wave action in the marina.[26] In December 1992 the breakwater was damaged in a storm, and Newport sought coverage for the breakwater damage from Travelers, its property insurer. Travelers provided coverage using a manuscript policy drafted by Newport's broker that included coverage for "Slips, consisting of metal slips, walkways, ramps, pilings, power cables, and other integral parts collectively called 'slips.'"[27] Travelers denied the claim because the insured "slips" did not include the breakwater, reasoning that the coverage applied only to the slips themselves and their physically attached component parts.[28] Newport, on the other hand, argued that the phrase "other integral parts" covered the breakwater because a breakwater is functionally necessary to the operation of the slips.[29]

The trial and appellate courts both found that Travelers's proffered interpretation was the only reasonable interpretation of the policy.[30] The courts explained that all specifically listed items in the policy definition of "slips" that preceded the phrase "and other integral parts" were physically attached to the structures on which the boats were berthed.[31] Accordingly, the courts found that the only reasonable construction of the phrase "and other integral parts" meant parts consistent with the items mentioned before the phrase.[32] Because the breakwater was unattached and located 120 feet away, and served a very different function from the slips, it could not be considered an "other integral part" covered by the policy.[33]

Here, the insurance policy language was unambiguous, the courts applied the plain and ordinary meaning of the language, and there was no need to go any further. If policy language is ambiguous, however, the parties may attempt to remove the ambiguity by submitting extrinsic evidence.

Extrinsic Evidence

Limitations. Generally, the parol evidence rule bars the introduction of extrinsic evidence to vary or contradict the terms of a completely written contract.[34] But the parol evidence rule does *not* apply where the extrinsic evidence is being submitted to clarify or aid in the interpretation of an ambiguous contract.[35] Thus, when policy language is reasonably susceptible to two or more interpretations, parties in most jurisdictions may introduce extrinsic evidence of their intent to support their interpretation of the contract, without running afoul of the parol evidence rule.

An important limitation on the

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use of extrinsic evidence is that it may not be used to substantiate a party's unexpressed, subjective intent[36]—the party's opinion about the meaning of an insurance policy or whether the coverage exists is irrelevant to determining the meaning of contractual language. Instead, the relevant intent is "objective," as evidenced by the expressed acts, words, or conduct of the parties with knowledge of the contract terms.[37] The *Restatement (Second) of Contracts* states this rule as follows: "Many contract disputes arise because different people attach different meanings to the same words and conduct. The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention."[38] These principles apply with equal force to insurance contracts.[39]

Because the party's undisclosed intent, motive, or opinion is not admissible as evidence, courts exclude that evidence when it is offered to interpret the meaning of insurance contract language.[40] The reason, of course, is that this evidence invariably is self-serving. To be relevant, extrinsic evidence must consist of acts, words, or conduct of the party as expressed to the other party or relevant parties.

Another important limitation on the use of extrinsic evidence is that it must predate controversy between the parties about the existence of coverage or the meaning of insurance policy language.[41] For example, a party may not offer as evidence a letter he or she wrote expressing an intent or opinion about the meaning of an insurance policy or existence of coverage after the dispute between the parties had already begun—again, because such evidence is self-serving.

Prior and contemporaneous negotiations. The most common type of extrinsic evidence offered to counter ambiguity consists of parties' statements before and/or when the policy was issued or renewed. In instances where a manuscript policy is used, considerable negotiation about the terms and conditions of that policy may have occurred. Even where the policy is made up of standardized forms, negotiations still may be necessary regarding which forms or endorsements should be included in the policy. Evidence pertaining to these discussions and circumstances can be taken into account to determine the parties' intent.[42]

Monsanto v. International Insurance Co. is a good example.[43] Monsanto sought coverage under an environmental impairment liability policy issued by International Insurance Co. (IIC) for costs incurred in cleaning up a contaminated Superfund site.[44] Monsanto had sold toxic styrene tars to the operator of the Superfund site, and IIC denied coverage based on exclusion 7(a) of its policy, which excluded coverage for environmental impairment arising from "any commodity, article or thing supplied . . . by the Insured."[45] In granting summary judgment to IIC, the trial court refused to consider Monsanto's proffer of precontract communications with IIC,[46] in which Monsanto queried whether exclusion 7(a) applied in cases where liability arose out of waste products it sold.[47] In response IIC's underwriter assured Monsanto, in a series of letters, telexes, and phone calls, that exclusion 7(a) did not apply to waste products sold by Monsanto.[48] The appellate court reversed the summary judgment, holding that the trial had erred in refusing to consider Monsanto's proffered extrinsic evidence.[49]

Acts and conduct after policy issue. Relevant extrinsic evidence is not limited to the preissuance communications between the parties; their conduct or acts after issuance or renewal of the insurance policy (but before any controversy occurs) provides another source of evidence about the parties' intent.[50] In fact, this evidence is considered to be one of the most persuasive items of extrinsic evidence of the parties' mutual intent.[51] As the U.S. Supreme Court said regarding a contracting party's intent, "There is no surer way to find out . . . than to see what they have done."[52] Similarly, the drafters of the *Restatement (Second) of Contracts* stated, "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning."[53]

In *Zito v. Fireman's Fund Insurance Co.*,[54] Alfred Zito owned a small food processing business and was insured under an auto policy issued by Fireman's Fund that covered Zito's two vehicles for both business and personal use.[55] The policy specifically excluded coverage for nonowned vehicles.[56] Although Zito sometimes rented trucks to pick up supplies for his business, he declined his agent's offer to add such coverage to the policy, saying he always purchased the renter's insurance at these times.

Zito was killed in a multicar accident while driving one of the rented trucks. A number of other people who were injured sued Zito's estate, and Fireman's denied coverage based on the nonowned vehicle exclusion. The plaintiff argued that the exclusion was ambiguous and applied only to a nonowned vehicle driven by a third person in a business context.[57] In finding in favor of Fireman's, both trial and appellate courts found that evidence of Zito's postissuance conduct demonstrated there was no coverage:

> Zito confirmed his belief that the Fireman's policy did not afford liability coverage for the rented truck not just by words, but by purchasing special insurance to cover that contingency every time he rented the truck.

> Both by what he said in conversations with Streeter and by his conduct, Zito acknowledged the Fireman's policy was not intended to afford liability coverage when he rented a truck and used it in his business.[58]

Trade custom and usage. Other courts have allowed the use of evidence of trade usage to determine the meaning of ambiguous insurance contract language.[59] This evidence can take the form of trade industry publications or expert witness testimony.

In *Golden Eagle Insurance Co. v. Insurance Company of the West*,[60] for instance, the court considered a Fire Casualty & Surety (FC & S) Bulletin to help it determine whether the indemnitee's defense costs were included as "damages" under a CGL form's contractual liability coverage.[61] In allowing this evidence, the court reasoned, "[The] FC & S bulletin, which is published by the National Underwriters Association, is used by insurance agents and brokers to interpret standard insurance policy provisions."[62]

Similarly, the court in *Coppi v. West American Insurance Co.*[63] allowed expert witness testimony on trade usage concerning the record-keeping requirement of the policy. The court reasoned, "Expert testimony as to the custom and practice of an industry is admissible to elucidate the meaning of ambiguous language."[64]

Construing Ambiguities Against the Drafter

As discussed previously, if the proffered extrinsic evidence does not remove the ambiguity, then that ambiguity will be construed against the drafter, usually the insurer. But there are instances where ambiguities may not be construed against the insurer.

Broker-Drafted Policies

Today, many commercial policyholders place their insurance through insurance brokers such as Marsh, Aon, and others.[65] These companies have the resources and leverage to develop their own policy forms and to apply substantial pressure on insurers to accept them.[66] Because insurance brokers act as the insured's agent, the agent's conduct is imputed to the insured under generally accepted principles of agency law.[67]

This raises the question whether courts will then construe ambiguities against the insured and in favor of the insurer when confronted with an unresolvable ambiguity in policy language drafted by an *insured's* broker.[68] Although no court has yet done so, it is a logical result. Further, language in several opinions supports this result.

In *Fireman's Fund Insurance Co. v. Fibreboard Corp.*,[69] the California Court of Appeal held that asbestos exclusions in broker-drafted liability policies clearly and unambiguously precluded coverage.[70] But in dicta, the court suggested that any ambiguities should be construed against Fibreboard because its broker drafted the policy:

> Here, . . . the typical relationship (unequal bargaining strength, use of standardized language by more powerful insurer-draftsman) simply did not exist. Rather, two large corporate entities, each represented by specialized insurance brokers or risk managers, negotiated the terms of the insurance contract. Neither Truck nor other respondents drafted or controlled the policy language: . . . In fact, the record clearly shows that Fibreboard itself proposed or drafted language for the asbestos exclusion.
>
> None of the authorities relied upon by Fibreboard reflects a comparable factual situation where the insured itself drafted or proposed the policy language. Moreover, to the extent that any ambiguity exists, ordinarily it would be interpreted against Fibreboard, the party who caused the uncertainty to exist.[71]

Similar comments can be seen in *Metpath, Inc. v. Birmingham Fire Insurance Co. of Pennsylvania*,[72] in which Metpath sought coverage for extra expenses incurred in operating its medical laboratory as the result of a two-day air traffic controller strike.[73] The New York appellate court held that the policy's seven-day waiting period was unambiguous and precluded coverage.[74] But the court also stated that even if the policy language was ambiguous, any ambiguity would be resolved against Metpath because its broker drafted the policy, including the provisions regarding the seven-day waiting period:

> [E]ven if the policy language is considered ambiguous or open to doubt, any ambiguity or doubt must be resolved against Metpath and in favor of Birmingham since the drafter of the insurance policy was Metpath's agent, J&H, and those provisions requested by Metpath's representatives are the very provisions which limit the coverage to the period of the strike.[75]

Commentators also have recognized the appropriateness of reversing the *contra proferentem* rule when the insured or its broker is the drafter:

> Almost everyone would agree that where a policyholder or its bona fide agent drafts a contract term, the rule of contra proferentem should not operate in its favor. On the contrary, in these instances, the ambiguity principle should operate in favor of the insurer and against the insured. Although this might shock consumer advocates, it is a sensible approach. Contra proferentem becomes an untenable, unprincipled doctrine if it comes to mean the insurer always loses regardless of the situation.[76]

The Sophisticated Insured

Many policyholders are large commercial entities with in-house legal departments, risk management departments, and substantial

resources, putting such a policyholder on a somewhat level playing field with the insurer. In these circumstances, the application of the *contra proferentem* doctrine has been called into question.

For example, the court in *Eagle Leasing Corp. v. Hartford Fire Insurance Co.* observed:

> We do not feel compelled to apply, or, indeed, justified in applying the general rule . . . in the commercial insurance field when the insured is not an innocent but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated businessmen and represented by counsel on the same professional level as the counsel for insurers. [77]

But other courts have rejected this view. In *Boeing Co. v. Aetna Casualty & Surety Co.*, for instance, the Washington Supreme Court explained that it would be incongruous to apply different rules of construction based on the size of the policyholder:

> The critical fact remains that the policy in question is a standard form policy prepared by the company's experts, with language selected by the insurer. . . . Additionally, this standard form policy has been issued to big and small businesses throughout the state. Therefore it would be incongruous for the court to apply different rules of construction based on the policyholder because once the court construes the standard form coverage clause as a matter of law, the court's construction will bind policyholders throughout the state regardless of the size of their business. [78]

A review of the cases indicates that courts will not decline to construe ambiguities against the insurer simply because the insured is a sophisticated entity. Rather, courts may decline to construe ambiguities against the insurer where the insured is a sophisticated entity *and* did negotiate the contract terms.[79]

If the ambiguities will not be construed against either party, how are they resolved? According to at least one court, "the ambiguous provisions should be construed in favor of what reason and probability dictate was intended by the parties."[80]

Conclusion

A court's first step in interpreting allegedly ambiguous insurance contract language is to determine whether it is in fact ambiguous. Courts employ standard contractual construction principles, such as reading the contract as a whole or giving effect to all terms, to properly understand particular terms or words in a full policy context. Only if the policy language is susceptible to two reasonable interpretations will the court find language to be ambiguous. If ambiguity is present, most courts today will not immediately construe the ambiguity against the drafter but instead will attempt to remove the ambiguity by considering extrinsic evidence to determine the parties' mutual intent. If a common understanding or intent can be ascertained through *communicated* extrinsic evidence, that understanding or intent will be enforced. Only if the uncertainty remains after reference to extrinsic evidence will the ambiguity be construed against the drafter. ■

Notes

1. *See, e.g.*, U.S. Fire Ins. Co. v. Gen. Reins. Corp., 949 F.2d 569, 573 (2d Cir. 1991); Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 538-39 (9th Cir. 1990); Hansen v. Ohio Cas. Ins. Co., 687 A.2d 1262, 1265 (Conn. 1996). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981); PETER J. KALIS ET AL., POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE § 20.02 (2000); BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 1.03[b][1] (10th ed. 2000).

2. 1 JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 4.04 (2d ed. 2002).

3. *Id.* § 4.08[a].

4. *See* Steven H. Cohen & Katheryn L. Quaintance, *Role of* Contra Proferentem *in Interpretation of Insurance Contracts*, 2 ENVTL. CLAIMS J. 15 (1989); *see also* David S. Miller, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849, 1850-51 (1988); Patrick E. Shipstead & William H. Stanhope, *Ambiguities in Insurer and Broker-Drafted Policy Forms:* J. INS. COVERAGE, Spring 2001, at 3.

5. Cohen & Quaintance, *supra* note 4, at 15.

6. *See generally* KALIS, *supra* note 1 § 20.03, at 20-5–6 (2000); 2 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3d § 22:18–21 (1997); STEMPEL, *supra* note 2, § 4.05, at 4-24.

7. *See generally* Cohen & Quaintance, *supra* note 4, at 13.

8. *See, e.g.*, Am. Nat'l Fire Ins. Co. v. Rose Acre Farms, Inc., 107 F.3d 451, 457-58 (7th Cir. 1997) (applying Ind. law); Charter Oil Co. v. Am. Employers' Ins. Co., 69 F.3d 1160, 1163 (D.C. Cir. 1995) (Mo. law); State Farm Mut. Auto. Ins. Co. v. Fermahin, 836 P.2d 1074, 1077 (Haw. 1992). These states allow extrinsic evidence to be used only to clarify a latent ambiguity, which is an ambiguity that is not apparent on the face of the contract. *See Rose Acre Farms*, 107 F.3d at 457; *Charter Oil*, 69 F.3d at 1167-68.

9. *See, e.g.*, Aetna Cas. & Sur. Co. v. Dow Chem. Co., 28 F. Supp. 2d 440, 445-46 (E.D. Mich. 1998) (applying Mich. law); State Farm Mut. Auto. Ins. Co. v. Wilson, 782 P.2d 727, 734 (Ariz. 1989); Travelers Indem. Co. v. Howard Elec. Co., 879 P.2d 431, 434-35

(Colo. Ct. App. 1994); Playtex FP, Inc. v. Columbia Cas. Co., 609 A.2d 1087, 1092 (Del. Super. Ct. 1991); Cameron v. USAA Prop. & Cas. Co., 733 A.2d 965, 968 (D.C. 1999); Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686, 687 (Ga. 1989); Univ. of Ill. v. Cont'l Cas. Co., 599 N.E.2d 1338, 1345 (Ill. App. Ct. 1992); Doerr v. Mobil Oil Corp., 774 So. 2d 119, 124 (La. 2000); Bailer v. Erie Ins. Co., 687 A.2d 1375, 1378 (Md. 1997); Simon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 782 N.E.2d 1125, 1128-29 (Mass. 2003); Stine v. Cont'l Cas. Co., 349 N.W.2d 127, 137 (Mich. 1984); State v. Home Indem. Co., 486 N.E.2d 827, 829 (N.Y. 1985); Walle Mut. Ins. Co. v. Sweeney, 419 N.W.2d 176, 179-80 (N.D. 1988); Boso v. Erie Ins. Co., 669 N.E.2d 47, 51 (Ohio Ct. App. 1995); DiFabio v. Centaur Ins. Co., 531 A.2d 1141, 1142-43 (Pa. Super. Ct. 1987); Mescalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc., 56 S.W.3d 313, 319 (Tex. Ct. App. 2001); S. Ins. Co. of Va. v. Williams, 561 S.E.2d 730, 733 (Va. 2002); Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 882 P.2d 703, 721 (Wash. 1994). A few jurisdictions allow the use of extrinsic evidence as an aid to determining the meaning of insurance contract language even if the contract is not ambiguous. *See, e.g.*, Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 651 (9th Cir. 1988) (applying Or. law); Garcia v. Truck Ins. Exch., 682 P.2d 1100, 1104 (Cal. 1984); Lynott v. Nat'l Union Fire Ins. Co., 871 P.2d 146, 149 (Wash. 1994).

10. *See generally* Cohen & Quaintance, *supra* note 4, at 22-24.

11. *See, e.g.*, United Cal. Bank v. Prudential Ins. Co. of Am., 681 P.2d 390, 413 (Ariz. Ct. App. 1983); Waller v. Truck Ins. Exch., 900 P.2d 619, 627 (Cal. 1995). *See generally* RUSS & SEGALLA, *supra* note 6, § 22:7, at 22-14.

12. *See, e.g.*,Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134, 1138 (Ariz. 1993).

13. *See, e.g*, AIU Ins. Co. v. Superior Ct., 799 P.2d 1253, 1264 (Cal. 1990).

14. *United Cal. Bank*, 681 P.2d at 41; Aydin Corp. v. First State Ins. Co., 959 P.2d 1213, 1217 (Cal. 1998). *See generally* RUSS & SEGALLA, *supra* note 6, § 22:9, at 22-17.

15. Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263, 1271 (Cal. 1993).

16. *E.g.*, *AIU Ins. Co*, 799 P.2d at 1264. *See generally* RUSS & SEGALLA, *supra* note 6, § 22:38, at 22-82.

17. *See, e.g.*, *Taylor*, 854 P.2d at 1139; *AIU Ins. Co.*, 799 P.2d at 1264.

18. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Wilson, 782 P.2d 727, 733 (Ariz. 1989); Bank of the W. v. Superior Ct., 833 P.2d 545, 552 (Cal. 1992).

19. *See, e.g.*, Am. Nat'l Fire Ins. Co. v. Rose Acre Farms, Inc., 107 F.3d 451, 457 (7th Cir. 1997) (applying Ind. law); Solers, Inc. v. Hartford Cas. Ins. Co., 146 F. Supp. 2d 785, 792 (E.D. Va. 2001); Gen. Auth. for Supply, Commodities, Cairo, Egypt v. Ins. Co. of N. Am., 951 F. Supp. 1097, 1108 (S.D.N.Y. 1997); Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., 868 F. Supp. 1278, 1287 (D. Utah 1994); E.I. du Pont Nemours & Co. v. Allstate Ins. Co., 693 A.2d 1059, 1061 (Del. 1997); State Farm Mut. Auto. Ins. Co. v. Fermahin, 836 P.2d 1074, 1077 (Haw. 1992); Hillenbrand v. Meyer Med. Grp., S.C., 682 N.E.2d 101, 104 (Ill. App. Ct. 1997); Lupo v. Shelter Mut. Ins. Co., 70 S.W.3d 16, 19 (Mo. Ct. App. 2002); U.S. Fire Ins. Co. v. Ace Baking Co., 476 N.W.2d 280, 282 (Wis. Ct. App. 1991).

20. Fed. Deposit Ins. Corp. v. W.R. Grace & Co., 877 F.2d 614, 621 (7th Cir. 1989).

21. *See, e.g.*, Solers, Inc. v. Hartford Cas. Ins. Co., 146 F. Supp. 2d 785, 792 (E.D. Va. 2001); Select Design, Ltd. v. Union Mut. Fire Ins. Co., 674 A.2d 798, 802 (Vt. 1996); Peerless Ins. Co. v. Wells, 580 A.2d 485, 488 (Vt. 1990). *But see* Sec. Ins. Co. of Hartford v. Investors Diversified Ltd., 407 So. 2d 314, 316 (Fla. Dist. Ct. App. 1981) ("The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language"); Cohen v. Erie Indem. Co., 432 A.2d 596, 599 (Pa. Super. Ct. 1981) ("The mere fact that several appellate courts have ruled in favor of a construction denying coverage, and several others have reached directly contrary conclusions, viewing almost identical policy provisions, itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation").

22. *See, e.g.*, Bay Cities Paving & Grading, Inc. v. Lawyers Mut. Ins. Co., 855 P.2d 1263, 1270 (Cal.1993); Heller v. Fire Ins. Exch., 800 P.2d 1006, 1009 (Colo. 1990) (the term "surface water" in a water damage exclusion); Fisher v. U.S. Fid. & Guar. Co., 586 A.2d 783, 789 (Md. Ct. Spec. App. 1991); U.S. Fire Ins. Co. v. Ace Baking Co., 476 N.W.2d 280, 282 (Wis. Ct. App. 1991). To ascertain the ordinary and popular meaning of undefined insurance policy terms, courts will consult general dictionaries. *See, e.g.*, Scott v. Cont'l Ins. Co., 51 Cal. Rptr. 2d. 566, 571 (Cal. Ct. App. 1996); *Heller*, 800 P.2d at 1009.

23. *E.g.*, Producers Dairy Delivery Co. v. Sentry Ins. Co., 718 P.2d 920, 924 (Cal. 1986).

24. *See, e.g*, Capelouto v. Valley Forge Ins. Co., 990 P.2d 414, 418-

19 (Wash. Ct. App. 1999) (insured's argument that inadequate equipment used by contractor was distinct peril from contractor's faulty workmanship was "an awkward interpretation of both the terms used in the [faulty workmanship] exclusion and the events leading to his loss"); McDonald v. State Farm Fire & Cas. Co., 837 P.2d 1000, 1004 (Wash. 1992) (insured's interpretation of faulty workmanship exclusion to mean it applies only to "loss which is made up of or composed of faulty construction or defective materials" and not to contractor's negligence was "unreasonable" interpretation).

25. 162 F.3d 789 (3d Cir. 1998).

26. *Id.* at 791.

27. *Id.*

28. *Id.* at 791-92.

29. *Id.* at 792.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See generally* 17 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D § 253:46, at 253-59 (2000).

35. *See, e.g.*, Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke & Co., 297 P.2d 428, 431 (Cal. 1956).

36. *E.g.*, Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588, 592 (4th Cir. 1972) (applying N.C. law); Statewide Ins. Corp. v. Dewar, 694 P.2d 1167, 1070-72 (Ariz. 1984); Pardee Constr. Co. v. Ins. Co. of the W., 92 Cal. Rptr. 2d 443, 457 (Cal. Ct. App. 2000); Allstate Ins. Co. v. Juniel, 931 P.2d 511, 516 (Colo. Ct. App. 1996); State Farm Mut. Auto. Ins. Co. v. Yanes, 447 So. 2d 945, 946 n.2 (Fla. Dist. Ct. App. 1984); Kook v. Am. Sur. Co. of N.Y., 210 A.2d 633, 636 (N.J. Super. Ct. App. Div. 1965); Ponder v. State Farm Mut. Auto. Ins. Co., 12 P.3d 960, 965 (N.M. 2000); Frey v. Aetna Life & Cas. Co., 633 N.Y.S.2d 880, 843-44 (N.Y. App. Div. 1995); Celley v. Mut. Benefit Health & Acc. Ass'n, 324 A.2d 430, 435 (Pa. Super. Ct. 1974); Lynott v. Nat'l Union Fire Ins. Co., 871 P.2d 146, 149 (Wash. 1994). *See generally* RUSS & SEGALLA, *supra* note 6, § 22:12, at 22-29 (1997).

37. *See, e.g.*, Franklin Life Ins. Co. v. Mast, 435 F.2d 1038, 1045 (9th Cir. 1970) (applying Ariz. law); Fireman's Fund Ins. Co. v. Fibreboard Corp., 227 Cal. Rptr. 203, 207 n.3 (Cal. Ct. App. 1986); Pac. Indem. Co. v. Interstate Fire & Cas. Co., 488 A.2d 486, 489 (Md. 1985).

38. RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1982).

39. *See, e.g.*, Isaak v. Mass. Indem. Life Ins. Co., 623 P.2d 11, 14 (Ariz. 1981) ("[N]o matter what form a written contract takes, it is not the undisclosed intent of the parties to a contract with which we are concerned, but the outward manifestations of their assent.").

40. Prudential Ins. Co. v. Superior Ct., 119 Cal. Rptr. 2d 823, 836-37 (Cal. Ct. App. 2002) (in action to recover under accident policy covering full-time students, court refused to consider affidavits from policyholder's parents stating their subjective belief that policyholder remained full-time student despite taking quarter off).

41. *See, e.g.*, Am. Cas. Co. of Reading, Pa. v. Baker, 22 F.3d 880, 887 (9th Cir. 1994); Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke & Co., 297 P.2d 428, 431 (Cal. 1956).

42. *See, e.g.*, Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 398 (Ariz. 1984); Morton Int'l, Inc. v. Thiokol Corp., 666 N.E.2d 1163, 1169-70 (Ohio Ct. App. 1995); Ponder v. State Farm Mut. Auto. Ins. Co., 12 P.3d 960, 962-66 (N.M. 2000); Celley v. Mut. Benefit Health & Acc. Ass'n, 324 A.2d 430, 433 (Pa. Super. Ct. 1974).

43. 652 A.2d 36 (Del. 1994) (applying Mo. law).

44. *Id.* at 38.

45. *Id.*

46. *Id.* at 39.

47. *Id.*

48. *Id.*

49. *Id.* at 40. The court applied Missouri law, which permitted the introduction of extrinsic evidence even in the absence of an ambiguity. *Id.* at 39, 40 n.6.

50. *See, e.g.*, Am. Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1503 (S.D.N.Y. 1983); Darner Motor Sales, Inc. v Universal Underwriters Ins. Co., 682 P.2d 388, 398 (Ariz. 1984); United Cal. Bank v. Prudential Ins. Co. of Am., 681 P.2d 390, 410 (Ariz. Ct. App. 1983); Walle Mut. Ins. Co. v. Sweeney, 419 N.W.2d 179, 180 (N.D. 1988); Nat'l Union Fire Ins. Co. v. Studer Tractor & Equip. Co., 527 P.2d 820, 831 (Wyo. 1974).

51. *See, e.g.*, Fed. Ins. Co. v. Ams. Ins. Co., 691 N.Y.S.2d 508, 512 (N.Y. App. Div. 1999).

52. Brooklyn Life Ins. Co. v. Dutcher, 95 U.S. 269, 273 (1877).

53. RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. g (1982).

54. 111 Cal. Rptr. 392 (Cal. Ct. App. 1973).

55. *Id.* at 394.

56. *Id.* at 394-95.

57. *Id.*

58. *Id.* at 397.

59. *E.g.*, Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 217 F.3d 33, 38-39 (1st Cir. 2000) (applying Mass. law); Travelers Indem. Co. v. Scor Reins. Co., 62 F.3d 74, 78 (2d Cir. 1995) (applying Conn. law); Employers Reins. Corp. v. Mid-Continent Cas. Co., 202 F. Supp. 2d 1221, 1234 (D. Kan. 2002); Aetna Cas. & Sur. Co. v. Dow Chem. Co., 28 F. Supp. 2d 440, 445-46 (E.D. Mich. 1998); Gulf Ins. Co. v. Edgerley, 107 Cal. Rptr. 246, 250 (Cal. Ct. App. 1973); Marathon Plastics, Inc. v. Int'l Ins. Co., 514 N.E.2d 479, 486 (Ill. App. Ct. 1987); Affiliated FM Ins. Co. v. Constitution Reins. Co., 626 N.E.2d 878, 881-82

(Mass. 1994); Mescalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc., 56 S.W.3d 313, 319 (Tex. Ct. App. 2001).

60. 121 Cal. Rptr. 2d 682 (Cal. Ct. App. 2002).

61. *Id.* at 684.

62. *Id.* at 688.

63. 524 N.W.2d 804 (Neb. 1994).

64. *Id.* at 815.

65. *See, e.g.*, KALIS, *supra* note 1, § 19.02, at 19-11 ("Many, if not most, insurance policies are placed through the use of insurance intermediaries, often referred to as insurance brokers and insurance agents."); OSTRAGER & NEWMAN, *supra* note 1, § 1.03[c][3], at 36 ("Most corporations place their insurance through independent insurance brokerage firms.").

66. *See* Deborah Lohse, *Marsh & McLennan's Planned Purchase of Sedgwick Stirs Increased Concerns*, WALL. ST. J., Sept. 29, 1998, at A6 ("Aon and Marsh & McLennan have said their market clout and breadth enables them to seek out the best products and prices.").

67. *See, e.g.*, Marsh & McLennan of Cal., Inc. v. City of Los Angeles, 132 Cal. Rptr. 796, 802 (Cal. Ct. App. 1976); Almerico v. RLI Ins. Co., 716 So. 2d 774, 776 (Fla. Dist. Ct. App. 1998); State Sec. Ins. Co., 630 N.E.2d 940, 946 (Ill. App. Ct. 1994); Nautilus Ins. Co. v. First Nat'l Ins., Inc., 837 P.2d 409, 411 (Mont. 1992); Inc. Vill. of Pleasantville v. Calvert Ins. Co., 612 N.Y.S.2d 441, 442 (N.Y. App. Div. 1994); Cont'l Cas. Co. v. Bock, 340 S.W.2d 527, 532 (Tex. Ct. App. 1960). *See generally* Lohse, *supra* note 66, at A6.

68. An insurance broker, of course, is the insured's agent. *See, e.g.*, Fireman's Fund Ins. Co. v. Nat'l Bank for Co-ops., 849 F. Supp. 1347, 1364 (N.D. Cal. 1994); Carlton v. St. Paul Mercury Ins. Co., 36 Cal. Rptr. 2d 229, 232 (Cal. Ct. App. 1994).

69. 227 Cal. Rptr. 203 (Cal. Ct. App. 1986).

70. *Id.* at 205.

71. *Id.* at 206-07 (italics in original, citations and footnote omitted).

72. 449 N.Y.S.2d 986 (N.Y. App. Div. 1982).

73. *Id.* at 987.

74. *Id.* at 989.

75. *Id.*

76. STEMPEL, *supra* note 2, § 4.11[f], at 4-201.

77. 540 F.2d 1257, 1261 (5th Cir. 1976) (applying Mo. law).

78. 784 P.2d 507, 514 (Wash. 1990).

79. Pittston Co. v. Allianz Ins. Co., 1124 F.3d 508, 521 (3d Cir. 1997) (applying N.J. law); Northbrook Excess & Surplus Ins. Co. v. Proctor & Gamble Co., 924 F.2d 633, 639 (7th Cir. 1991) (applying Ohio law); Travelers Indem. Co. v. United States, 543 F.2d 71, 74 (9th Cir. 1976) (applying Or. law); Fountain Powerboat Indus. v. Reliance Ins. Co., 119 F. Supp. 2d 552, 555 (E.D.N.C. 2000); St. Paul Fire & Marine Ins. Co. v. Microsoft Corp., 102 F. Supp. 2d 1107, 1112 (D. Minn. 1999); Koch Eng'g Co. v. Gibralter Cas. Co., 878 F. Supp. 1286, 1288 (E.D. Mo. 1995); Indus. Risk Insurers v. New Orleans Pub. Serv., Inc., 666 F. Supp. 874, 881 (E.D. La. 1987); McNeilab, Inc. v. N. River Ins. Co., 645 F. Supp. 525, 546-47 (D.N.J. 1986).

80. *New Orleans Pub. Serv., Inc.*, 666 F. Supp. at 881.