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TEN COMMANDMENTS OF INTERPRETING COMMERCIAL INSURANCE POLICIES (BUT, UNLIKE MOSES, THERE ARE SUB-COMMANDMENTS)

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I. INTRODUCTION

When it comes to rules of construction and interpretation of insurance policies, one size definitely does not fit all. Insurance policies are contracts. The law has a number of time-honored rules regarding the construction and interpretation of contractual language. Because *certain* insurance relationships involve what the courts have perceived to be a marked disparity in bargaining power between the Fortune 500 insurance company and the individual policyholder, and because some lines of insurance have streamlined their policies through the promulgation of forms that are not subject to negotiation, certain pro-policyholder rules of construction and interpretation of insurance policies have evolved.

While there is little argument that these rules of construction and interpretation may be appropriate in the contexts in which they arose, applying them in different contexts—particularly, a commercial context where there is no disparate bargaining power between insurer and insured—is problematic, unfair, and serves only to increase the cost of the insurance product. Not all "insurance" is the same. Just because the word "insurance" appears in the name of the product, or in the name of a litigant, does not mean that pro-policyholder rules of construction are warranted or appropriate.

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This is particularly true with fidelity insurance. Fidelity insureds are businesses (not individuals) with, at the very least, equal bargaining power and, in many instances, specific employees, departments, attorneys, and representatives actively involved in negotiating favorable policy terms. The standard form financial institution bond is in fact based upon a form that was jointly drafted by representatives of the insurance and banking industries—both equally sophisticated entities.[1]

This paper discusses the various rules of insurance policy construction and interpretation in general, how those rules apply to commercial insurance policies, and how they should apply to fidelity insurance (if at all).

II.
FIRST COMMANDMENT:
THE GOAL OF INTERPRETATION IS TO GIVE EFFECT TO THE INTENT OF THE PARTIES

Insurance policies are contracts and are interpreted in accordance with general rules of contract interpretation.[2] The primary rule of insurance policy interpretation—as with any contract—is to discern and give effect to the intent of the parties.[3] The easiest way to accomplish

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[1] *See* Robert J. Duke, *A Brief History of the Financial Institution Bond*, *in* FINANCIAL INSTITUTION BONDS 1 (Duncan L. Clore ed., 3d ed. 2008).

[2] *See, e.g.*, Fire Ins. Exch. v. Sullivan, 224 P.3d 348, 351 (Colo. App. 2009).

[3] *See, e.g.*, Metro. Prop. & Cas. Ins. Co. v. Auto-Owners Mut. Ins. Co., 924 N.W.2d 833, 840 (Iowa 2019) ("The cardinal principle in the construction and interpretation of insurance policies is that the intent of the parties at the time the policy was sold must control."); Santos v. Metro. Prop. & Cas. Ins. Co., 201 A.3d 1243, 1247 (N.H. 2019) ("The fundamental goal of interpreting an insurance policy, as in all contracts, is to carry out the intent of the contracting parties."); Gallagher v. GEICO Indem. Co., 201 A.3d 131, 137 (Pa. 2019) (recognizing that in interpreting an insurance policy, "we must ascertain the intent of the parties as manifested by the terms used in the written insurance policy"); Exxon Mobil Corp. v. Ins. Co. of the State of Pa., 568 S.W.3d 650, 657 (Tex. 2019) ("Our fundamental objective [in interpreting an insurance policy] is to effectuate the parties' intent as expressed by the words chosen to memorialize their agreement."); Leicht Transfer & Storage Co. v. Pallet Cent. Enters., Inc., 928 N.W.2d 534, 538 (Wis. 2019) ("Our goal in interpreting and applying an

this goal is to give unambiguous words and phrases their plain and ordinary meaning: "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms."[4] As the West Virginia Supreme Court explained,

> [i]t is also well settled that the words of an agreement should be given their natural and ordinary meaning, because the parties presumably used the words in the sense in which they were generally understood. It is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning.[5]

Interpretation of the language of an insurance policy usually is a task for the court (judge) to carry out, and is not for a jury (the trier of fact).[6] This is because disputes revolving around the meaning of policy language do not involve factual disputes; the parties generally agree on the actual wording of the policy and the *material* facts relevant thereto, thus rendering the dispute a legal one. Where real questions of fact do exist, "it is the function of the trial court to instruct the jury as to the meaning of terms in an insurance policy so the jury may make the relevant determinations of fact."[7]

Each of the commandments discussed below sprout from this commandment. They are all methods of attempting to ascertain the true intent of the parties in entering into the contract (that is, the insurance

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insurance policy's terms is the same as it is in addressing any other contract: To 'effectuate the intent of the contracting parties.'").

[4] W.W.W. Assocs., Inc. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990).

[5] Bennett v. Dove, 277 S.E.2d 617, 619 (W. Va. 1981); *see also, e.g.*, George Uzelac & Assocs., Inc. v. Guzik, 663 N.E.2d 238, 240 (Ind. Ct. App. 1996) ("Absent ambiguity, the terms of a contract will be given their plain and ordinary meaning.").

[6] *See, e.g.*, Regents of Mercersburg Coll. v. Republic Franklin Ins. Co., 458 F.3d 159, 171 (3d Cir. 2006).

[7] Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 717 (8th Cir. 1981).

policy). And they all arise from one basic rule: discerning the parties' intent requires focusing upon the language of the policy itself.[8]

III.
SECOND COMMANDMENT:
FIRST DEFINITIONS, THEN PLAIN MEANING

Most insurance policies, including fidelity policies, contain numerous defined terms. A policy's definition of a term or phrase may differ from its legal definition, or even its ordinary dictionary definition. If a term is defined in the policy, the term is to be given the meaning provided by the policy, and no other.[9]

A germane example of a situation where this "discrepancy in definitions" can happen is with the definition of the word "theft" in crime policies. Many crime policies define the word "theft." Because "theft" separately can be considered a criminal offense, it often also is defined by statute. For example, a crime policy may define "theft" as "the unlawful taking of property to the deprivation of the Insured."[10] A state penal statute may define it differently. New Jersey's statute, for example, has various definitions of "theft," including "theft by unlawful taking"[11] and "theft by deception."[12] "Theft by unlawful taking" includes "exercis[ing] unlawful control over" property.[13] The rules of construction require using the policy's definition of "theft"—"the unlawful taking of property to the deprivation of the Insured"—not the statutory definition

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[8] Tech-Built 153, Inc. v. Va. Sur. Co., 898 A.2d 1007, 1009 (N.H. 2006).

[9] *See, e.g.*, State Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Fla., Inc., 678 So. 2d 397, 401 (Fla. Dist. Ct. App. 1996) (noting that judges are not empowered to give a defined term in a policy a different meaning); MGM Apartments, LLC v. Mid-Century Ins. Co., 844 N.W.2d 469 (Iowa Ct. App. 2014) (holding defined term in policy could not be given its "ordinary meaning"); Long v. Shelter Ins. Co., 351 S.W.2d 692, 701 (Mo. Ct. App. 2011) (stating court's interpretation of insurance policy should be guided by the policy's definitions).

[10] Commercial Crime Policy, ISO Form CR 00 22 05 06, Definitions F(20) (rev. 2005).

[11] N.J. STAT. ANN. § 2C:20-3.

[12] *Id*. § 2C:20-4.

[13] *Id*. § 2C:20-3.

of "theft," "theft by unlawful taking," or "theft by deception." The statute's definitions are not relevant.

Only if the policy does not define a specific term should a court resort to the term's plain and ordinary meaning.[14] As long as the policy language is unambiguous, the plain and ordinary meaning of its terms governs (unless a particular term is specifically defined).[15] The Supreme Court of Minnesota said: "[i]n the interpretation of insurance contracts, as with any other contract, we start with the principles that the parties are free to contract as they see fit and that the language of the contract is to be given its plain and ordinary meaning."[16] Similarly, the Supreme Court of Tennessee has explained that

> Insurance contracts are subject to the same rules of construction as contracts generally, and in the absence of fraud or mistake, the contractual terms should be given their plain and ordinary meaning, for the primary rule of contract interpretation is to ascertain and give effect to the intent of the parties.[17]

Many jurisdictions talk about reading policy language "from the viewpoint of an individual untrained in law or business,"[18] or giving the language "the type of sensible construction that an average insurance

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[14] Leicht Transfer & Storage Co. v. Pallet Cent. Enters., Inc., 928 N.W.2d 534, 538 (Wis. 2019) (noting that courts "give undefined words and phrases [in an insurance policy] their common and ordinary meaning"); *see also Long*, 351 S.W.2d at 701 ("We look to definitions in insurance policies to guide our interpretation, but when words or phrases are not defined in the policy, we look to the plain meaning of words and phrases as it would have been understood by an ordinary person of average understanding when buying the policy.").

[15] *See, e.g.*, Imperato v. Navigators Ins. Co., No. 17-12959, 2019 WL 2443034 (11th Cir. June 11, 2019); Bacon Constr. Co. v. Arbella Protection Ins. Co., 208 A.3d 595 (R.I. 2019); James v. State Farm Mut. Auto. Ins. Co., 929 N.W.2d 541 (S.D. 2019).

[16] Emp'rs Mut. Liab. Ins. Co. of Wis. v. Eagles Lodge, 165 N.W.2d 554, 556 (Minn. 1969).

[17] Clark v. Sputniks, LLC, 368 S.W.3d 431, 441 (Tenn. 2012).

[18] Desert Mountain Props. LP v. Liberty Mut. Fire Ins. Co., 236 P.3d 421, 427 (Ariz. Ct. App. 2010).

purchaser would give."[19] This approach really is nothing more than giving terms their plain, ordinary meaning, and rejecting technical or unusual meanings that are not appropriately ascribed to the language (that is, by way of a specific definition).

IV.
THIRD COMMANDMENT:
A COURT CANNOT AND SHOULD NOT REWRITE A POLICY BECAUSE IT DOES NOT LIKE ITS TERMS OR TO AVOID A HARSH RESULT

It presumably comes as no surprise that insurance companies are not favorites of the law. Some courts are quite willing to find ambiguities and interpret policies against the insurer regardless of circumstances. Others reach determinations based upon the purported "reasonable expectations of the insured" without properly weighing the intent of the parties as to the meaning of the words used. And "bad faith" claims against insurance companies have become problematically routine, with courts all too often tolerating "bad faith" claims asserted reflexively by insureds solely in the mistaken belief that doing so provides them with some kind of leverage or advantage in the litigation, with extreme punitive damages awards in the rare case that a court finds supposed "bad faith."[20]

When it comes to reading insurance policy language, these approaches violate a cardinal rule of contract interpretation: a court should not rewrite a policy to avoid a result that it considers to be harsh, or because it does not like the result that enforcement of the clear language brings.

> [W]hen a policy's meaning and intent are clear, it is not the prerogative of the courts to create ambiguities where

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[19] Ingenco Holdings, LLC v. Ace Am. Ins. Co., 921 F.3d 803, 813 (9th Cir. 2019).

[20] For a detailed discussion of perceived judicial biases against insurance companies, see Willy E. Rice, *Judicial Bias, the Insurance Industry, and Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions 1900-1991*, 41 CATH. U. L. REV. 325, 327-31 (1992).

> none exist or to rewrite the contract in attempting to avoid harsh results. The same prohibition applies to attempts to rewrite a policy to avoid a result claimed to be unreasonable.[21]

The outcome of interpreting unambiguous language should not determine, or even affect, the interpretation. "The insurer should be required to pay damages only on claims intended to be insured against and to answer only for risks intended to be assumed."[22]

In *Employers Mutual Casualty Co. v. DGG & CAR, Inc.*,[23] the Arizona Supreme Court rejected the insured's contention that the phrase "series of acts" in a commercial crime policy was ambiguous. The insured argued that the insurer's interpretation left the insured with one limit of coverage for a loss that resulted from a series of acts, which it considered to be an unfair result. The court noted that it cannot find an ambiguity where none exists to avoid a "harsh result" and that, on the contrary, it was the insured's interpretation that would lead to a harsh result for other insureds, as it would leave a victim of a series of small thefts subject to a deductible for each theft and thereby potentially without coverage.[24] In *Newman v. Hartford Insurance Co. of Illinois,*[25] the court held that the bankruptcy trustee of the insured's affiliate did not have standing to assert a claim under the insured's employee dishonesty coverage. The court held that the policy language limiting rights under the policy to the named insured and nobody else was unambiguous. The failure to add the affiliate as an insured under the policy may have been an oversight, but the court said: "[w]e are aware that this is a harsh result, especially in light of the fact that . . . the failure to add WOI as a named

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[21] Catholic Med. Ctr. v. Executive Risk Indem., Inc., 867 A.2d 453, 457 (N.H. 2005); *see also, e.g.,* Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rick, 654 P.2d 56, 62 (Ariz. Ct. App. 1982) ("It is not the prerogative of the court to create ambiguities where none exist or to rewrite the contract in an attempt to avoid harsh results."); Certain Underwriters at Lloyd's of London v. Transcarriers Inc., 107 S.W.3d 496, 499 (Tenn. Ct. App. 2002) (noting "the courts will not rewrite an unambiguous [policy] term simply to avoid harsh results").

[22] *Rick,* 654 P.2d at 62.

[23] 183 P.3d 513 (Ariz. 2008).

[24] *Id.* at 518-19.

[25] No. 92 C 2678, 1994 WL 247071 (N.D. Ill. June 2, 1994).

insured may be nothing more than sheer oversight. The Court is not, however, in the business of ignoring the plain language of a contract for the purpose of saving a party from its own apparent carelessness."[26]

V.
FOURTH COMMANDMENT:
READ THE POLICY AS A WHOLE

An insurance policy is a contract comprised of various sections, including the declarations, insuring agreements/coverage parts, definitions, conditions, and exclusions. "An insured cannot create an ambiguity by reading only a part of the policy and claiming that, read in isolation, that portion of the policy suggests a level of coverage greater than the policy actually provides when read as a whole."[27] Rather, like any contract,[28] an insurance policy "must be read as a whole with effect given to every provision."[29] It is only by considering the policy in its entirety that the true intent of the parties can be ascertained.[30]

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[26] *Id.* at *8.

[27] Owners Ins. Co. v. Craig, 514 S.W.3d 614, 617 (Mo. 2017).

[28] *See, e.g.*, Albanese v. Consol. Rail Corp., 666 N.Y.S.2d 680, 682 (App. Div. 1997) (noting that "it is a cardinal rule of construction that a contract should not be interpreted in such a way as would leave one of its provisions substantially without force").

[29] Tozzi v. Long Island R.R., 651 N.Y.S.2d 270 (N.Y. Sup. Ct. 1996); *see also* R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co., 156 A.3d 539, 554-55 (Conn. App. Ct. 2017) ("When interpreting [an insurance policy], we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result."); Wash. Nat'l Ins. Corp. v. Ruderman, 117 So. 3d 943, 948 (Fla. 2013) ("In construing insurance contracts, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect."); Valley Forge Ins. Co. v. Swiderski Elecs., Inc., 860 N.E.2d 307, 314 (Ill. 2006) ("Like any contract, an insurance policy is to be construed as a whole, giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose."); Mass. Bay Ins. Co. v. Am. Healthcare Servs. Ass'n, 172 A.3d 1043, 1061 (N.H. 2017) (noting policy interpretation proffered by insured was not reasonable when it left words without meaning).

[30] Gilbane Bldg. Co. v. Admiral Ins. Co., 664 F.2d 589, 597 (5th Cir. 2011).

Because insurance policies are usually drafted by the insurer, one would imagine that interpreting the policy as a whole necessarily always would benefit the insurer. But such is not always the case. By virtue of either poor drafting (by the insurer) or poor reasoning (by the court), the case law is replete with decisions where consideration of the policy as a whole led the court to find inconsistencies and conclude that the policy was ambiguous, resulting in decisions adverse to the insurer.[31]

For fidelity insurers, however, pressing a court to consider the policy as a whole can inform the court's interpretation of key fidelity insurance concepts. For example, in *CP Food & Beverage, Inc. v. United States Fire Insurance Co.*,[32] the Nevada federal court predicted that Nevada would employ the "direct means direct" standard of direct loss after it considered the entirety of the policy and how a "proximate cause" standard would be inconsistent with not only with the phrase "direct loss" but with other aspects of the policy, such as the policy's definition of "theft" and the property covered by the policy.[33] In *Cargill, Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*,[34] the Minnesota appellate court considered the policy in its entirety when it rejected the insured's argument that the policy provided liability-type coverage for indirect losses resulting from defending and settling the claims of third parties.[35]

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[31] *See, e.g.*, MDW Enters., Inc. v. CNA Ins. Co., 772 N.Y.S.2d 79 (App. Div. 2004) ("Reading the subject policy as a whole, we conclude that the term 'vandalism' in this policy is ambiguous, and thus, must be construed in favor of the insured."); Badger Mut. Ins. Co. v. Schmitz, 647 N.W.2d 223 (Wis. 2002) ("If we looked only at the reducing clause and not at the policy as a whole, our inquiry would be at an end. . . . Here, the policy as a whole, and the 'Availability of Underinsured Motorists Coverage—Wisconsin' form in particular, create ambiguity.").

[32] 324 F. Supp. 3d 1172 (D. Nev. 2018).

[33] *Id.* at 1176-77.

[34] No. A03-187, 2004 WL 51671 (Minn. Ct. App. Jan. 13, 2004).

[35] *Id.* at *10-11.

VI.
FIFTH COMMANDMENT:
READ THE POLICY SO AS TO AVOID AMBIGUITY

Another basic rule of contract interpretation is that a contract should be read in a manner that avoids ambiguity.[36] This rule is as applicable to insurance policies—contracts of insurance—as it is to all other contracts.[37] When there are two reasonable ways to construe policy language, a court should read the language (using its plain and ordinary meaning) in the manner that avoids creating an ambiguity.[38] Moreover, a court should not "torture" the language of a policy so as to create an ambiguity and thereby allow for interpretation.[39]

The issue then arises: what happens if, to avoid ambiguity, interpretation of the policy would result in a provision being without meaning or effect? In the insurance context, the answer is that the law

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[36] Kane Gas Light & Heating Co. v. Pennzoil Co., 587 F. Supp. 910, 911 (W.D. Pa. 1984) (noting "the court should read such provisions to avoid ambiguities, if the plain language of the contract permits"); Payne v. Weston, 466 S.E.2d 161, 166 (W. Va. 1995) (stating "a court should read policy provisions to avoid ambiguities and not torture the language to create them").

[37] Berg v. Liberty Mut. Ins. Co., 319 F. Supp. 2d 933, 938 (N.D. Iowa 2004) ("The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them."); Poulton v. State Farm Fire & Cas. Cos., 675 N.W.2d 665, 671 (Neb. 2004) (stating "the language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them"); Inter-Ins. Exch. v. Westchester Fire Ins. Co., 130 N.W.2d 185, 188 (Wis. 1964); Imperial Cas. & Indem. Co. v. High Concrete Structures, Inc., 858 F.2d 128, 131 (3d Cir. 1988) (stating "policy terms should be read to avoid ambiguities").

[38] *Imperial Cas. & Indem. Co.*, 858 F.2d at 131 (applying Pennsylvania law); Jameson v. Mut. Life Ins. Co., 415 F.2d 1017, 1020 (5th Cir. 1969); Am. Cas. Co. of Reading, Pa. v. Resolution Trust Corp., 839 F. Supp. 282, 290 (D.N.J. 1993); Erie Ins. Prop. & Cas. Co. v. Chaber, 810 S.E.2d 207, 211 (W. Va. 2017) (stating a court "should read policy provisions to avoid ambiguities and not torture the language to create them").

[39] *See, e.g.*, Guerrier v. Mid-Century Ins. Co., 663 N.W.2d 131, 135 (Neb. 2003); *Payne*, 466 S.E.2d at 166.

favors avoiding ambiguity over creating surplusage.[40] The reason for favoring surplusage over ambiguity is grounded in the redundancies found in almost all insurance policies. The Sixth Circuit explained:

> The label ["redundancy"] surely is not a fatal one when it comes to insurance contracts . . . where redundancies abound. In just this one provision of the 80-page insurance contract, there are at least three *truly* redundant phrases, as opposed to logically redundant phrases: (1) "loss or damage"; (2) "caused by or resulting from"; and (3) "faulty, inadequate or defective." As in so many insurance contracts, iteration is afoot throughout—from an exclusion for "war and military action" to one for "fraudulent, dishonest or criminal acts or omissions" to one for flooding of "lakes, reservoirs, ponds, brooks, rivers, streams, harbors, oceans or any other body of water or watercourse" to numerous others.
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> . . . .
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> All of this helps to reveal the limits of the interpretive canon . . . that courts must avoid interpreting contracts to contain superfluous words. The canon is one among many tools for dealing with ambiguity, not a tool for creating ambiguity in the first place. Where there are two ways to read the text—and the one that avoids surplusage makes the text ambiguous—applying the rule against surplusage is, absent other indications, inappropriate.[41]

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[40] TMW Enters., Inc. v. Fed. Ins. Co., 619 F.3d 574, 579 (6th Cir. 2010); *see also* Ardente v. Standard Fire Ins. Co., 744 F.3d 815, 819 (1st Cir. 2014).

[41] *TMW Enters.*, 619 F.3d at 577-78 (emphasis in original).

VII.
SIXTH COMMANDMENT: SPECIFIC PROVISIONS CONTROL OVER GENERAL PROVISIONS

Insurance policies, including policies containing types of fidelity coverage, often are comprised of dozens (if not hundreds) of pages, containing multiple sections and parts, and then supplemented by riders and endorsements. It thus should not come as any surprise that policies may contain seemingly internal inconsistencies. For example, a policy may generally state at the outset that it covers employee theft, but later specify that only certain types of employee theft are covered, or that coverage only applies for losses discovered during a certain period.

The prior commandments require that a court consider the policy in its entirety, and read it so as to avoid ambiguity if at all possible. This commandment is the next step, requiring that "[s]pecific provisions in the policy control over general statements of coverage."[42] Thus, "[f]or example, when a contract provision makes a general statement of coverage, and another provision specifically states the time limit for such coverage, the more specific provision will control."[43]

Examples of this commandment can be found in cases across a broad range of insurance coverages. In *DRK, LLC v. Burlington Insurance Co.*,[44] the court enforced an exclusion barring coverage for

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[42] Simco Enters., Ltd. v. James River Ins. Co., 566 F. Supp. 2d 555, 561 (E.D. Tex. 2008); *see also* State Farm Fla. Ins. Co. v. Phillips, 134 So. 3d 505, 508 (Fla. Dist. Ct. App. 2014) ("[W]hen provisions of insurance policy conflict, we recognize the clear rule of construction that a specific provision in a policy governs over a general provision."); Auto-Owners Ins. Co. v. Barnes, 373 S.E.2d 217, 219 (Ga. Ct. App. 1988); Gies v. City of Gering, 695 N.W.2d 180, 193 (Neb. Ct. App. 2005); Weldon v. Comm'l Union Assurance Co., 710 P.2d 89, 91 (N.M. 1985); W2001Z/15 CPW Realty, LLC v. Lexington Ins. Co., 9 N.Y.S.3d 18, 19 (App. Div. 2015). This basic premise of contract interpretation applies equally to statutory interpretation. *See* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) ("It is a commonplace of statutory construction that the specific governs the general.").

[43] Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 133-34 (Tex. 1994) (citation omitted).

[44] 905 N.Y.S.2d 58 (App. Div. 2010).

loss resulting from injury to an employee of "any insured" as a specific provision, over a general "separation of insureds" provision, which addresses other topics, to bar coverage for a loss resulting from an injury to an employee of a non-named insured.[45] In *Weldon v. Commercial Union Assurance Co.*,[46] the policy contained a broad description of the property that was covered, which was followed by a more specific provision identifying property not covered, including things below the surface.[47] The New Mexico Supreme Court, in reversing a lower court's award to the insured, held that the policy was not ambiguous because the specific provision controlled, limiting coverage to parts of the building that were not subsurface.[48]

VIII.
SEVENTH COMMANDMENT:
EJUSDEM GENERIS

The rule of *ejusdem generis* follows from the prior commandment, and requires that "when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation."[49] Translated into simple English, the rule requires examination of the context in which terms of an insurance policy are used.[50] Thus, where a general term follows specific terms or phrases, the rule requires that the court construe the general term narrowly so that it relates only to the specific circumstances that are mentioned in the preceding terms.[51]

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[45] *See id.* at 60.

[46] 710 P.2d 89 (N.M. 1985).

[47] *See id.* at 91.

[48] *Id.*

[49] Atain Specialty Ins. Co. v. Sai Darshan Corp., 226 F. Supp. 3d 807, 819 (S.D. Tex. 2016); *see also, e.g.*, Paster v. Putney Student Travel, Inc., No. CV 99-2062 RSWL, 1999 WL 1074120 (C.D. Cal. Oct. 25, 2012) ("A primary rule of contract interpretation is that the common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it.").

[50] New Castle Cty. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 243 F.3d 744, 750-51 (3d Cir. 2001).

[51] *Id.* at 751.

Ejusdem generis is derived from the more general rule *nocitur a sociis*, which means "it is known from its associates."[52] In the world of contract interpretation, the maxim means that a word "is known by the company it keeps."[53] In other words, the meaning of a word susceptible to more than one reasonable meaning can be determined by considering the words associated with it and the context within which it is used. Both rules, of course, take a backseat to the clear language; they cannot be used "to overrule the plaining meaning of the terms" of the policy.[54]

Ejusdem generis is typically employed

> where specific enumeration precedes the word "other" followed by general words . . . . [U]se of the term "other" to connect the phrase "invasion of the right of private occupancy" to the wording that precedes it satisfies us that the parties intended that such invasion also be limited to claims that involve a possessory interest in the premises.[55]

The Sixth Circuit relied upon the rule of *ejusdem generis* in interpreting an exclusion to a computer fraud insuring agreement to cover loss resulting from a hacking and theft of customer credit card information in *Retail Ventures, Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*[56] The insurer argued that the phrase "loss of confidential information of any kind" applied to the credit card data stolen, which in other contexts was referred to as "confidential." In rejecting the argument, the court applied *ejusdem generis* to conclude that "confidential information" was a general term that should be read in conjunction with more specific terms in the insuring agreement "that all pertain to secret information of plaintiffs involving the manner in which

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[52] Harris v. Capital Growth Investors XIV, 805 P.2d 873, 882 (Cal. 1991).

[53] SMI Realty Mgmt. Corp. v. Underwriters at Lloyd's, London, 179 S.W.3d 619, 625 n.2 (Tex. Ct. App. 2005).

[54] Welch Foods, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 659 F.3d 191, 194 (1st Cir. 2011).

[55] Groshong v. Mut. of Enumclaw Ins. Co., 985 P.2d 1284, 1290 (Or. 1999).

[56] 691 F.3d 821 (6th Cir. 2012).

the [insured's] business is operated."[57] It thus held that customers' credit card information was not "confidential information" contemplated by the exclusionary language, and that the loss was not excluded.[58]

IX.
EIGHTH COMMANDMENT:
EXCLUSIONS

The rules of policy construction discussed above and below are equally applicable to interpreting policy exclusions. Words and phrases are to be interpreted as defined in the policy. If not defined in the policy, they are to be given their plain and ordinary meaning. They are to be read in the context of the policy as a whole and so as not to create ambiguity. Nonetheless, there are additional considerations applicable to exclusions that cannot be overlooked.

A. The Insurer Bears the Burden of Establishing that an Exclusion Applies

Exclusions in an insurance policy are like affirmative defenses in an answer in litigation. While the insured-plaintiff, which is making the claim against the insurance policy, bears the burden of establishing its claim that coverage triggers one or more insuring agreements, the insurer bears the burden of establishing that an exclusion applies to bar the claim.[59] Where the insurer makes a prima facie showing that an exclusion applies, the burden then shifts back to the insured to establish

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[57] *Id.* at 834.

[58] *See id.*

[59] *See, e.g.*, Minden v. Atain Specialty Ins. Co., 788 F.3d 750, 754 (8th Cir. 2015) (noting that "if the insurance company relies on a policy exclusion to deny coverage, the insurance company bears the burden of proving that such exclusion is applicable"); Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1205 (2d Cir. 1995) ("It is the insurer which has the burden of proof to establish that a claim is encompassed by an exclusion in a policy.") (applying New York law); Flomerfelt v. Cardiello, 997 A.2d 991, 1004 (N.J. 2010) ("Our well-established principles require that the insurer bear the burden of demonstrating that the exclusion applies.").

that an exception to the exclusion bars its application and allows coverage to attach.[60]

An insurer's burden has been explained as establishing "that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case."[61] Many courts, not being particularly friendly to insurers, construe exclusions very narrowly. In Connecticut, for example, "[w]hen construing exclusion clauses, the language should be construed in favor of the insured unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim."[62]

But a narrow reading of an exclusion, like any other provision of a contract, is appropriate only where the language of the exclusion is ambiguous. In *Resolution Trust Corp. v. Fidelity & Deposit Co. of Maryland*,[63] the Third Circuit held that compensation "earned in the normal course of employment" was unambiguously excluded from the type of "financial benefit" required to satisfy the subject fidelity bond's "manifest intent" requirement, "and thus, the presumption of construing the exclusion in the contract narrowly does not apply here."[64]

B. Exclusions are Presumptively Valid and are Enforced if the Exclusion is Specific, Clear, Prominent, and Not Contrary to Public Policy

"Exclusions are presumptively valid and will be given effect if specific, plain, clear, prominent, and not contrary to public policy."[65] This statement itself seems clear enough. The question then is when, if ever, have courts refused to enforce an exclusion because it was not "specific," "clear," or "prominent," or because it was contrary to public policy? Rejection of an exclusion because it is not "specific" or "clear"

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[60] *See, e.g.*, Crownover v. Mid-Continent Cas. Co., 772 F.3d 197, 201 (5th Cir. 2014) (applying Texas law).

[61] Cont'l Cas. Co. v. Rapid-Am. Corp., 609 N.E.2d 506, 512 (N.Y. 1993).

[62] Nationwide Mut. Ins. Co. v. Pasiak, 173 A.3d 888, 896 (Conn. 2017).

[63] 205 F.3d 615 (3d Cir. 2000).

[64] *Id.* at 646.

[65] Princeton Ins. Co. v. Chunmuang, 698 A.2d 9, 16-17 (N.J. 1997).

relates to finding policy language to be ambiguous or unambiguous, which is discussed above. Research did not locate any reported decisions where a court refused to enforce a valid exclusion on the ground that it was not "prominent."

Generally, courts are reluctant to hold that an exclusion violates public policy.[66] Cases where exclusions have been found to be contrary to public policy are, nevertheless, more common. Such cases, however, usually arise in insurance contexts other than fidelity insurance—particularly where the challenge to the exclusion on public policy grounds is successful. Public policy is more likely to be implicated in cases involving individual policyholders, where the inquiry is "whether the exclusion either unfairly penalizes innocent victims or unfairly exposes the insured to liability,"[67] or in cases where there is a law relating to the insured risk and the exclusion is inconsistent with the policy underlying the law.[68]

During the savings and loan crisis of the 1980s and 1990s, federal regulators had some initial success arguing that the automatic termination provision of the financial institution bond was contrary to public policy.[69] This line of cases is no longer authoritative, as in later cases circuit courts of appeal held otherwise.[70] In the fidelity context, challenges to policy terms or limitations on public policy grounds have

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[66] Mendoza v. Rivera-Chavez, 999 P.2d 29, 30 (Wash. 2000).

[67] S. Guar. Ins. Co. v. Union Timber Co., 708 F. Supp. 1314, 1316 (M.D. Ga. 1989).

[68] *See, e.g.*, Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co., 889 N.W.2d 596, 604 (Neb. 2016); Nat'l Cty. Mut. Fire Ins. Co. v. Johnson, 879 S.W.2d 1, 4 (Tex. 1993).

[69] *See, e.g.*, Fed. Sav. & Loan Ins. Corp. v. Aetna Cas. & Sur. Co., 701 F. Supp. 1357, 1363 (E.D. Tenn. 1988) (holding automatic termination provision void as against public policy because it precluded the FSLIC from enforcing the rights of the insured); Branning v. CNA Ins. Cos., 721 F. Supp. 1180, 1184 (W.D. Wash. 1989) (holding termination provision void as against public policy because it hindered FSLIC's "exercise of its federal powers").

[70] *See, e.g.*, FDIC v. Aetna Cas. & Sur. Co., 903 F.2d 1073, 1078-79 (6th Cir 1990); Sharp v. Fed Sav. & Loan Ins. Corp., 858 F.2d 1042, 1045 (5th Cir. 1988); *accord* Mut. Sec. Life Ins. Co. v. Fid. & Deposit Co. of Md., 659 N.E.2d 1096, 1099-1101 (Ind. 1995) (holding automatic termination provision not void as contrary to public policy under state law).

not been successful in the instances where they have been made,[71] likely because (a) fidelity insurance is unlike mass-marketed coverages that affect the public at large, and (b) in circumstances that do have broader implications, bonds are required by and issued pursuant to statute or regulation, so a determination that a non-compliant bond violates public policy is not necessary.[72]

C. Exclusions are Narrowly Construed Against the Insurer

The law imposes upon an insurer a duty "to define any limitations or exclusionary clauses in clear and explicit terms."[73] Exclusions generally are narrowly construed against the insurer.[74] What this means is that any question about the meaning of an exclusion will be interpreted in a manner that favors, and does not limit, coverage.[75] An exception that negates the application of an exclusion does not prevent application of another exclusion or create an ambiguity in the exclusions that must be resolved in favor of the insured; "[a]n exception to an

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[71] *See, e.g.*, Tri City Nat'l Bank v. Fed. Ins. Co., 674 N.W.2d 617, 628 (Wis. Ct. App. 2003) (rejecting argument that public policy required finding coverage under fidelity bond); Se. Bakery Feeds, Inc. v. Ranger Ins. Co., 974 S.W.2d 635, 640 (Mo. Ct. App. 1998) ("A fidelity bond may validly limit the liability of the insurer on such bond to losses discovered within a specified term. Such provisions are not contrary to public policy.").

[72] *See, e.g.*, FDIC v. Kan. Bankers Sur. Co., 105 F. Supp. 3d 1234, 1245 (D. Colo. 2015) (stating bond that complies with statute does not violate public policy); FDIC v. Ins. Co. of N. Am., 105 F.3d 778, 786 (1st Cir. 1997) (noting that Massachusetts statutes and regulations express the state's public policy relative to financial institution bonds).

[73] Thomas v. Progressive Cas. Ins. Co., 749 N.W.2d 678, 682 (Iowa 2008).

[74] *See, e.g.*, Duddy v. Gov't Emps. Ins. Co., 23 A.3d 436, 439 (N.J. App. Div. 2011); Lancer Indem. Co. v. JKH Realty Group, LLC, 7 N.Y.S.3d 492, 494 (App. Div. 2015); Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 882 P.2d 703, 717 (Wash. 1994); Day v. Allstate Indem. Co., 798 N.W.2d 199, 206 (Wis. 2011).

[75] *See, e.g.*, PBM Nutritionals, LLC v. Lexington Ins. Co., 724 S.E.2d 707, 713 (Va. 2012) ("Language in a policy purporting to exclude certain events from coverage will be construed mostly strongly against the insurer.").

exclusion only has bearing on that exclusion's applicability—it is without force with respect to other provisions of the policy."[76]

The construction of exclusions against the insurer is appropriate only where there is true ambiguity in the language of the exclusion. If the language of the exclusion (like any other provision in an insurance policy) is clear and unambiguous, "a court should not engage in a strained construction to support the imposition of liability."[77]

D. Exclusions are Defined by a Required Causal Link; If No Causal Link is Required, the Exclusion Should be Applied as Written

Some exclusions exclude loss caused by a specific risk or peril. For example, an automobile insurance policy may exclude coverage for injuries that involve a pre-existing condition. In other contexts, an exclusion will exclude from coverage a category of loss irrespective of how the loss actually incurred. Where the exclusion is based upon how the loss was caused, a court must delve into how the loss was caused to determine whether the parties did or did not intend for such a loss to covered.[78] Conversely, an inquiry into the cause of a loss is improper where the exclusion plainly applies irrespective of the cause of the loss.

For example, in *Aviation Charters, Inc. v. Avemco Ins. Co.*,[79] the policy excluded coverage for losses for airplanes "operated in flight by a

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[76] *Id.; see also, e.g.*, Hanneman v. Cont'l W. Ins. Co., 575 N.W.2d 445, 450 (N.D. 1998) ("Generally, a limitation in one section of an insurance policy and the absence of similar limiting language in another section shows the insurer intended to limit in one section but not in another.").

[77] Flomerfelt v. Cardiello, 997 A.2d 991, 996 (N.J. 2010); *see also, e.g.*, Hooper v. Allstate Ins. Co., 571 So. 2d 1001, 1002 (Ala. 1990) (holding an unambiguous exclusion that does not violate public policy should be enforced as written); Bituminous Cas. Corp. v. Sand Livestock Sys., Inc., 728 N.W.2d 216, 222 (Iowa 2007) (acknowledging courts "must enforce unambiguous exclusions as written"); Prudential Prop. & Cas. Ins. Co. v. Brenner, 795 A.2d 286, 289 (N.J. App. Div. 2002) (noting unambiguous exclusion that does not violate public policy should be enforced as written).

[78] *Flomerfelt*, 997 A.2d at 997.

[79] 763 A.2d 312 (N.J. App. Div. 2000).

pilot who is not approved."[80] The insured's plane sustained damage by virtue of mechanical failure while being operated by an unapproved pilot, but pilot operation had nothing to do with the loss. Nevertheless, the New Jersey Appellate Division, reversing the trial court, held that the exclusion barred the claim as the exclusion did not contain any language requiring that the damage result in any way from operation by an unapproved pilot. The mere fact that the damage occurred while the plane was being operated in flight by an unapproved pilot was sufficient to trigger the exclusion.[81]

X.
NINTH COMMANDMENT:
A POLICY IS NOT AMBIGUOUS MERELY BECAUSE THE INSURED OFFERS AN ALTERNATE INTERPRETATION OF POLICY LANGUAGE

A provision in an insurance policy is not rendered ambiguous merely if the insured offers an interpretation that differs from that of the insurer. The law is well settled that ambiguity requires more than one *reasonable* interpretation of policy language.[82] "An insurance policy is ambiguous when it contains language of doubtful or conflicting meaning based on a *reasonable* construction of the policy's language."[83]

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[80] *Id.* at 313.

[81] *See id.* at 318.

[82] W3i Mobile, LLC v. Westchester Fire Ins. Co., 632 F.3d 432, 436 (8th Cir. 2011) (applying Minnesota law); Am. Home Assurance Co. v. Cat Tech, LLC, 660 F.3d 216, 220 (5th Cir. 2011) ("An ambiguity is present if a 'policy is susceptible to two or more reasonable interpretations.'"); New Castle Cty. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 174 F.3d 338, 344 (3d Cir. 1999) ("An insurance policy is not ambiguous, however, merely because two conflicting interpretations may be suggested. Rather, both interpretations must reflect a reasonable reading of the contractual language.") (applying Delaware law); Mass. Bay Ins. Co. v. Am. Healthcare Servs. Ass'n, 172 A.3d 1043, 1061 (N.H. 2017) ("[F]or a policy to be construed to be ambiguous, it must be susceptible of two *reasonable* interpretations, one of which affords coverage to the insured." (Emphasis in original)).

[83] Marshall v. Kan. Med. Mut. Ins. Co., 73 P.3d 120, 130 (Kan. 2003) (emphasis added); *see also* Renasant Bank v. St. Paul Mercury Ins. Co., 235 F.

As with most other principles of insurance policy interpretation, this principle is as applicable to fidelity insurance as it is to other types of coverage.[84] In *Patrick Schaumburg Automobiles, Inc. v. Hanover Insurance Co.*,[85] for example, an Illinois federal court applied this rule to fidelity coverage. In *Patrick Schaumburg,* the insured argued that "direct loss" and "indirect loss" were ambiguous. The court analyzed the competing arguments, referred to decisions from other jurisdictions that concluded that the language was not ambiguous, found that the insured's proffered interpretations were less than reasonable, and concluded that, in the absence of more than one reasonable interpretation, the phrases were not ambiguous.[86] In *Abady v. Certain Underwriters at Lloyds London*,[87] the court similarly relied upon the principle that ambiguity requires "two reasonable interpretations" in concluding that "direct financial loss" was not ambiguous.[88]

XI.
TENTH COMMANDMENT:
IN THE CASE OF TRUE AMBIGUITY IN A COMMERCIAL INSURANCE POLICY . . .

A. Try to Discern the Parties' Intent and Expectations

The first rule of resolving a true ambiguity in an insurance policy is that the court should attempt to determine the intent and expectations of the parties through, for example, extrinsic evidence.[89] The application

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Supp. 3d 805, 817 (N.D. Miss. 2017) (applying principle to Form 24), *aff'd*, 882 F.2d 203 (5th Cir. 2018).

[84] *See, e.g.*, Lynch Props., Inc. v. Potomac Ins. Co. of Ill., 140 F.3d 622, 626 (5th Cir. 1998) ("If the provisions of the insurance contract can be given a definite or certain legal meaning, then the insurance policy is not ambiguous. Disagreement over the meaning or interpretation of a term is not sufficient to make a provision ambiguous or to create a question of fact." (Citations omitted)).

[85] 452 F. Supp. 2d 857 (N.D. Ill. 2006).

[86] *See id*. at 872.

[87] 317 P.3d 1248 (Colo. Ct. App. 2012).

[88] *See id*. at 1253.

[89] *See, e.g.*, M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127, 142 (2d Cir. 2005).

of strict "rules of interpretation" that do not address the intent and expectations of the parties is disfavored in a majority of jurisdictions.[90]

B. Consider that Both Parties are Likely Sophisticated

Commercial insurance, such as fidelity insurance, differs from mass-marketed general risk lines such as fire, life, theft, auto, etc., in that fidelity insureds are typically businesses that are sophisticated (or that one would expect to be sophisticated). This difference is critical when it comes to policy interpretation.

Because fidelity insureds are sophisticated businesses, these commercial policies are not adhesion contracts. In the standard "adhesion contract" scenario (such as the above-referenced, mass-marketed general risk lines), the big multi-billion dollar insurer has a standard policy form, "consisting largely of boilerplate terms proffered by sophisticated commercial entities and ordinarily accepted by professionally unsophisticated consumers."[91] As Professor Williston opined:

> The fundamental reason which explains this and other examples of judicial predisposition toward the insured is the deep-seated, often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance contracts with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. The established underwriter is magnificently qualified to understand and protect its own selfish interests. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a "take-it-or-leave-it" basis if he or she wishes insurance

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[90] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Wilson, 782 P.2d 727, 734 (Ariz. 1989); Playtex FP, Inc. v. Columbia Cas. Co., 609 A.2d 1087, 1092-93 (Del. Super. Ct. 1991); Cameron v. USAA Prop. & Cas. Ins. Co., 733 A.2d 965, 968 (D.C. 1995); Bailer v. Erie Ins. Exch., 687 A.2d 1375, 1378 (Md. 1997).

[91] Economy Premier Ins. Co. v. W. Nat'l Mut. Ins. Co., 839 N.W.2d 749, 754-55 (Minn. Ct. App. 2013).

> protection. In other words, insurance policies, while contractual in nature, are certainly not ordinary contracts, and should not be interpreted or construed as individually bargained for, fully negotiated agreements, but should be treated as contracts of adhesion between unequal parties. This is because, except perhaps in the case of group insurance, or other policies negotiated between large companies and insurers, insurance contracts are generally not the result of the typical bargaining and negotiating process between roughly equal parties that is the hallmark of freedom to contract.[92]

The law thus expects that the insurer will clearly and unambiguously lay out its coverage terms and conditions, and allows for those terms and conditions to be construed against the insurer if the insurer fails to do so.

These considerations do not exist where the insured is a sophisticated commercial entity. Customers of fidelity insurers often have risk managers, whose job is to handle and, importantly, *negotiate* insurance coverages and policy terms. They also may have attorneys, either in-house or outside counsel on retainer, who advise them on matters like policy language. Their volume of premium gives them the power to shop their business, obtain the most favorable terms, and participate in the drafting of policy language. It thus should not be a surprise that many courts

> do not feel compelled to apply, or, indeed, justified in applying the general rule that an insurance policy is construed against the insurer 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 business men, and represented by counsel on the same professional level as the counsel for

[92] 16 RICHARD LORD, WILLISTON ON CONTRACTS § 49:15 (4th ed. 2000).

> insurers. In substance the authorship of the policy is attributable to both parties alike.[93]

C. Interpret the Language of the Policy Against the Drafter Only as a Last Resort and Identify the "Drafter"

While reasonable people may disagree about the application of the rule of *contra proferentem*—that ambiguities in insurance policies should be interpreted against the drafter (usually, but not always, the insurance company)—to mass-marketed insurance policies, the courts have come into general agreement that *contra proferentem* is last on the list of rules of interpretation, to be invoked only when all else has failed. As one court explained:

> The rule of contra proferentem, when applicable, requires that ambiguity in a particular term of a contract be strictly construed against the drafter. But that doctrine, sometimes called a rule of "last resort," applies only where other secondary rules of interpretation have failed to elucidate the contract's meaning. Therefore, it is not a mechanistic device to be deployed whenever ambiguity arises. Rather, the doctrine's utility hinges upon the extent to which it is helpful in divining the intent of the contracting parties.[94]

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[93] Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1976).

[94] Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington, No. 19035, 2002 WL 418032, at *9 (Del. Ch. Mar. 12, 2002); *see also, e.g., M. Fortunoff*, 432 F.3d at 142; Penford Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 662 F.3d 497, 505 (8th Cir. 2011) (stating *contra proferentem* rule not applicable where the ambiguity could be resolved via extrinsic evidence); Viking Constr., Inc. v. 777 Residential, LLC, __ A.3d __, 190 Conn. App. 245, 254 (2019) ("In the event that an insurance policy term is deemed to be ambiguous, the parties are entitled to present extrinsic evidence regarding the mutual intent of the insured and the insurer as to the scope of coverage, and the trial court must consider that evidence before applying the rule of contra proferentem to resolve the ambiguity in favor of the insured. In other words, the rule should be applied as a tie breaker only when all other avenues to determining the parties' intent have been exhausted.").

Contra proferentem thus requires that courts be faithful to the rules described above, attempt to employ them first, and only resort to *contra proferentem* when all else fails. This basic tenet of insurance policy interpretation applies as much to interpretation of fidelity insurance and bonds as it does to any other insurance policy.[95]

Where a court cannot discern the parties' intent and expectations other than resorting to *contra proferentem*, the court must begin its analysis by identifying the drafter of the language in question. Courts should not simply construe the language against the insurer, assuming that the insurer was the drafter. As mentioned above, commercial insurance products such as fidelity insurance can be—and often are—the subject of negotiation, either as to the specific policy at issue or as to a standard form, generally.[96] Manuscripted policies are far from uncommon. Insurance brokers have the leverage to propose their own

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[95] *See, e.g.*, Resolution Trust Co. v. Fid. & Deposit Co. of Md., 205 F.3d 615, 643 (3d Cir. 2000) (applying New Jersey law, which is not considered to be "insurance friendly" and stating that "when the terms of an insurance contract are clear, it is the function of a court to enforce it as written and not make a better contract for either of the parties. Thus, we must not torture the language of a contract to create ambiguity where none exists in order to impose liability, and we must construe the words of an insurance policy so as to adhere to their ordinary meaning." (Citations omitted)); *see also* People Bank & Trust Co. v. Aetna Cas. & Sur. Co., 113 F.3d 629, 636 (6th Cir. 1997) (noting rule that blanket bond language should be construed in favor of insured does not apply where the language is not ambiguous or self-contradictory); Lynch Props., Inc. v. Potomac Ins. Co. of Ill., 962 F. Supp. 956, 961 (N.D. Tex. 1996), *aff'd*, 140 F.3d 622 (5th Cir. 1998) ("These rules of construction, however, apply only when the terms of the policy are ambiguous. The court will not alter the clear terms of an insurance policy or strain to find an ambiguity where none exists." (Citations omitted)).

[96] *See, e.g.*, Calcasieu Marine Nat'l Bank v. Am. Emp'rs Ins. Co., 533 F.2d 290, 295 (5th Cir. 1976) (describing a version of a bankers' blanket bond as "drafted by a joint effort of the American Bankers' Association and the American Surety Association"). In *Renasant Bank*, however, the Mississippi federal court refused to consider another version of Form 24 as having been drafted jointly by both industries, because the bond was based on a form of the Surety & Fidelity Association of America, and "[t]he SFAA is comprised of member surety and insurance companies . . . and has no bank members." Renasant Bank v. St. Paul Mercury Ins. Co., 235 F. Supp. 3d 805, 818 (N.D. Miss. 2017).

policy language and pressure insurers to accept it.[97] Similarly, insureds with unique needs may work with an insurer to customize a manuscript policy specifically tailored to address those needs.

Proper application of the *contra proferentem* "tie-breaker" therefore requires interpreting unclear language against the party that drafted it and, if the drafter is unclear, then the rule should not be applied at all. And various decisions in the commercial insurance context reflect that courts will not automatically interpret policy language against the insurer on a *contra proferentem* theory where the sophisticated insured participated in drafting the language.[98]

XII.
CONCLUSION

Interpretation of commercial insurance policies, such as fidelity insurance, does not involve the same considerations as the interpretation of mass-market liability insurance issued to individuals. While general rules of contract interpretation apply to all insurance policies, as to contracts in general, courts must recognize the specific circumstances involved in the commercial insurance context with which they are presented, such as equality of bargaining power or insured participation in the drafting of policy language. Only with such considerations can policies be read so as to fairly discern and give effect to the intent of the parties.

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[97] *See, e.g.*, Scott G. Johnson, *Resolving Ambiguities in Insurance Policy Language*, THE BRIEF 33, 36 (Winter 2004).

[98] *See, e.g.*, *Penford Corp.*, 662 F.3d at 505 (noting construction against insurer not appropriate where the evidence "is equivocal on the identity of the drafter of the policy form, given the back-and-forth nature of the drafting process and the relatively equal bargaining power of the parties"); Cummins, Inc. v. Atl. Mut. Ins. Co., 867 N.Y.S.2d 81, 82 (App. Div. 2008) (holding construction against insurer not appropriate where insured "was instrumental in crafting various parts of the agreement" and had equal bargaining power and acted like an insurance company by maintaining a self-insured retention); Union Pac. R.R. v. Certain Underwriters at Lloyd's London, 771 N.W.2d 611 (S.D. 2009) (noting rule of construction against insurer did not apply where insured was a sophisticated party with insurance brokers hired to negotiate policy terms, and where policy terms were negotiated and agreed jointly by the parties).