**Docket No. 20-cv-56020**

*In the*

# United States Court of Appeals

*for the*

# Ninth Circuit

PLAN CHECK DOWNTOWN III, LLC, a California limited liability company and others similarly situated,

*Plaintiff-Appellant,*

v.

AMGUARD INSURANCE COMPANY, a Pennsylvania company, and DOES 1 through 20,

*Defendant-Appellee.*

*Appeal from a Decision of the United States District Court for the Central District of California, No. 2:20-cv-06954 · Honorable George H. Wu*

# BRIEF OF APPELLANT

KATHRYN LEE BOYD
HECHT PARTNERS LLP
6420 Wilshire Boulevard, 14th Floor
Los Angeles, CA 90048
(646) 502-9515 Telephone
(646) 492-5111 Facsimile
lboyd@hechtpartners.com
*Attorneys for Appellant, Plan Check Downtown III, LLC, a California limited liability company and others similarly situated*

**DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 and Ninth Circuit LAR 26.1, Plan Check Downtown III, LLC declares that it has no parent corporation and no publicly traded corporation currently owns 10% or more of its stock.

Dated: February 5, 2021

By: /s/ Kathryn Lee Boyd

Kathryn Lee Boyd (SBN 189496)
Hecht Partners LLP
6420 Wilshire Boulevard, 14th Floor
Los Angeles, CA 90048
(646) 502-9515 Telephone
(646) 492-5111 Facsimile
lboyd@hechtpartners.com

*Attorneys for Appellant Plan Check Downtown III, LLC, and others similarly situated*

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## INTRODUCTION

In this insurance coverage dispute, the district court recognized that Appellant Plan Check Downtown III, LLC's ("Plan Check") interpretation was "not inconceivable" based on the plain language of the policy issued by Appellee AmGuard Insurance Company ("AmGuard") and applicable canons of contract interpretation. That should have been the end of the inquiry under California's well-established *contra proferentem* rule, and AmGuard's motion to dismiss should have been denied. Yet the district court nevertheless dismissed the complaint based on a range of hypothetical policy consequences that, it asserted, render Plan Check's policy interpretation unreasonable – even if conceivable.

For this Court, correcting that misapplication of California rules of policy interpretation is a straightforward error-finding exercise. Not only did the district court's decision rest on an inappropriate legal basis, its imagined consequences, when analyzed in detail, are not in fact threats in policy or reality. All of its proffered scenarios not only could be addressed by changing definitions in the policy forms – which insurers frequently do – but in fact are already addressed in *this* policy.

In addition, the district court, and other district courts in this Circuit and around the country, appear to have given in to certain analytical errors out of concern for imposing a heavy burden on the insurance industry. But such

weighing of policy is for legislatures, not the courts. Fear of the consequences of correct policy interpretation is not the relevant inquiry here, and, if anything, the equities point in the opposite direction, with a restaurant industry devastated by the pandemic and left holding all the risk by both government and its carriers. Despite the circumstances leaving Plan Check with a heavy loss *and* having a reasonable interpretation of the policies on offer, it is *still* being left out in the cold. Indeed, if it is considered at all, policy points toward coverage here.

Finally, the district court did not reach the issue of the policy's virus exclusion and therefore neither should this Court. We address it here out of an abundance of caution. It does not bar recovery because of the efficient proximate cause doctrine.

Accordingly, the judgment should be reversed and remanded.

## JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction in this case pursuant to 28 U.S.C. § 1332 because Plan Check is a California limited liability company and AmGuard is a Pennsylvania insurance company. (2-ER-035 ¶¶ 8-10.)

This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's dismissal of this action for failure to state a claim is a final judgment. The district court issued a tentative ruling dismissing Plan Check's complaint on September 10, 2020. (1-ER-003-11.) On September 17, 2020, the district court

adopted its tentative ruling as its final decision and dismissed the complaint with prejudice. (1-ER-012.)

## STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum to this brief.

## ISSUES PRESENTED

Did the district court err in holding that Plan Check's loss of its restaurant to sit-down service was not "physical loss of or damage to" covered property because the property was not tangibly altered, a standard appearing nowhere in the Policy, and despite acknowledging that this leaves the Policy without distinct meanings for the words "loss" and "damage"?

## STATEMENT OF THE CASE

### A. The Policy

Plan Check operates two popular restaurants in Los Angeles. (2-ER-035.) It timely paid all premiums for, and performed all duties required of it under, a "Businessowner's" commercial property and general liability insurance policy (2-ER-056-212) (the "Policy") issued by Defendant for the period February 27, 2020 to February 27, 2021 (2-ER-036; 2-ER-064 ¶ 3).

The Policy is a comprehensive Businessowner's Policy issued by AmGuard to provide a variety of property and liability coverages. At issue in this case is the property coverage, which is "all-risk" in nature, *i.e.*, it covers all risks of physical

loss or damage unless expressly subject to an exclusion or limitation. (2-ER-036 ¶ 16.) Covered Cause of Loss is, therefore, defined to include "risks of direct physical loss unless the loss is: a. Excluded in Paragraph B. Exclusions in Section I; or b. Limited in Paragraph 4. Limitations in Section I." (2-ER-219 § I.A.3.)

Section I.A.5.f.(1)(a) of the Policy, "Business Income," provides in relevant part that:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. (2-ER-222.)[1]

The Policy defines "Covered Cause of Loss" to exclude "loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (2-ER-234 § (B)(1)(j)(1).)

### B. COVID-19 and Related Closure Orders

In late 2019 and early 2020, COVID-19 and the virus that causes it spread to

[1] Section I.A.5.f.(3) provides that "With respect to the coverage provided in this Additional Coverage, suspension means: (a) The partial slowdown or complete cessation of your business activities; or (b) That a part or all of the described premises is rendered untenantable, if coverage for Business Income applies." (2-ER-223-24.) The terms "physical," "loss," and "damage" are not defined.

the United States. On January 26, 2020, the CDC confirmed the first COVID-19 case in California, and on January 30, 2020, the World Health Organization declared a "public health emergency of international concern." (2-ER-039 ¶ 30.)

On March 15, 2020, Los Angeles Mayor Eric Garcetti issued a "Public Order under City of Los Angeles Emergency Authority" which, among other things, prohibited restaurants from serving individuals food and alcohol on their premises where individuals would not be socially distanced. (2-ER-267-69.) On March 19, 2020, the Governor of California issued an order requiring residents to stay in their homes. The Mayor of Los Angeles then issued a similar stay-at-home order, which required restaurants to close to in-person dining (2-ER-274-83) (all three collectively the "Orders"). Plan Check indeed closed its two restaurants to dine-in service and, consequently, suffered a loss of business income. (2-ER-040 ¶ 39.)

### C. Appellant's Insurance Claim and Respondent's Denial

After suspending its restaurant operations, Plan Check submitted a claim to AmGuard by phone for the income it had lost as a result of the Orders. (2-ER-042 ¶ 50.)

On April 8, 2020, AmGuard responded by letter denying coverage. (*Id.* ¶ 52.) AmGuard's denial incorrectly assumed the claim was based solely on the

Civil Authority provision of the Policy, and it denied the claim solely based on the virus exclusion. (*Id.*)

### D. Procedural and Appellate History

Plan Check filed the instant action on June 16, 2020 in the Superior Court of California, Los Angeles County. AmGuard removed it to the U.S. District Court for the Central District of California on July 31, 2020 and moved to dismiss on August 7, 2020 under Fed. R. Civ. P. 12(b)(6). (2-ER-014-311; 3-ER-336-38.)

Briefing of the motion to dismiss concluded on September 4, 2020. The district court issued a tentative ruling dismissing the complaint on September 8, 2020, on the basis that it did not plead "direct physical loss of or damage to" property. (1-ER-003-11.) Oral argument took place by phone before the Hon. George H. Wu on September 10, 2020. (1-ER-002.) On September 17, 2020, the district court adopted its tentative ruling and dismissed the complaint with prejudice. (1-ER-012.)

Acknowledging Plan Check's emphasis on giving the terms "loss of" and "damage to" different meanings, and "the principle that in interpreting insurance policies, a court should give effect to every part of the policy with each clause helping to interpret the other,"[2] the district court noted that Plan Check's interpretation was "not inconceivable," but nevertheless adopted AmGuard's

[2] Internal quotation omitted.

interpretation of the phrase "direct physical loss of or damage to" property as requiring a "tangible alteration" of the property itself. In doing so, the district court acknowledged that it was creating some redundancy. (1-ER-006-08.) The district court expressed its belief that "loss of" and "damage to" are intended as "default, catch-all terms for referring to what the insured is protected against" (1-ER-007), rather than terms with separate and independent meanings. In support of its finding that Plan Check's interpretation of the phrase "direct physical loss of or damage to Covered Property" is unreasonable, the district court proposed several hypothetical scenarios discussed in greater detail below, noting that "[w]hile Plan Check may believe that [coverage in each situation] is an appropriate result, the Court is not persuaded." (1-ER-010.)

Plan Check timely filed a Notice of Appeal on September 30, 2020. (3-ER-412-14.)

## SUMMARY OF THE ARGUMENT

Under California law, insurance policies are interpreted broadly to protect the objectively reasonable expectations of the insured. Where the insurer and insured both offer reasonable readings of the policy language, the policyholder's reasonable expectation of coverage controls under the *contra proferentem* rule. California courts have defined reasonableness broadly to include any construction which is "semantically permissible." Part of determining which policy

constructions are reasonable is the rule that courts should give every word in a contract an independent meaning.

Plan Check is insured by Appellee AmGuard for loss of business income arising from "direct physical loss of or damage to" its restaurant property. When state and city governments ordered the restaurant's closure to dine-in traffic soon after the onset of the coronavirus pandemic, Plan Check sustained a physical loss of the property. The loss was physical in nature not because it was altered, but because the property was no longer available for human beings to enter the restaurant and be served food: the premises were lost for the duration of the Orders. The terms "physical" and "loss" at issue here are not defined in the policy and both have broad plain-language meanings. While AmGuard argues that Plan Check did not experience "direct physical loss of or damage to" its property unless it can show a tangible alteration of the property's structure, this reading conflates the definition of "loss" with the definition of "damage" and deprives them of separate meaning. Moreover, AmGuard's reading of case law it contends imposes the tangible alteration standard is incorrect, and the cases enact no such blanket requirement. Plan Check's reading of the policy is at least reasonable, as the district court essentially acknowledged.

The district court's decision was in error because it acknowledged that Plan Check's interpretation of the policy was conceivable and yet declined to follow it, in violation of California rules of policy construction. The district court also relied on a number of hypothetical scenarios which it contended were improper consequences of Plan Check's reading. This, however, ignores insurers' ability to modify their policy forms to head off such problems – and, indeed, several of the court's hypotheticals are already addressed in the policy issued to Plan Check by AmGuard. The language of the Policy controls, and it creates a reasonable expectation of coverage on these facts.

The district court did not reach the separate issue of the applicability of the virus exclusion in the policy, and this Court need not, and should not, do so either in the absence of a decision below. However, if this Court should see fit to decide the issue, it should follow the many California cases holding that, where multiple causes contribute to a loss, the efficient proximate cause doctrine dictates that a jury should determine which was the "predominant" cause. Insurers are not permitted to contract around this rule.

Accordingly, the district court's order granting the motion to dismiss should be reversed.

## STANDARD OF REVIEW

The standard of review on a Rule 12(b)(6) dismissal is *de novo*. *See, e.g.*, *Manzarek v. St. Paul Fire & Marine Ins. Co*., 519 F.3d 1025, 1030-31 (9th Cir. 2008).

## ARGUMENT

### A. The District Court Violated the *Contra Proferentem* Rule in Interpreting the Policy

Under California law,[3] insurance policies are to be interpreted broadly, protecting the objectively reasonable expectations of the insured. This is a result of the *contra proferentem* rule: the insurer drafts policy language, leaving the insured little or no meaningful opportunity or ability to bargain for modifications. *See AIU Ins. Co. v. Superior Ct.*, 799 P.2d 1253, 1264 (Cal. 1990); *see also Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 888-89 (Cal. 1995) (ambiguous language to be construed against insurer who caused it to exist); *Bareno v. Emps. Life Ins. Co. of Wausau*, 500 P.2d 889, 890 (Cal. 1972) (discussing importance of clear and careful draftsmanship of insurance policies); Restatement (Second) of Contracts § 206 cmt. a (agreements should be read against their drafters, who are "likely to provide more carefully for the protection of [their] own interests than for those of the other party").

[3] The parties agreed before the district court that the policy was governed by California law. (1-ER-004.)

A policy provision is ambiguous when it can have two or more reasonable constructions. *See Safeco Ins. Co. of Am. v. Robert S.*, 28 P.3d 889, 893 (Cal. 2001). Accordingly, when a policy is susceptible of more than one interpretation, a court is not permitted to weigh which is the more reasonable or "select one 'correct' interpretation from the variety of suggested readings. To [find] in favor of claimants, we need not determine that the [ ] interpretations proposed by the insurer are not possible, or even reasonable, interpretations of the clause in question. . . . Instead, even assuming that the insurer's suggestions are reasonable interpretations which would bar recovery by the claimants, we must nonetheless [find] coverage so long as there is any other reasonable interpretation under which recovery would be permitted in the instant cases." *State Farm Mut. Auto. Ins. Co. v. Jacober*, 514 P.2d 953, 958-59 (Cal. 1973); *see also Palacin v. Allstate Ins. Co.*, 14 Cal. Rptr. 3d 731, 734-35 (Cal. Ct. App. 2004) (insured's construction of the policy applies unless negated beyond reasonable controversy).

The district court distinguished between interpretations which are conceivable, as it characterized Plan Check's reading of the policy, and those which are reasonable – a distinction which does not appear in the case law. (1-ER-004.) Rather, "reasonableness" under these rules has a broad scope: where a reasonable person in the position of the insured could interpret a policy provision both for and against coverage, the policyholder wins. *See State of Cal. v. Cont'l*

*Ins. Co.*, 281 P.3d 1000, 1004-05 (Cal. 2012). This is so in any case where the insured's construction is "semantically permissible." *Nat'l Auto. & Cas. Ins. Co. v. Underwood*, 11 Cal. Rptr. 2d 316, 319 (Cal. Ct. App. 1992) (quoting *Reserve Ins. Co. v. Pisciotta*, 640 P.2d 764, 767-68 (Cal. 1982)). The purpose of crediting the policyholder's interpretation of the policy is to "protect the objectively reasonable expectations of the insured." *See Minkler v. Safeco Ins. Co.*, 232 P.3d 612, 615-16 (Cal. 2010) (quoting *Bank of the W. v. Superior Ct.*, 833 P.2d 545, 552 (Cal. 1992)).[4]

As the district court recognized – but set aside – in this case, each word used in a clause of an insurance contract should be presumed to have been used because it has a separate meaning. Interpretations which create surplusage violate this rule. (*See* 1-ER-007.) *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 839-40 (Cal. Ct. App. 1993) ("The way we define words should not produce redundancy, but instead should give each word significance. . . . If a covered pollution has to be 'a sudden, unintended and unexpected happening,' then we

[4] In *Minkler*, the Supreme Court of California answered a policy interpretation question certified to it by this Court. Plan Check is aware that the plaintiff in *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America*, No. 20-16858 (Dkt. No. 16 at 38-48), has asked this Court to certify the question, also at issue here, of whether COVID-19 closures constitute "direct physical loss of or damage to" property. Plan Check does not oppose this request, and would be pleased to proceed before the Supreme Court of California. However, because this Court has frequently interpreted insurance policies, Plan Check acknowledges that it could in its discretion decide this case without certification, and therefore focuses on the policy interpretation question at hand.

must distinguish 'sudden' from 'unexpected' and 'unintended.'"); *Total Intermodal Servs., Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 17-cv-04908 AB (KSx), 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018) (failure to give separate meaning to "physical loss of" and "damage to" would violate "a black-letter canon of contract interpretation – that every word be given a meaning"); *Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1 SEA, 2020 WL 6784271, at *2 (Wash. Super. Nov. 13, 2020) ("physical loss of" and "physical damage to" must have different meanings as applied to COVID-19 business income coverage); *N. State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Oct. 9, 2020) (same). Where an insurer's interpretation violates this rule, the policy may fairly be read as susceptible of the policyholder's interpretation. *See Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 20-cv-01239, 2021 WL 168422, at *10 (N.D. Ohio Jan. 19, 2021) (policyholder interpretation distinguishing "physical loss of" from "damage to" property credited in COVID-19 context).

In sum, where the insured's interpretation of the policy is "semantically permissible," it creates a reasonable expectation of coverage that must be protected against the imprecations of the insurer-draftsman. An insured's reasonable expectation of coverage may be created by the insurer's interpretation violating a canon of construction such as the rule giving each word separate meaning.

### B. Plan Check's Interpretation of "Direct Physical Loss of or Damage to" Property Is Reasonable

The central question in this case is whether the closure of Plan Check's restaurant to dine-in service due to pandemic restrictions constitutes "direct physical loss of or damage to" property. The district court dismissed Plan Check's complaint solely on this basis.

None of the words "direct," "physical," "loss" or "damage" is a defined term in the Policy. Under California law, therefore, they carry their ordinary and popular meaning. *See Am. Alternative Ins. Corp. v. Superior Ct.*, 37 Cal. Rptr. 3d 918, 922-23 (Cal. Ct. App. 2006) ("We interpret words in accordance with their ordinary and popular sense"). If application of that ordinary and popular meaning yields more than one possible meaning, ambiguity exists and the insured's interpretation controls. *See, e.g., EOTT Energy Corp. v. Storebrand Int'l Ins. Co.*, 52 Cal. Rptr. 2d 894, 900-01 (Cal. Ct. App. 1996) (where ordinary and popular meaning of "occurrence" did not resolve coverage question, insured's expectation of coverage protected); *Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, 239 Cal. Rptr. 3d 416, 421 (Cal. Ct. App. 2018) (insured reading policy would understand property uninhabitable as a result of a noxious stench to have been lost).

The meaning of the term "direct" was not disputed below. It is uncontroversial that Plan Check suffered a direct loss: no significant intervening

events occurred between the Orders and Appellant's having to close to on-premises dining. The issue, then, is whether Plan Check experienced "physical loss of or damage to" its property.

On its face, the adjective "physical" has an expansive meaning. Dictionary definitions include "having material existence," "perceptible especially through the senses and subject to the laws of nature," "of or relating to material things."[5] *See also Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 800 (W.D. Mo. Aug. 12, 2020) (using similar dictionary definition of "physical"). The absence of diners who would have entered Plan Check's restaurant but for the restrictions imposed by the city and state is, by these definitions, a physical phenomenon.

For coverage to apply, Plan Check must have suffered a "physical loss of" its property. Here, the loss of the property *vis-à-vis* indoor dining is physical – corporeal restaurant patrons used to sit at tables and now they do not. The Policy does not require, for example, a "loss of physical elements of the covered property." *See Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 654-56 (Cal. Dist. Ct. App. 1962) ("common sense requires" rejection of insurer's reading of all-risk policy to require "tangible injury to the physical structure itself" absent "a provision specifically limiting coverage in this manner"). Indeed, the Policy

[5] Merriam-Webster, online ed. "physical" https://www.merriam-webster.com/dictionary/physical, last visited Feb. 1, 2021.

contains, as part of the liability coverage part of the Businessowner's Policy (2-ER-262 § II.F.17), a definition of "property damage" which requires "physical injury to tangible property." The Policy's drafters knew how to include such a requirement, but chose not to do so in the Business Income coverage.

That plain meaning is enhanced by the juxtaposition of physical "loss of" property with physical "damage to" that same property. This requires an interpretation with room for some category of insurable event which is physical loss but not physical damage. Otherwise, the term "damage" is rendered surplusage. *See Studio 417*, 478 F. Supp. 3d at 800 (where plaintiff hair salon and restaurants sought coverage after COVID-19 shutdown, defendant insurer's argument failed because the court must give meaning to all policy terms and insurer "conflate[d] 'loss' and 'damage' in support of its argument that the Policies require a tangible physical, alteration"); *Henderson Rd.*, 2021 WL 16842 at *10 (insured restaurant shut down in pandemic argued physical loss of real property means something different than damage to real property, "and this is a valid argument. Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction 'or'? . . . The Policy's language *is* susceptible to this interpretation." (emphasis original)). Tangible alteration of property is already captured by the word "damage." Put another way, Plan Check paid a premium for

coverage of both "loss" and "damage," and making those terms equivalent deprives it of one or the other.

The district court, startlingly, acknowledged that it was accepting the insurer's interpretation in this matter as the *only* reasonable interpretation despite that it offered no explanation for "loss" and "damage" having the same meaning. The district court explained this by asserting that "'loss' and 'default' are the default, catch-all terms for referring to what the insured is protected against," citing Black's Law Dictionary and Couch on Insurance. (1-ER-006-07.) This is essentially an acknowledgment that the insurer's interpretation vitiates what the *Total Intermodal* court termed a "black-letter" rule of construction. Moreover, it ignores the distinction between the prepositions "of" and "to," which are paired with the words "physical" and "damage," respectively. "Loss to" a property could conceivably present as a term-of-art "triggering" phrase unique to insurance, as it would be rare to hear those two words used together outside triggering language in an insurance policy. "Loss of" something, however, has a plain and ordinary meaning. *See Total Intermodal*, 2018 WL 3829767, at *3 (discussing significance of the preposition "of" in the phrase "loss of" property, which contemplates property "misplaced and recoverable, without regard to whether it was damaged").

More fundamentally, even if this Court were to accept that the phrase "physical loss of or damage to" is just a set of "trigger words," the plain meaning

of which is to be set aside – which is not the law – that lack of meaning would only render the phrase ambiguous, which in any event tilts the claim in favor of Plan Check.

The district court, in support of its reading of "loss of or damage to" as indistinct "trigger language," cited *Flintkote Co. v. General Accident Assurance Co.*, 410 F. Supp. 2d 875 (N.D. Cal. 2006). In that case, the court considered definitions of the terms "additional insured" and "affiliated corporation" (of a named insured), which could both cover a parent corporation. *Id.* at 890. Rather than two separate definitions both independently applying to the same party by virtue of their overlapping conceptual content – as in *Flintkote* – this case concerns a *single* clause which juxtaposes two words, one of which in the district court's view has *no* independent meaning.

The district court then went on to hold, as AmGuard urged and as other courts have held (*see* discussion *infra*), that California law "appears to require some tangible alteration" for property claims. (1-ER-008.) The district court cited *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.,* 187 Cal. App. 4th 766 (Cal. Ct. App. 2010), *Simon Marketing, Inc. v. Gulf Insurance Co.*, 149 Cal. App. 4th 616, 623 (Cal. Ct. App. 2007), and *Ward General Insurance Services, Inc. v. Employer's Fire Insurance Co.*, 114 Cal. App.

4th 548, 556 (Cal. Ct. App. 2003), *as modified on denial of reh'g* (Jan. 7, 2004). But *MRI Healthcare*, *Simon*, and *Ward* do not require this outcome.

In *Ward*, the California Court of Appeal confronted a claim for "direct physical loss of or damage to" a computer system that had lost data. The court denied coverage on the ground that information in a database was not "physical" and therefore could not be the subject of "physical loss." 114 Cal. App. 4th at 554. *MRI Healthcare* involved a claim for an MRI machine that ceased to turn on when the switch was thrown. No physical change to the machine of any kind could be found. The policy at issue in *MRI Healthcare* required an "accidental direct physical loss" to trigger coverage. Because the triggering language did not include the word "damage," the court was not forced to read "loss" as having distinct meaning from "damage." Confronting nevertheless the "serious questions [that] crop up in instances when the structure of the property itself is unchanged to the naked eye and the insured claims its usefulness for normal purposes has been destroyed or reduced," the *MRI Healthcare* court concluded that the machine's failure "emanated from the inherent nature of the machine itself . . . ." 187 Cal. App. 4th at 780. Reasoning that "physical" losses may not be "intangible or incorporeal," the court thus held that no coverage was available. *Id.* at 779. Finally, *Simon* involved the cancellation of services contracts, and the court

observed that those may not even be "property," let alone property affected by a "physical loss." 149 Cal. App. 4th at 623.

The district court cited the *MRI Healthcare* court's additional remark that for a "loss" to have occurred, "some external force must have acted upon the insured property to cause a physical change in the condition of the property, *i.e.*, it must have been 'damaged' within the common understanding of the term." (1-ER-008.) Application of this *dictum* in the case at bar, and those like it, is misguided.

First, because only the word "loss" was included in the policy, the *MRI Healthcare* court could use "loss" and "damage" interchangeably. But the different policy language here offers AmGuard no such escape. Put another way, the *MRI Healthcare* policy *did* make "loss" and "damage" the same thing, while AmGuard's policy here does the opposite. An opposite result should follow.

Second, the *MRI Healthcare* court did not necessarily seek to state this as the rule in every kind of case with every kind of policy language. Rather, the "external force" formulation is meant to exclude the MRI machine, the lack of function of which had no obvious origin. By contrast, there is a ready physical manifestation of Plan Check's loss of its premises: the lack of patrons in it. That is to say, the loss is physical, though it may not leave the structure itself tangibly changed.

In fact, the California case law on this question predating the COVID-19 pandemic is strikingly consistent. Only "intangible or incorporeal" losses are excluded by the use of the modifier "physical" to describe "loss," and this is heightened by use of "damage" in addition to "loss." *Ward* demonstrates this, as does another case cited in the *MRI Healthcare* opinion. *See State Farm Fire & Cas. Co. v. Superior Ct.*, 264 Cal. Rptr. 269, 274-75 (Cal. Ct. App. 1989) (rejecting "physical loss" where insured home was inadequately fire- and earthquake-proofed due to faulty workmanship by the builder which predated insurance because diminution in market value is a measure of damages, not an insured peril). Plan Check's is not a loss of the ability to pledge property as collateral, or of the loss of a contract as in *Simon* – those are intangible, non-physical losses like the ones in *MRI Healthcare*, *Ward*, and *State Farm*.[6] Plan Check's shutdown from the Orders instead involves whether customers may enter a physical restaurant and how many feet apart they have to sit while they eat.[7]

[6] The same is true of *Meridian Textiles, Inc. v. Indemnity Insurance Co. of North America,* No. 06-cv-4766 CAS, 2008 WL 3009889, at *4 (C.D. Cal. Mar. 20, 2008), cited by AmGuard below. In that case, some yarn from a shipment was burned, but the disputed claim was only for the loss of salability of the *non-burned* portion because it had "reputational" issues.

[7] "Property," of course, is a bundle of rights. For a restaurant, the most important part of the property it owns is its right to sell food and service to patrons, lost here. *See Studio 417*, 478 F. Supp. 3d at 801 (even absent a physical alteration, loss may occur when property is uninhabitable or unusable for its intended purposes) (citing cases).

The district court's reading, and the one promoted by AmGuard and other insurers – that "physical loss of or damage to property" cannot occur without tangible alteration to property – is not necessary for any of these results. Only exclusion of the "intangible" and "incorporeal" is. This case falls in between.

The district court and AmGuard's standard would, however, vitiate *Total Intermodal* and *Hughes*.

In *Total Intermodal*, a shipment of goods to the insured was mistakenly marked as having arrived empty and then sent back to China, making it unrecoverable. The carrier argued, as AmGuard does here, that "physical loss or damage" is covered only if the property is physically damaged, "implying that property that is merely lost but not damaged is not covered." *Id.*, at *4. The court rejected the carrier's argument, focusing especially on the policy's use of the preposition "of." "Loss of" a shipment includes "dispossession of something," not merely the physical damage urged by the carrier. *Id.*, at *3-4 (distinguishing *Ward* and *MRI Healthcare* as having turned on "loss to" language). Requiring a tangible alteration to the shipment itself would reverse the result. It is the *loss* that must be physical, but that does not imply physical alteration of the *property*.

The district court distinguished *Total Intermodal* by emphasizing that Plan Check's loss is not "permanent," as was Total Intermodal's loss of its cargo. But, as with *MRI Healthcare* and *Ward*, nothing in the circumstances of *Total*

*Intermodal* requires this, and this scrap of descriptive language need not control here. The plain meaning of "loss" does not connote permanence. It requires dispossession. One can lose one's wallet without losing hope that it may be returned. Nothing in the Policy requires or references permanent loss. *Cf. Blue Springs Dental Care, LLC v. Owners Ins. Co*., No. 20-CV-00383-SRB, 2020 WL 5637963, at *5 (W.D. Mo. Sept. 21, 2020) (a "suspension" not defined in a policy does not have to be "total or complete" to qualify as a suspension).

*Hughes* is even more explicit. There, a landslide took a large chunk out of ground underlying the insured's property and left a house hanging over a cliff. The house was not tangibly altered, but the court still found physical loss to the dwelling, reasoning that requiring a tangible injury to the physical structure itself "would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another." 18 Cal. Rptr. 650, 654-55.[8] Rather than so depart from the "common sense" expectations of a policyholder, the court declined to endorse a reading that would prevent coverage even though the home had been placed in a state whereby no "rational

[8] By the same token, the district court's remark that, unlike under the cargo policy in *Total Intermodal*, Plan Check should not expect coverage for dispossession of its restaurant, is misplaced. (1-ER-009.) An insured can, in fact, be dispossessed of their physical space, as in the example given by the *Hughes* court or Plan Check's situation, and therefore can reasonably expect to be insured for such dispossession where "loss of" the property is covered.

persons would be content to reside there." *Id.* at 654-66; *see also Cooper v. Travelers Indem. Co. of Ill.*, No. 10-cv-2400-VRW, 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002) (health department shutdown of restaurant due to presence of E. coli in well water covered despite lack of any physical damage).

The "tangible injury" requirement is not necessary to *MRI Healthcare*, *Ward*, or *State Farm*, and is incompatible with *Total Intermodal* and explicitly rejected by *Hughes*. It is synonymous with "damage," and fails to give independent meaning to "loss" and "damage" under the Policy. Finally, it does not account for the pairing of "loss" with "of" and "damage" with "to." The Policy even uses the "tangible alteration" formulation elsewhere, but not in the operative language here. With all these factors pointing toward Plan Check's reading, it cannot be said that it is not at least reasonable for the insured to expect coverage in these circumstances.

### C. The Analysis of the District Court and of Other District Courts Confronting Related Issues Is Untenable

Plan Check is not unmindful of various decisions of federal courts rejecting coverage for businesses affected by the COVID-19 pandemic. Respectfully, however, these courts make a small number of analytical errors which have been repeated a number of times in cascading fashion. This Court, in its *de novo* review, need not perpetuate them. Indeed, several courts, including in California,

have denied motions to dismiss pleadings under similar circumstances. *See, e.g.*, *Henderson Rd.*, 2021 WL 168422; *Hill & Stout*, 2020 WL 6784271; *N. State Deli*, 2020 WL 6281507; *Best Rest Motel Inc. v. Sequoia Ins. Co.*, No. 37-2020-00015679-CU-IC-CTL, 2020 WL 7229856 (Cal. Super. San Diego Cnty. Sept. 30, 2020) (denying demurrer).

As discussed, the district court acknowledged the intuitive appeal of Plan Check's reading, but rejected it nonetheless. Its principal basis for doing so was policy concern: Plan Check's conceivable interpretation would supposedly present a major expansion of insurance coverage without manageable boundaries. (1-ER-009.) Notably, none of the extant case law would have restricted Plan Check's coverage as did AmGuard and the district court; thus it is the district court's dismissal here that altered the scope of available coverage under the policy. AmGuard, of course, also retains the ability to modify its policies if it does not like the result of its language.

But even on its own terms, the district court's analysis is misguided insofar as none of its parade of horribles would come to pass even on the face of this coverage. Specifically, the district court believed it impracticable for an all-risk policy to anticipate a variety of scenarios which are proposed in its opinion. (1-ER-010.) Each, however, is already dealt with in the Policy.

- The district court's scenarios 1 and 2, in which government edicts change permitted occupancy or hours for restaurants on an ongoing basis, would not trigger coverage since both of these scenarios are already excluded by the "law or ordinance" exclusion of the Policy. (2-ER-232.)
- The third scenario, in which a city issues a mandatory evacuation order to all of its residents due to nearby wildfires, but lifts the order three weeks later without any destruction of property, might not be "direct" loss, depending upon the circumstances. The district court notes that "a consequence" of such an order would be business suspension, but only indirectly so; here, the Orders *themselves* instructed Plan Check to shut down. Were the suspension in this scenario a direct one, though, coverage would apply and properly so.
- A snowstorm interfering with outdoor service is explicitly anticipated in the Policy. Snow is one of the "limitations" in the Policy – showing that it would otherwise be covered, and that even in all-risk policies, carriers are fully capable of carving out risks. (2-ER-219 at A.4.a.(5).)
- An elevator malfunction that prevented diners from accessing a restaurant would not be covered either. First, the district court says, strangely, that this would "interfere with permitted physical activities." (1-ER-010.) But permission would have nothing to do with it. The

distinction matters. Like an evacuation order which deprives a restaurant of customers, the intercession of the elevator problem renders this not a direct loss (except perhaps to the elevator itself, which, depending on the circumstances, might be suffering a problem as incorporeal as that in *MRI Healthcare* or *Ward*). Plan Check, however, was directly ordered not to use its space for diners.

- The district court's hypothetical in its footnote no. 6 (1-ER-010) posits that a rule changing the use of restaurant booths from a maximum of six to four occupants would not render the structure useless. This would not constitute a "loss" of anything, and, again, would probably be barred as a law or ordinance.

At bottom, AmGuard could have unambiguously preserved its "tangible alteration" standard by simply inserting that language into its policy form. Again, it knew how to do so, as the *MRI Healthcare* case on which it relies is a decade old and, more to the point, the Policy has a variant on this language written in to the liability coverage. The notion that the court must disregard an otherwise reasonable (conceivable) reading of the policy to protect AmGuard not only is contrary to the law, it is unjustifiable on the facts.

Other courts have similarly ignored the fundamental problem of giving "loss" a separate meaning from "damage," and fallen prey to the "tangible

alteration" standard discussed above. This is not a necessary consequence of the California cases, and thus cannot be viewed as rendering Plan Check's expectation of coverage unreasonable. *10E, LLC v. Travelers Indemnity Co.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 6749361 (C.D. Cal. Nov. 13, 2020), in particular, makes this mistake, and has been followed by several cases citing or quoting *10E* and thereby repeating it. *See Pappy's Barber Shops, Inc. v. Farmers Grp.*, No. 20-cv-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co.*, No. 2:20-cv-04423-AB-SK, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, No. 20-cv-3619 PSG (Ex), 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020); *Selane Prods., Inc. v. Cont'l Cas. Co.*, No. 2:20-cv-07834-MCS-AFM, 2020 WL 7253378 (C.D. Cal. Nov. 24, 2020); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, No. 2:20-cv-05663-VAP-DFMx, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020); *VStyles Inc. v. Cont'l Cas. Co.*, RIC2003415 (Cal. Super. Ct. Riverside Cnty. Dec. 23, 2020).

Other cases acknowledge, citing *Total Intermodal*, that a demonstrable alteration of the property itself is *not* necessary in this situation. *See Mudpie, Inc. v. Travelers Cas. Ins. Co.*, No. 20-cv-03213-JST, 2020 WL 5525171, at *3 (N.D. Cal. Sept. 14, 2020); *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, No.

20-cv-01713-CJC(JDEx), 2020 WL 6865774, at *3 (C.D. Cal. Nov. 12, 2020); *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.*, No. 20-cv-05441-CRB, 2020 WL 7247207, at *3 (N.D. Cal. Dec. 9, 2020). However, these courts postulate that, like the goods in *Total Intermodal*, lost property which is not tangibly altered must be the subject of a "permanent dispossession" – not so, as addressed *supra*.

Ultimately, it is the policy language that must control. Where "loss" is distinct from "damage," in an all-risk business income policy, it gives rise to a reasonable expectation of coverage where a restaurant loses its physical premises for dining-in to coronavirus shutdowns. The various justifications offered by carriers and courts ruling in their favor are layered on top of policy language that simply does not support them.

### D. This Court Need Not Decide the Virus Exclusion Issue

In its Motion to Dismiss below, AmGuard argued that Plan Check's claim fell within a Policy exclusion for loss or damage caused by virus, bacterium or other microorganism that can induce physical distress, illness or disease. (3-ER-313-335.) Plan Check responded that whether this exclusion applied was a question of fact governed by California's efficient proximate cause doctrine. (3-ER-347.) *See also* discussion *infra* at 25-28. Plan Check does not allege any loss of or damage to property caused by the virus, but rather loss triggered by the

Orders.[9] The district court expressly declined to reach this issue and did not decide it. (1-ER-010 n.7.)

Typically, a court of appeals does not decide questions not reached below. *See generally Singleton v. Wulff*, 428 U.S. 106, 119-21 (1976); *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union*, 721 F.3d 1147, 1156-57 (9th Cir. 2013). A district court is usually best positioned to apply the law to the record. *See, e.g.*, *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1095 (9th Cir. 2014) (despite fully developed record, unclear resolution of unconscionability issue below led to this Court declining to exercise discretion to address it). This may be so even at the motion to dismiss stage. *See, e.g.*, *F.D.I.C. v. Nichols*, 885 F.2d 633, 638 (9th Cir. 1989) (declining to affirm dismissal on limitations ground which did not form the basis of the district court's decision).

This Court should exercise its discretion not to hear the virus issue, which was not decided by the district court. Far more of the COVID-19 coverage cases decided to date have been decided on the physical loss issue. Moreover, of the few courts to decide the virus exclusion issue under California law, most have relied on (unenforceable) anti-concurrency language in policies. At this stage, and in the

[9] A number of plaintiffs in COVID-19-related business interruption cases cited *infra* have made such an allegation. Plan Check has not done so because, as of this writing, it has not experienced an outbreak at its restaurant, nor does it have specific reason to believe virus matter has actually been present inside its premises. Nevertheless, restaurant property was lost to Plan Check by dint of the Orders within the meaning of the Policy, as discussed herein.

context of the large array of cases, the district court should be given the opportunity to decide this issue in the first instance. In the event this Court exercises its discretion to decide the virus exclusion question, however, it is discussed below.

### E. The Virus Exclusion Does Not Bar Appellant's Claim at This Stage

Under California law, the efficient proximate cause doctrine resolves first-party losses caused by multiple events or perils by asking which is the predominant, or most important cause. *See* Cal. Ins. Code § 530; *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 706-08 (Cal. 1989) (where insured's home was damaged by a combination of covered contractor negligence and excluded earth movement, jury must decide which was the predominant cause of the loss); *Boardwalk Condo. Ass'n v. Travelers Indem. Co.*, No. 03-cv-505-WQH(WMc), 2007 WL 1989656, at *6 (S.D. Cal. July 3, 2007) (mold caused by water intrusion was covered despite mold exclusion because "mold which occurs naturally in the environment over time can be an excluded peril, but mold damage resulting from a covered cause of loss . . . is covered"); *Gillis v. Sun Ins. Office, Ltd.*, 47 Cal. Rptr. 868, 872-76 (Cal. Dist. Ct. App. 1965) (where wind caused gangway to fall on and sink a dock, loss covered despite water damage exclusion, because wind was the efficient proximate cause); *Sauer v. Gen. Ins. Co.*, 37 Cal. Rptr. 303, 304-06 (Cal.

Dist. Ct. App. 1964) (claim covered where water leaked from plumbing system, a covered peril, causing subsidence damage, an excluded peril).

Federal and state courts in California have repeatedly held that the efficient proximate cause of a loss is a fact question to be resolved by a jury. *See Garvey*, 770 P.2d at 714-15 ("Coverage should be determined by a jury under an efficient proximate cause analysis"); *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 820 (9th Cir. 2014) ("If more than one peril contributes to a loss, the question which is the efficient proximate cause generally is a factual matter for the jury to resolve." (quotation omitted)); *Encompass Ins. Co. v. Berger*, No. 12-cv-08294-MWF (PJWx), 2014 WL 4987978, at *24 (C.D. Cal. Oct. 7, 2014) ("The determination of the efficient proximate cause is ordinarily a question of fact for the jury [unless the facts are undisputed]."); *Boardwalk Condo. Ass'n*, 2007 WL 1989656 at *10 ("When there is sufficient evidence to support the possibility that the efficient proximate cause . . . is either an excluded peril . . . or a covered peril . . . the question of causation is for the jury to decide.") (quotation marks and citations omitted); *Are-east River Sci. Park, LLC v. Lexington Ins. Co.*, No. 13-cv-01837-BRO (JCGx), 2014 WL 12587051, at *7 (C.D. Cal. Mar. 27, 2014) ("Under California law, in situations in which multiple causes contribute to a single loss, the court looks to the efficient proximate cause, meaning the cause that is responsible for setting any and all other causes in motion. Under an efficient

proximate cause analysis, coverage should be determined by a jury.") citations and quotation marks omitted)); *Winans v. State Farm Fire & Cas. Co.*, 743 F. Supp. 733, 736 (S.D. Cal. 1990), *rev'd on other grounds,* 968 F.2d 884 (9th Cir. 1992) ("California law . . . requires the jury to determine the precise cause of the loss under the efficient proximate cause analysis.").

Dismissal on the pleadings based on efficient proximate cause questions is nearly always inappropriate, and so it would be here. Plan Check alleged that the covered loss of property was the result of the Orders, not the coronavirus. (2-ER-040 ¶¶ 41-42.) Restaurants rarely, if ever, close due to influenza or hepatitis outbreak, because the government typically does not require it. Even government-mandated restaurant shutdowns during this pandemic did not go into effect in every state and county in the U.S. that was affected by COVID-19, nor were all shutdowns implemented at the same time. Plan Check was doing a thriving business even after the coronavirus arrived in California, but that stopped suddenly when the Orders were imposed. (2-ER-039 ¶ 38; 2-ER-040 ¶ 43.) The finder of fact should determine whether Plan Check ceased operations principally because of COVID-19 or because of the government orders.

Nor may insurers contract around this doctrine using anti-concurrency language. (*See* 2-ER-231, 234 (Policy purporting to exclude losses where virus is "direct or indirect" cause).) In *Garvey*, 770 P.2d at 705, negligent construction and

earth movement both contributed to damage to a home. The carrier relied on an exclusion for any loss "caused by, resulting from, contributed to or aggravated by any earth movement." The California Supreme Court held that coverage should be determined by a jury under an efficient proximate cause analysis anyway. *Id.*

This was made more explicit in *Howell v. State Farm Fire & Casualty Co.*, 267 Cal. Rptr. 708 (Cal. Ct. App. 1990). In *Howell,* rain caused a landslide which damaged a home; the exclusion purported to exclude any loss "which would not have occurred in the absence of" earth movement. The Court of Appeal decided that the exclusion was not enforceable to the extent it conflicted with California law because "if we were to give full effect to the . . . policy language excluding coverage whenever an excluded peril is a contributing or aggravating factor in the loss, we would be giving insurance companies carte blanche to deny coverage in nearly all cases." *Id*. at 722 n.6.

There is no question in the case at bar that COVID-19 is at least a contributing factor in the proximate causation chain leading to Plan Check's losses. Yet California law gives policyholders the opportunity to prove *at trial* that an excluded cause was not the *predominant* cause of a loss. AmGuard cannot override this doctrine with broad prefatory words in the exclusion. District court decisions analyzing virus exclusions in the context of COVID-19-related shutdowns have failed to grapple with this issue, and have not offered any basis for

ignoring the problem. *See 10E, LLC v. Travelers Indem. Co.*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020); *Boxed Foods Co., LLC v. Cal. Cap. Ins. Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021 (N.D. Cal. Oct. 27, 2020); *Founder Inst. Inc. v. Hartford Fire Ins. Co.*, No. 20-CV-04466-VC, 2020 WL 6268539 (N.D. Cal. Oct. 22, 2020); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-CV-04434 JSC, 2020 WL 5642483 (N.D. Cal. Sept. 22, 2020).

## CONCLUSION

For all these reasons the judgment should be reversed, and the case remanded.

Dated: February 5, 2021

By: /s/ Kathryn Lee Boyd

Kathryn Lee Boyd (SBN 189496)
Hecht Partners LLP
6420 Wilshire Boulevard, 14th Floor
Los Angeles, CA 90048
(646) 502-9515 Telephone
(646) 492-5111 Facsimile
lboyd@hechtpartners.com

*Attorneys for Appellant Plan Check Downtown III, LLC, and others similarly situated*

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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# UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

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- [ ] a party or parties are filing a single brief in response to a longer joint brief.

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| |
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| Appellant's Opening Brief<br>Excerpt of Record – Volumes 1 to 3 |

**Signature** /s/ Kathryn Lee Boyd **Date** **February 5, 2021**

# ADDENDUM

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

# § 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

**CREDIT(S)**

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

**End of Document**





 

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1332

# § 1332. Diversity of citizenship; amount in controversy; costs
[Statutory Text & Notes of Decisions subdivisions I to V]

Currentness

<Notes of Decisions for 28 USCA § 1332 are displayed in multiple documents.>

**(a)** The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

**(1)** citizens of different States;

**(2)** citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

**(3)** citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

**(4)** a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

**(b)** Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

**(c)** For the purposes of this section and section 1441 of this title--

**(1)** a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of--

**(A)** every State and foreign state of which the insured is a citizen;

**(B)** every State and foreign state by which the insurer has been incorporated; and

**(C)** the State or foreign state where the insurer has its principal place of business; and

**(2)** the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

**(d)(1)** In this subsection--

**(A)** the term "class" means all of the class members in a class action;

**(B)** the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

**(C)** the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

**(D)** the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

**(2)** The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which--

**(A)** any member of a class of plaintiffs is a citizen of a State different from any defendant;

**(B)** any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

**(C)** any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

**(3)** A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

**(A)** whether the claims asserted involve matters of national or interstate interest;

**(B)** whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

**(C)** whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

**(D)** whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

**(E)** whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

**(F)** whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

**(4)** A district court shall decline to exercise jurisdiction under paragraph (2)--

**(A)(i)** over a class action in which--

**(I)** greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

**(II)** at least 1 defendant is a defendant--

**(aa)** from whom significant relief is sought by members of the plaintiff class;

**(bb)** whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

**(cc)** who is a citizen of the State in which the action was originally filed; and

**(III)** principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

**(ii)** during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

**(B)** two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

**(5)** Paragraphs (2) through (4) shall not apply to any class action in which--

**(A)** the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

**(B)** the number of members of all proposed plaintiff classes in the aggregate is less than 100.

**(6)** In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

**(7)** Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

**(8)** This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

**(9)** Paragraph (2) shall not apply to any class action that solely involves a claim--

**(A)** concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

**(B)** that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

**(C)** that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

**(10)** For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

**(11)(A)** For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

**(B)(i)** As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

**(ii)** As used in subparagraph (A), the term "mass action" shall not include any civil action in which--

**(I)** all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

**(II)** the claims are joined upon motion of a defendant;

**(III)** all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

**(IV)** the claims have been consolidated or coordinated solely for pretrial proceedings.

**(C)(i)** Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

**(ii)** This subparagraph will not apply--

**(I)** to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

**(II)** if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

**(D)** The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

**(e)** The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

**CREDIT(S)**

(June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; Pub.L. 85-554, § 2, July 25, 1958, 72 Stat. 415; Pub.L. 88-439, § 1, Aug. 14, 1964, 78 Stat. 445; Pub.L. 94-583, § 3, Oct. 21, 1976, 90 Stat. 2891; Pub.L. 100-702, Title II, §§ 201(a), 202(a), 203(a), Nov. 19, 1988, 102 Stat. 4646; Pub.L. 104-317, Title II, § 205(a), Oct. 19, 1996, 110 Stat. 3850; Pub.L. 109-2, § 4(a), Feb. 18, 2005, 119 Stat. 9; Pub.L. 112-63, Title I, §§ 101, 102, Dec. 7, 2011, 125 Stat. 758.)

Footnotes

1 So in original. Reference to "16(f)(3)" probably should be preceded by "section".

2 So in original. Probably should be "77p(f)(3)".

28 U.S.C.A. § 1332, 28 USCA § 1332

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

**End of Document**

West's Annotated California Codes
Insurance Code (Refs & Annos)
Division 1. General Rules Governing Insurance (Refs & Annos)
Part 1. The Contract (Refs & Annos)
Chapter 6. Loss
Article 2. Causes of Loss

West's Ann.Cal.Ins.Code § 530

# § 530. Proximate and remote causes

Currentness

An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

**Credits**
(Stats.1935, c. 145, p. 510.)

West's Ann. Cal. Ins. Code § 530, CA INS § 530
Current with urgency legislation through Ch. 2 of 2021 Reg.Sess

**End of Document**

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 12

# Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing [Rule Text & Notes of Decisions subdivisions I, II]

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 12 are displayed in multiple documents. >

**(a) Time to Serve a Responsive Pleading.**

**(1)** ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

**(A)** A defendant must serve an answer:

**(i)** within 21 days after being served with the summons and complaint; or

**(ii)** if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

**(B)** A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

**(C)** A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

**(2)** ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

**(3)** ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.


 

**(4)** ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

**(A)** if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

**(B)** if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

**(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

**(1)** lack of subject-matter jurisdiction;

**(2)** lack of personal jurisdiction;

**(3)** improper venue;

**(4)** insufficient process;

**(5)** insufficient service of process;

**(6)** failure to state a claim upon which relief can be granted; and

**(7)** failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

**(c) Motion for Judgment on the Pleadings.** After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

**(d) Result of Presenting Matters Outside the Pleadings.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

**(e) Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must


 

be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

**(f) Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

**(1)** on its own; or

**(2)** on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

**(g) Joining Motions.**

**(1)** ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.

**(2)** ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

**(h) Waiving and Preserving Certain Defenses.**

**(1)** ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by:

**(A)** omitting it from a motion in the circumstances described in Rule 12(g)(2); or

**(B)** failing to either:

**(i)** make it by motion under this rule; or

**(ii)** include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

**(2)** ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

**(A)** in any pleading allowed or ordered under Rule 7(a);

**(B)** by a motion under Rule 12(c); or

**(C)** at trial.

**(3)** ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

**(i) Hearing Before Trial.** If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

**CREDIT(S)**

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

Fed. Rules Civ. Proc. Rule 12, 28 U.S.C.A., FRCP Rule 12
Including Amendments Received Through 2-1-21

**End of Document**

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title VII. General Provisions

Federal Rules of Appellate Procedure Rule 32, 28 U.S.C.A.

# Rule 32. Form of Briefs, Appendices, and Other Papers

Currentness

**(a) Form of a Brief.**

**(1) Reproduction.**

**(A)** A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

**(B)** Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

**(C)** Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

**(2) Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

**(A)** the number of the case centered at the top;

**(B)** the name of the court;

**(C)** the title of the case (see Rule 12(a));

**(D)** the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

**(E)** the title of the brief, identifying the party or parties for whom the brief is filed; and

**(F)** the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

**(3) Binding.** The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

**(4) Paper Size, Line Spacing, and Margins.** The brief must be on 8 ½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

**(5) Typeface.** Either a proportionally spaced or a monospaced face may be used.

**(A)** A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

**(B)** A monospaced face may not contain more than 10 ½ characters per inch.

**(6) Type Styles.** A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

**(7) Length.**

**(A) Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B).

**(B) Type-Volume Limitation.**

**(i)** A principal brief is acceptable if it:

- contains no more than 13,000 words; or
- uses a monospaced face and contains no more than 1,300 lines of text.

**(ii)** A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

**(b) Form of an Appendix.** An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

**(1)** The cover of a separately bound appendix must be white.

**(2)** An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

**(3)** When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8 ½ by 11 inches, and need not lie reasonably flat when opened.

**(c) Form of Other Papers.**

**(1) Motion.** The form of a motion is governed by Rule 27(d).

**(2) Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

**(A)** A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

**(B)** Rule 32(a)(7) does not apply.

**(d) Signature.** Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

**(e) Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule and the length limits set by these rules. By local rule or order in a particular case, a court of appeals may accept documents that do not meet all the form requirements of this rule or the length limits set by these rules.

**(f) Items Excluded from Length.** In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- cover page;
- disclosure statement;
- table of contents;
- table of citations;
- statement regarding oral argument;
- addendum containing statutes, rules, or regulations;
- certificate of counsel;
- signature block;
- proof of service; and

• any item specifically excluded by these rules or by local rule.

**(g) Certificate of Compliance.**

**(1) Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)--and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)--must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words--or the number of lines of monospaced type--in the document.

**(2) Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

**CREDIT(S)**
(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 25, 2019, eff. Dec. 1, 2019.)

F. R. A. P. Rule 32, 28 U.S.C.A., FRAP Rule 32
Including Amendments Received Through 2-1-21

**End of Document**

**Restatement (Second) of Contracts § 206 (1981)**

**Restatement of the Law - Contracts** | October 2020 Update

**Restatement (Second) of Contracts**

**Chapter 9. The Scope of Contractual Obligations**

**Topic 2. Considerations of Fairness and the Public Interest**

# § 206 Interpretation Against the Draftsman



**In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.**

**Comment:**

*a*. *Rationale.* Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party. The rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position, but it is not limited to such cases. It is in strictness a rule of legal effect, sometimes called construction, as well as interpretation: its operation depends on the positions of the parties as they appear in litigation, and sometimes the result is hard to distinguish from a denial of effect to an unconscionable clause.

*b*. *Compulsory contract or term.* The rule that language is interpreted against the party who chose it has no direct application to cases where the language is prescribed by law, as is sometimes true with respect to insurance policies, bills of lading and other standardized documents. In some cases, however, the statute or regulation adopts language which was previously used without compulsion and was interpreted against the drafting party, and there is normally no intention to change the established meaning. Moreover, insurers are more likely than insureds to participate in drafting prescribed forms and to review them carefully before putting them into use.

**Reporter's Note**



 

This Section carries forward the substance of former § 236(d). See 3 Corbin, Contracts § 559 (1960 & Supp.1980); 4 Williston, Contracts § 621 (3d ed.1961).

*Comment a.* On the general rule, see, e.g., Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1206-07 (2d Cir.1970), quoting from this Comment in Tentative Draft; Goddard v. South Bay Union High School Dist., 79 Cal.App.3d 98, 144 Cal.Rptr. 701 (1978); Pappas v. Bever, 219 N.W.2d 720 (Iowa 1974). That it has less force when the other party has taken an active role in the drafting process, or is particularly knowledgeable, see Centennial Ent., Inc. v. Mansfield Dev. Co., 568 P.2d 50 (Colo.1977); Crestview Bowl, Inc. v. Womer Constr. Co., 225 Kan. 335, 592 P.2d 74 (1979); Graziano v. Tortora Agency, Inc., 78 Misc.2d 1094, 359 N.Y.S.2d 489 (Civ.Ct.1974). As the text of the Section makes clear, the rule does not apply if the non-drafting party's interpretation is unreasonable. See Intertherm, Inc. v. Coronet Imp. Corp., 558 S.W.2d 344 (Mo.Ct.App.1977), quoting from this Comment in Tentative Draft; Perry and Wallis, Inc. v. United States, 192 Ct.Cl. 310, 427 F.2d 722 (1970). Nonetheless, one may doubt that the rule is "the last one to be resorted to, and never to be applied except when other rules of interpretation fail," Quad Constr., Inc. v. Wm. A. Smith Contr. Co., 534 F.2d 1391 (10th Cir.1976), quoting (in a diversity case) from Patterson v. Gage, 11 Colo. 50, 16 P. 560 (1888).

*Comment b.* The substance of this Comment was contained in former § 236(d) as a qualification of the general rule concerning terms prescribed by law.

**Case Citations - by Jurisdiction**

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U.S.
C.A.1,
C.A.1
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C.A.Fed.
U.S.Cl.Ct.
U.S.Ct.Cl.
Ct.Fed.Cl.
N.D.Ala.
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D.Del.
D.Del.Bkrtcy.Ct.


 

D.D.C.
N.D.Ill.
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N.D.Iowa
D.Kan.
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D.Or.
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D.C.App.
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Ill.App.
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N.Y.Sup.Ct.App.Term.

**U.S.**

**U.S.**2019. Cit. in disc. Employees filed a class action against employer after a hacker deceived employer into disclosing employees' tax information, which was subsequently used to file fraudulent tax returns. The district court granted defendant's motion to compel arbitration. The court of appeals affirmed. This court reversed and remanded, holding that the lower courts erred by applying the doctrine of contra proferentem to interpret ambiguities in the arbitration provisions as permitting class arbitration. The court noted that Restatement Second of Contracts § 206 classified the doctrine as a consideration of fairness and public interest rather than a rule of contract interpretation, and explained that the Federal Arbitration Act limited the doctrine's application in construing arbitration provisions. Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407, 1417.

**U.S.**2015. Com. (a) cit. in diss. op. Customers brought a state-court action against satellite-television provider, alleging that defendant's early-termination fees violated California law; defendant filed a motion to compel arbitration based on an arbitration provision contained in the parties' service agreement, which included a waiver of class arbitration unless the law of the customer's state made the waiver unenforceable, in which case the entire arbitration provision was rendered unenforceable. The trial court denied defendant's motion; the court of appeals affirmed, holding that the class-action waiver was unenforceable under


 

California law. This court reversed and remanded, holding that the contract's reference to state law referred to valid state law, and, given that the Federal Arbitration Act preempted California's law on the issue, the arbitration provision was enforceable. Citing Restatement Second of Contracts § 206, Comment *a*, the dissent argued that the ambiguity in the contract should have been construed against defendant, the drafter, particularly given that the contract was not the product of bilateral bargaining. DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463, 475.

**U.S.**2000. Quot. in conc. and diss. op. Mobile-home purchaser sued lender that financed her purchase for violating the Equal Credit Opportunity Act by requiring her to arbitrate her statutory causes of action against lender. The district court granted lender's motion to compel arbitration, and dismissed purchaser's claims with prejudice. The court of appeals reversed and remanded. Reversing in part, this court held, inter alia, that an arbitration agreement that did not mention arbitration costs and fees was not unenforceable because it failed to affirmatively protect a party from potentially steep arbitration costs. The concurring and dissenting opinion asserted that it would remand for closer consideration of the arbitral forum's financial accessibility to purchaser. Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 97, 121 S.Ct. 513, 525, 148 L.Ed.2d 373.

**U.S.**1995. Cit. in headnote, cit. in sup., com. (a) quot. in ftn. in sup. Customers of brokerage firm sued firm for mishandling their account. Relying on the standard form "Client Agreement" that defendant drafted and plaintiffs signed, defendant moved to stay court proceedings and compel arbitration. An arbitration panel awarded plaintiffs compensatory and punitive damages, but the trial court vacated the punitive award, concluding that under New York law, specified by the agreement as controlling, arbitrators could not award punitive damages. The intermediate appellate court affirmed, but this court reversed, holding that the Federal Arbitration Act (FAA), which allowed punitive damages, preempted the New York choice-of-law provision, which defendant argued forbade punitive damages. Attempting to read this provision consistently with one mandating compliance with the FAA, the court concluded that, at best, defendant's argument that the former provision disallowed punitive damages injected into the agreement an ambiguity that had to be resolved against its drafter. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, _, _, 115 S.Ct. 1212, 1213, 1219, 131 L.Ed.2d 76, on remand 54 F.3d 779 (7th Cir.1995).

**C.A.1,**

**C.A.1,** 2013. Com. (b) quot. in ftn. and in ftn. to panel op. in appendix. Borrower under a mortgage insured by the Federal Housing Administration (FHA) filed a putative class action against bank that became the servicer of borrower's loan after the original mortgage holder went bankrupt, alleging that defendant breached a covenant in his mortgage contract that precluded defendant from requiring him to maintain any flood insurance in excess of the amount required by federal regulations. The district court granted defendant's motion to dismiss. On rehearing en banc, this court affirmed, holding that defendant's reading of the language of the covenant, which was mandated by federal regulations in all FHA-insured mortgages, was correct, and thus plaintiff failed to state a claim for breach of contract. In making its decision, the court noted that the rule that contract language was interpreted against the party who chose it had no direct application in cases such as this one, where the government mandated the specific contract language at issue and neither party could directly impact the language through superior bargaining power. Kolbe v. BAC Home Loans Servicing, LP, 738 F.3d 432, 442, 483.

**C.A.1**

**C.A.1,** 2012. Subsec. (b) quot. in ftn. Mortgagor brought a putative class action against mortgagee and insurer, alleging that mortgagee breached the mortgage agreement and the agreement's implied covenant of good faith and fair dealing by compelling him to purchase flood insurance in excess of the outstanding loan balance. The district court granted defendants' motion to dismiss the complaint. Vacating in part and remanding, this court held, inter alia, that the mortgage agreement was reasonably susceptible to an understanding that supported plaintiff's claims. The court, however, rejected, as a basis for judgment against mortgagee at this stage of the case, the doctrine that any ambiguity in the mortgage should be construed against mortgagee as the drafter of the agreement, since the Federal Housing Authority required that the mortgage agreement conform to its requirements, and thus the language was prescribed by law. Kolbe v. BAC Home Loans Servicing, LP, 695 F.3d 111, 122.


 

**C.A.1,** 2012. Com. (b) quot. in sup. Mortgagor brought a putative class action against mortgagee and mortgage servicer, alleging that mortgagee breached the mortgage agreement by wrongfully demanding an increase in flood-insurance coverage to a level beyond the amount required by her mortgage. The district court dismissed the complaint. Vacating and remanding, this court held that, while the pertinent mortgage provision explicitly gave mortgagee discretion to prescribe the amount of flood insurance, a supplemental document given to plaintiff at her real-estate closing reasonably could be read to state that the mandatory amount of flood insurance imposed at that time would remain unchanged for the duration of the mortgage. The court, however, declined at this stage of the case to apply the principle of *contra proferentem* to construe plaintiff's mortgage against mortgagee as the drafter of the agreement, because the record did not reveal how much control, if any, lenders had over its terms, or whether the language was properly characterized as prescribed by law. Lass v. Bank of America, N.A., 695 F.3d 129, 137.

**C.A.1,** 2007. Cit. in ftn. After criminal defendant who pled guilty to possession with intent to distribute cocaine was permitted to withdraw his plea based on post-plea evidence of innocence, the district court denied the prosecution's motion in limine for an order that defendant's guilty plea was admissible at trial. Affirming on interlocutory appeal, this court held, inter alia, that, in light of ambiguities in the plea agreement, defendant's successful plea withdrawal did not constitute a breach of his plea agreement such that he waived his rights under the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. The court reasoned, in part, that ambiguities in plea agreements were interpreted against the government, not only because ambiguities in contracts were interpreted against the drafter, but also because plea agreements implicated broader societal interests, some of constitutional magnitude. U.S. v. Newbert, 504 F.3d 180, 185.

**C.A.1,** 2003. Cit. in sup. Company that predicted sports information via telephone sued telephone service provider for breach of contract, alleging that provider improperly withheld monies due company. District court granted telephone service provider summary judgment. Affirming, this court held, inter alia, that parties' agreement unambiguously stated that provider was not responsible to caller for calls originating from coin telephones. Sportfolio Publications, Inc. v. AT & T Corp., 320 F.3d 75, 79.

**C.A.1,** 2000. Com. (a) cit. in disc. Corporations petitioned to compel arbitration of managers' breach-of-contract actions pursuant to relevant rules and regulations of the National Association of Securities Dealers (NASD). The district court denied the petition. Affirming, this court held that corporations that were not NASD members could not compel arbitration, and that the one corporation that was a member lacked standing to compel arbitration, since all claims against it had been dismissed and it did not risk joint liability with member-corporations. Paul Revere Variable Annuity Ins. Co. v. Kirschhofer, 226 F.3d 15, 24.

**C.A.1,** 1987. Cit. in sup. After one construction company purchased equipment and took over several ongoing construction contracts from another construction company, both parties brought suit for breach of the sales agreement. The district court held that a settlement agreement between the parties resolved all prior disputes, so that certain sums allegedly due to the seller could not be recovered. This court affirmed the district court decision, stating that the agreement was clear, but even if it had been ambiguous, the court was entitled to construe it against the seller, as the seller had drafted the agreement. Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 12.

**C.A.2,**

**C.A.2,** 2019. Quot. in diss. op. Consumer brought a lawsuit against power company, alleging, inter alia, that defendant breached the duty of good faith and fair dealing through its variable monthly rates, because the monthly rates did not fluctuate based on procurement costs as the contract indicated. The district court entered summary judgment for defendant on that claim. This court affirmed, holding, inter alia, that defendant did not breach the duty of good faith and fair dealing, because, under the terms of the agreement, defendant was not barred from calculating its monthly rates to maximize its profits. The dissent argued that a reasonable jury could find that defendant had breached the duty of good faith because, under a reasonable interpretation of the contract, defendant was obligated to calculate its monthly rate based on costs as a risk-sharing measure, rather than based on maximizing profitability. The dissent cited Restatement Second of Contracts § 206 in explaining that the terms of the contract regarding how defendant would calculate monthly rates should have been interpreted to favor plaintiff, because defendant supplied the words of the contract. Richards v. Direct Energy Services, LLC, 915 F.3d 88, 111.


 

**C.A.2**

**C.A.2,** 1996. Cit. in headnote, cit. in sup. Car buyer sued automobile manufacturer for violating the Magnuson-Moss Warranty —Federal Trade Commission Improvement Act (MMWA) and state law by refusing to honor its new car warranty on her vehicle. Reversing the district court's grant of summary judgment for defendant and remanding, this court held, inter alia, that accidental damage done to the car during its use as a demonstrator by car dealership prior to plaintiff's purchase of the car was not excluded from warranty coverage under the accident-exclusion provision. The court said that the MMWA, by requiring any warrantor to draft clear warranty terms and conditions, simply incorporated the well-established contract principle of contra proferentem, by which a drafting party must be prepared to have ambiguities construed against it. Wilbur v. Toyota Motor Sales, U.S.A., Inc., 86 F.3d 23, 24, 27.

**C.A.2,** 1987. Cit. in sup., com. (a) cit. in sup. After an insurer tried to cancel a policy which provided completed operations coverage for a solid waste disposal facility, the insured sued the company for breach of contract. The federal district court found for the plaintiff and held that cancellation during the policy period was ineffective. Affirming, this court held that the term "policy period" was ambiguous in the insurance contract, and that the defendant's cancellation notice could not operate to accelerate the end of the policy period. The court stated that where an ambiguity existed in a standard-form contract supplied by one of the parties, a well-established rule of construction required that the ambiguity be construed against that party. Westchester Resco v. New Eng. Reinsurance Group, 818 F.2d 2, 3.

**C.A.2,** 1973. Section 232 of Tentative Drafts 1 through 7, Revised and Edited, which is now Section 206 of the Official Draft cit. in sup. An insured brought an action against an insurer under a policy provision covering goods in due course of transit to recover for loss of gold stolen in an armed robbery at a motel. The court reversed judgment in favor of the insurer, holding that the gold was in transit within the meaning of the policy where it was held in a motel room overnight in the town to which insured's agents had transported it for the purpose of examination by a prospective customer. In interpreting the meaning of the phrase "due course of transit", the court said it was to be guided by the applicable New York state rule favoring a construction founded upon the objectively reasonable expectations of businessmen relying upon this type of policy, and noted the rubric of insurance law that any ambiguity in the construction of a policy will be resolved against the insurer. Ore & Chemical Corp. v. Eagle Star Insurance Co., Ltd., 489 F.2d 455, 457.

**C.A.2,** 1970. Section 232 of Tentative Draft 5 which is now Section 206 of the Official Draft cit. in sup. Plaintiff-dealer brought an action against an auto manufacturer for termination of his dealership in alleged harassment for his efforts in organizing a dealers' association. The defendant manufacturer alleged fraudulent practices in the dealer's warranty repairs operation. The dealer operated in New York; his association was incorporated in New Jersey. He first brought action with the association as co-plaintiff in New Jersey. Motivated at least partially by adverse rulings in the original suit the plaintiff later sought to prosecute a second action brought in New York and to dismiss the New Jersey action. The court affirmed a temporary injunction prohibiting the termination of the dealership, modified to allow the manufacturer to make inquiries of the dealer's customers related to its claim of fraud, but ordered that further proceedings be stayed pending termination of the New Jersey litigation, ruling that the prior suit should prevail even though both states would presumably enforce the choice of law provision in the dealership contract. As to the contract itself, the court ruled that the manufacturer was subject to the "construction against the draftsman" rule on the issue of termination, and that the language was not so crystal clear as to prevail over contrary evidence from a past course of dealing. Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197, 1207.

**C.A.3**

**C.A.3,** 2018. Cit. in disc. (general cite). Borrower who had executed a consumer-loan agreement subject to the laws of an Indian reservation and tribal court brought an action against lender, alleging unlawful and deceptive lending practices in violation of federal and state laws. The district court denied defendant's motion to compel arbitration based on the agreement's arbitration provision. This court affirmed, holding that, because the arbitral forum provided by the agreement was nonexistent, there was


 

no tribal arbitral forum to evaluate the enforceability of the arbitration provision. In rejecting defendant's argument that the agreement provided for alternative arbitral forums before other organizations, the court explained that it would follow caselaw applying common-law and cardinal principles of contract interpretation found in Restatement Second of Contracts §§ 202, 203, and 206, and determined that the law of New Jersey, the forum state, governed the dispute, because, although the agreement referenced the law of the reservation, the parties did not provide the court with any such law. MacDonald v. CashCall, Inc., 883 F.3d 220, 228.

**C.A.3,** 2002. Quot. in sup. Under plea agreement with U.S. Attorneys for Northern and Southern Districts of Ohio, defendants were convicted of misprision of felony. U.S. Attorney for Western District of Pennsylvania subsequently began prosecution of defendants for felony that formed basis of misprision pleas. The district court dismissed that count of indictment. Affirming, this court held plea agreement protected defendants from prosecution in Pennsylvania, and that any ambiguities in plea agreement were construed against government. U.S. v. Gebbie, 294 F.3d 540, 552.

**C.A.3,** 1999. Quot. in disc., com. (a) quot. in disc. and quot. in ftn. Beneficiary sued trustees for breach of fiduciary duty. The district court entered judgment for beneficiary against trustee/attorney, but against beneficiary with respect to cotrustee. Affirming in part, vacating in part, and remanding, this court held, inter alia, that beneficiary was not entitled to trial by jury on his equitable claim; that, when read in accordance with the rule of contra proferentem contract interpretation, the relevant agreement did not permit trustee/attorney to recover fees in connection with collection actions, rendering his attempt to take such fees a breach of his duty of loyalty; and that further factfinding was required on the issue of cotrustee's defense of reliance on advice of counsel. Dardovitch v. Haltzman, 190 F.3d 125, 139, 141.

**C.A.3,** 1997. Cit. in disc. Insurer brought a declaratory judgment action, seeking to establish that insured's comprehensive general liability insurance policy did not cover products liability tort claims brought against insured by a worker who had sustained carbon monoxide poisoning as the result of the malfunction of a vaporator manufactured and sold by insured. Reversing the district court's grant of summary judgment to insurer and remanding, this court held, inter alia, that a genuine issue of material fact existed as to whether insured had a reasonable expectation of coverage for the underlying products liability claims, predicting that the Pennsylvania courts would conclude that insured's status as a sophisticated purchaser of insurance did not preclude application of the doctrine of reasonable expectations. The court noted that, in recognition of the unequal relationship between insurer and insured, courts had attempted to favor the insured in a number of ways, including application of the reasonable expectations doctrine and adaptation to the insurance context of the contra proferentem principle of interpretation, by which ambiguities in policies were construed against the insurer. Reliance Ins. Co. v. Moessner, 121 F.3d 895, 905.

**C.A.3,** 1989. Cit. in ftn. The Small Business Administration (SBA), as guarantor of a loan, sued a debtor and moved to open a confession of judgment entered in favor of the SBA against the debtor. The district court denied the motion. This court reversed and remanded, holding that the defendant did not waive his right to assert the defense of the applicable statute of limitations to the confession of judgment. The court reasoned that the note that the debtor signed for the loan was not sufficiently specific to put the defendant on notice and did not therefore constitute an advance waiver of the applicable statute of limitations. U.S. on Behalf of Small Bus. Admin. v. Richardson, 889 F.2d 37, 40, on remand _ F.Supp. _ (E.D.Pa.1990).

**C.A.3,** 1982. Cit. in disc. The plaintiff was a development corporation which contracted with the defendant housing authority to redevelop a parcel of urban property. The contract included a provision that, should the defendant have a subsequent offer and wish to terminate the contract with the plaintiff, the plaintiff would have the right of first refusal; the contract did not specifically provide for the duration of the right. When the plaintiff repeatedly failed to meet provisions of the contract within a reasonable time, the defendant terminated the contract. The plaintiffs brought an action for the specific performance of the contract, claiming that before the termination, the plaintiff had the right of first refusal. The lower court entered judgment in favor of the defendant and the plaintiff appealed. This court reasoned that even though the parties did not specify the duration of the right, the court could supply that the duration was to be for a reasonable time as determined by the circumstances. The court found that five years was not within a reasonable amount of time. The plaintiff then argued that the provision was severable from the agreement, but the court noted that the writing was to be interpreted as a whole. Moreover, as the plaintiff drafted


 

the contract, the agreement and provision were not interpreted to operate in the manner most favorable to the plaintiff. The judgment in favor of the defendant was again affirmed. Barco Urban Renewal v. Housing Auth., Etc., 674 F.2d 1001, 1010.

**C.A.3,** 1980. Quot. in part in sup. in ftn. (Cit. section 232 of the Tentative Drafts, which is now section 206 of the Official Draft.) After defendant, who had obtained a surety for his bail bond, was convicted, the trial judge continued his bail on appeal in the same amount, based on perfect attendance record at trial. The United States Attorney mistakenly sent a form letter to the clerk of the district court instructing him to cancel the bond, which the clerk did. After the court of appeals affirmed the conviction and the Supreme Court denied certiorari, the district court judge ordered defendant to surrender, but defendant failed to appear, and remained a fugitive at the time of this decision. The United States Attorney, upon discovering his error, moved to reinstate the bond without notice either to defendant's attorney or to the surety. The district court granted the motion, and denied the motion on behalf of the surety by defendant's counsel to vacate the order, holding that the judge had the authority under the federal rules to correct a clerical error, because the clerk lacked the authority to release the surety, and because the surety must have realized that the clerk's action was mistaken and improper. On appeal the court of appeals affirmed the district court, gave strict effect to the specific wording of the standard bail bond form, especially considering the policy implications of a contrary result, and held that the bail bond continued in effect during the appeal, and since there had been no reliance by the surety on the clerk's erroneous cancellation, the bond could be remitted and forfeited. United States v. Martinez, 613 F.2d 473, 476.

**C.A.4,**

**C.A.4,** 2014. Quot. in disc. Defendant was convicted in district court of various weapons and explosives possession charges, and was sentenced to terms in prison. Affirming in part, this court held, inter alia, that a merger or integration clause contained in defendant's plea agreement entered in a prior proceeding involving a firearms offense—in which the government covenanted not to use any information provided by defendant to prosecute him for additional crimes, except for crimes of violence—precluded an interpretation of the agreement that took into account any preliminary oral representations by the government of broad transactional immunity that were inconsistent with its written form. The court rejected defendant's reliance on a prior case in which the court construed an ambiguity in a plea agreement against the government, pursuant to Restatement Second of Contracts § 206, distinguishing that case on the basis that it did not seek to test the enforceability of a valid integration clause by attempting to introduce parol statements as bearing on the agreement's proper interpretation. U.S. v. Barefoot, 754 F.3d 226, 243.

**C.A.4**

**C.A.4,** 2006. Quot. in sup. International conglomerate filed maritime lien against vessel, alleging that it never received payment for fuel-oil bunkers it delivered to vessel. The district court granted defendant's motion to dismiss. Affirming, this court held that the maritime lien could not be enforced because the parties' contract contained a choice-of-law clause providing for the application of English law, which did not recognize the existence of maritime liens for bunkers. The court rejected plaintiff's argument that failure to apply United States law would render certain language in the contract meaningless, reasoning, in part, that to conclude otherwise would allow plaintiff, which drafted the contract, to escape its own choice-of-law clause through the ambiguity and sloppiness of other provisions in the contract. Bominflot, Inc. v. The M/V HENRICH S, 465 F.3d 144, 150.

**C.A.4,** 1986. Cit. in disc. A defendant in a criminal case appealed from an order by a federal trial court denying his motion for enforcement of a plea agreement that he contended barred his prosecution in another federal district in a related case. The trial court denied the motion on the ground that the plea agreement by its terms only prevented the defendant's prosecution in one particular federal district. Vacating the order and remanding, this court concluded that the the plea was, as a matter of law, ambiguous on the point and that in such a case the ambiguity must be construed against the government, since the government proffered the terms in the written agreement. United States v. Harvey, 791 F.2d 294, 301.

**C.A.5**


 

**C.A.5,** 1998. Quot. in disc., cit. in ftn. Participant in multiemployer pension plan who went back to work three years after retiring sued plan, alleging that it wrongfully suspended his retirement benefits, pursuant to a plan amendment adopted after he retired, in violation of ERISA and the common law of contracts. The district court entered summary judgment for plaintiff on the ground that application of the amendment was arbitrary and capricious. Reversing and remanding, this court held that defendant's conduct did not violate pertinent ERISA sections; that construing the broad amendment provision as allowing plan administrators to adopt any amendment that comported with ERISA's statutory requirements did not render employer's obligations under the plan illusory; and that, even construing the amendment provision against defendant, the court could not term defendant's actions arbitrary and capricious. Spacek v. Maritime Ass'n, 134 F.3d 283, 298, 299.

**C.A.5,** 1970. Section 232 of Tentative Draft 5 which is now Section 206 of the Official Draft cit. in sup. The state sold a pipeline company a right of way for a gas pipeline across the bed of a bayou. The company also received a letter from the state public works department permitting the proposed crossings, which directed that the pipeline company bear the costs of any changes in the "project concerned" required by changes in the locations or sections of the existing channels in the public interest. The company purchased a right of way from the adjacent landowners to run its pipeline through. A port commission later decided to widen the bayou as part of a new port facility. The port commission purchased an easement subject to existing servitudes including the plaintiff's right of way. It then required the pipeline company to lower its line not only for the width of the original bed, but also for the newly dredged adjacent area. The company complied, reserving its right to seek compensation. The court reversed and remanded a denial of relief for the pipeline company, holding that the letter assigned liability for changes only in the crossing of the then current width of the bayou, that the words "project concerned" could not encompass more, interpreting them most strongly against the party from whom they proceeded. Tenneco, Inc. v. Greater La Fourche Port Commission, 427 F.2d 1061, 1065, denied, 400 U.S. 904, 91 S.Ct. 142, 27 L.Ed.2d 141 (1970).

**C.A.6,**

**C.A.6,** 2018. Com. (a) quot. in disc. Participants in a retirement-benefit plan brought a putative class action under ERISA against plan administrator, alleging that defendant underpaid them under the terms of the plan. The district court granted summary judgment for plaintiffs. While vacating in part and remanding for further proceedings, this court affirmed the district court's conclusion that the arbitrary-and-capricious standard of review applied, because the plan gave defendant discretion to construe the terms of the plan. The court further concluded that the doctrine of contra proferentem set forth in Restatement Second of Contracts § 206, in which courts construed ambiguities in a contract against the drafter of the contract, could not be applied in conjunction with an arbitrary-and-capricious standard of review. Clemons v. Norton Healthcare Inc. Retirement Plan, 890 F.3d 254, 267, 268.

**C.A.6**

**C.A.6,** 2008. Cit. in sup., com. (a) cit. in case quot. in sup. Automobile manufacturer and its insurer sued ocean carrier for breach of a multimodal transport contract, after a transporting vessel encountered stormy weather and thousands of manufacturer's transmissions were allegedly lost or damaged. The district court granted partial summary judgment for carrier. This court reversed and remanded, holding, inter alia, that the bill of lading issued for the sea stage of transport was governed by the liability limitations set forth in the Hague-Visby Rules, which favored manufacturer, rather than the Carriage of Goods by Sea Act, which favored carrier; because the bill of lading was ambiguous regarding which set of rules governed, it was to be construed against carrier, as the drafter, under the doctrine of contra proferentem. Royal Ins. Co. of America v. Orient Overseas Container Line Ltd., 525 F.3d 409, 424.

**C.A.6,** 2008. Cit. in sup., com. (a) cit. in case quot. in sup. Motor company and its cargo insurer sued carrier for damages arising from the loss of cargo during a transatlantic voyage, and carrier impleaded the carrying vessel. The district court granted partial summary judgment for carrier and vessel, ruling that their liability was limited under the Carriage of Goods by Sea Act (COGSA). Reversing and remanding upon interlocutory appeal, this court held, inter alia, that, although the district court correctly determined that United States law governed the bill of lading issued by carrier for the lost cargo, carrier's liability


 

was subject to the Hague-Visby Rules, rather than COGSA, because the bill of lading was ambiguous and therefore had to be construed against carrier, as the drafter. Royal Ins. Co. v. Orient Overseas Container Line Ltd., 514 F.3d 621, 636, 637.

**C.A.6,** 2008. Quot. in disc. Student-loan borrower filed a class action against lender, asserting claims for breach of contract and unjust enrichment in connection with the manner in which lender collected certain interest payments due under the loans. The district court granted partial summary judgment for plaintiffs on the issue of defendant's liability. This court reversed in part and remanded for a determination as to whether defendant acted in good faith in collecting the interest. The court noted that, while ambiguous contract language was generally construed against the drafter under the rule of contract proferentem, the student-loan contracts at issue were silent, rather than ambiguous, as to the method and timing of defendant's collection of the interest. Savedoff v. Access Group, Inc., 524 F.3d 754, 764.

**C.A.6,** 2006. Cit. in diss. op., com. (a) quot. in diss. op. Excess no-fault auto-policy insurer sought declaratory judgment that its coverage of insured's medical expenses resulting from a motor-vehicle accident was secondary to coverage by the ERISA plan provided by insured's employer. The district court declared plaintiff the primary payer. Reversing and remanding, this court held that an ambiguous exclusions provision in the policy was intended to exclude benefits plans such as the ERISA plan, and thus the ERISA plan was first in priority for payment. The dissent argued that plaintiff should have been deemed the primary payer because, under federal common law, ambiguities in a contract were to be resolved against the drafter, and plaintiff could have drafted a provision clearly excluding coverage where the insured was covered by a health-benefit plan, but failed to do so. Citizens Ins. Co. of America v. MidMichigan Health ConnectCare Network Plan, 449 F.3d 688, 697, 698.

**C.A.6,** 2001. Quot. in disc., com. (a) quot. in disc. Seller of subsidiary's common stock sued buyer for breach of the stock-purchase agreement, demanding reimbursement of certain tax payments. Reversing the district court's grant of summary judgment for buyer and remanding, this court held that a genuine issue of material fact existed as to what the parties intended by including in agreement a particular section pertaining to preclosing tax liability. The court said that reliance by district court on rule of contra proferentem in rejecting the interpretation proposed by seller, as drafter, of the ambiguous section was inappropriate, since the case did not involve a standardized contract, seller was not in a stronger bargaining position, and buyer had previously participated in many acquisitions. B.F. Goodrich Co. v. U.S. Filter Corp., 245 F.3d 587, 597.

**C.A.7**

**C.A.7,** 2002. Quot. in disc. Creditor bank brought an adversary proceeding against another creditor of Chapter 11 debtor, seeking to assert the validity of its security interest in certain assets of debtor. The bankruptcy court granted bank's motion for summary judgment, finding that other creditor's security interest was limited to inventory it had sold to debtor. The district court reversed, holding that other creditor's security interest extended to all of the inventory. Reversing and remanding, this court held that the ambiguous language of the security agreement drafted by other creditor would be construed against it, since a third-party creditor like bank had no way to resolve ambiguities internal to the agreement. The court noted that the contra proferentem rule of contract construction did not apply here. Shelby County State Bank v. Van Diest Supply Co., 303 F.3d 832, 838.

**C.A.7,** 1988. Cit. but dist. A defendant indicted for counterfeiting and conspiracy agreed to cooperate with the government in its investigation and to testify if necessary in return for the dismissal of the counterfeiting charge. The defendant testified at one trial but refused to testify again when a retrial was ordered, and the government reindicted him on the counterfeiting charge. The trial court dismissed the indictment, sustaining the defendant's argument that the plea agreement was ambiguous and should be construed against the government as the draftor. Reversing and remanding, this court held that the defendant had breached his obligation to the plea agreement. The court reasoned that the plea agreement was a contract and that the government's demands were reasonably within the bounds of the agreement. The court stated that the agreement, when read as a whole, indicated that the defendant's obligations included, but were not limited to, testifying at one specified trial. The court noted that the defendant's refusal to testify constituted repudiation of the agreement and could be treated as a breach. U.S. v. Ataya, 864 F.2d 1324, 1328.


 

**C.A.8**

**C.A.8,** 1986. Cit. in ftn., com. (a) cit. in ftn. Representatives individually and on behalf of a class of bondholders sued a utility claiming that the prospectus for a series of bonds misrepresented and omitted material facts regarding call-protection provisions of the bond contract. The trial court found for the plaintiffs. Affirming, this court held, inter alia, that there was sufficient evidence for the jury to have found that the prospectus was misleading and ambiguous in that it omitted material facts that would have adequately disclosed the defendant's right to call the bonds. The court stated that because the prospectus was drafted by the defendant, it should be interpreted and construed liberally in favor of the bondholders and strictly against the utility. Harris v. Union Elec. Co., 787 F.2d 355, 365, cert. denied 479 U.S. 823, 107 S.Ct. 94, 93 L.Ed.2d 45 (1986).

**C.A.8,** 1984. Cit. in disc. A medical student brought a claim for breach of contract and sought to enjoin a university from expelling him. The district court granted the injunction and the university appealed. This court affirmed and stated that where the contract was on a printed form prepared by one party and adhered to by another who had little or no bargaining power, ambiguities were to be construed against the drafting party. Therefore, the procedures for disciplinary action set forth in the student handbook were interpreted as providing a right to a hearing and a right of appeal to the university president prior to imposition of a serious penalty. Corso v. Creighton University, 731 F.2d 529, 533.

**C.A.9**

**C.A.9,** 1992. Quot. in sup., cit. in conc. and diss. op. California winemaker submitted a written agreement to Arizona distributor providing that California law governed "except as otherwise required by applicable law." Later, winemaker notified distributor that it would not further extend the agreement, and subsequently winemaker sued distributor for an outstanding account balance. Distributor filed various counterclaims. The district court held that Arizona law was not applicable and granted judgment on the pleadings for winemaker on all claims. Reversing in part and remanding, this court held, inter alia, that the district court should have applied Arizona law. The winemaker drafted the distributor agreement, so any ambiguity in the choice-of-law clause should have been construed against it. The concurrence and dissent argued that California law controlled because the choice-of-law clause was clear, and there was no manifestation that the parties intended its terms to have an unconventional meaning. Sutter Home Winery v. Vintage Selections, 971 F.2d 401, 406, 410.

**C.A.10**

**C.A.10,** 2007. Cit. in case cit. in disc. After defendant pled guilty to money laundering and securities fraud pursuant to a negotiated plea agreement with the government, and, as part of his sentence, he was instructed to pay restitution to an individual who had not been listed as a victim of either of these offenses in the indictment, he sought to appeal, in part, the restitution award. Dismissing the appeal, this court held, inter alia, that the factual challenges raised fell within the scope of the waiver provision in the plea agreement. Although the court recognized that, because plea agreements were governed by contract principles, and, as such, any ambiguities were to be construed against the drafter (government), there was no ambiguity; the agreement made it clear that the parties considered a restitution award for victims to be part of the sentence, and, therefore, a general waiver of the right to appeal a sentence barred this appeal. U.S. v. Cooper, 498 F.3d 1156, 1159.

**C.A.10,** 2007. Cit. in sup. After criminal defendant pled guilty to a single count of credit-card fraud and signed a plea agreement, the district court ordered payment of restitution for the loss associated with the conviction as well as for losses resulting from six other incidents in which defendant allegedly committed, but was not convicted of, credit-card fraud. Vacating and remanding for entry of a restitution order in the amount of the loss associated with the conviction only, this court held that the plain language of the plea agreement showed that defendant did not waive her right to appeal an unlawful restitution order or agree to pay restitution beyond the amount causally linked to the single count to which she pled guilty. The court noted that plea agreements were governed by contract principles, including the doctrine of contra proferentem, in which ambiguities in an agreement were construed against the drafter. U.S. v. Gordon, 480 F.3d 1205, 1207.


 

**C.A.11,**

**C.A.11,** 2018. Com. (a) cit. in ftn. Insurer that compensated its insured for cargo that was damaged during its international transport from South Korea while it was between Miami, Florida and Orlando, Florida brought a negligence action against transporters, seeking recovery for damages paid. Following a bench trial, the district court awarded damages under the Montreal Convention's limitation-of-liability rules. This court reversed, holding that because the cargo was damaged during carriage by land while in Florida, the limitation-of-liability provision of the waybill issued by defendants applied, and remanded for a determination of damages due to the ambiguous nature of the provision. The court cited Restatement Second of Contracts § 206, Comment *a*, to explain that a contract should be construed against the drafter only so long as other factors were not decisive, rejecting plaintiff's argument that the court had to construe the waybill against defendants before the district court considered extrinsic evidence to interpret the ambiguous waybill. Underwriters at Lloyds Subscribing to Cover Note B0753PC1308275000 v. Expeditors Korea Ltd., 882 F.3d 1033, 1054.

**C.A.11**

**C.A.11,** 2002. Cit. in sup. Mexican farm workers under the H-2A program of the Immigration Reform and Control Act sued Florida growers for violations of the Fair Labor Standards Act, claiming that clearance order work contracts entitled them to reimbursement for transportation costs. Reversing in part the district court's grant of summary judgment for defendants and remanding, this court held, inter alia, that the phrase “the place where the worker was hired” was ambiguous and would be construed against defendants as drafters of the contract, since defendants easily could have provided much clearer language as to the point from which transportation had to be reimbursed. Arriaga v. Florida Pacific Farms, L.L.C., 305 F.3d 1228, 1248.

**C.A.D.C.**

**C.A.D.C.**2016. Quot. in sup. After defendant pleaded guilty to drug charges based on his history of distributing heroin at a housing project, the district court sentenced him to a term of imprisonment followed by a term of supervised release conditioned on his staying away from the project. Affirming, this court held that the district court did not abuse its discretion in imposing the condition that defendant stay away from the project. The court rejected the government's argument that defendant was barred from appealing his sentence under the plea agreement, reasoning that the agreement did not unambiguously foreclose defendant from challenging the conditions of his supervised release; although defendant waived his right to appeal any "term of supervised release," that phrase, when read in context, likely referred to the duration of his supervised release, rather than the conditions of his supervised release, and, under Restatement Second of Contract § 206, the plea agreement had to be construed against the government, as its drafter. United States v. Hunt, 843 F.3d 1022, 1027.

**C.A.D.C.**2008. Cit. in sup. Liability insurer sought a declaratory judgment regarding its responsibility under an insurance policy, issued to a children's residential facility, after insured facility settled an action brought against it by minor child resident who was sexually assaulted on four occasions by four different older boys at the facility. The district court agreed with insurer that child, to whom facility had assigned its rights under the policy, had only one “claim” for the four occurrences. Reversing in part, this court held, inter alia, that child was entitled to payment of the policy's aggregate annual limit for sexual-abuse claims, because, read as a whole, the policy unambiguously supported the position that the number of claims for an individual sexual-abuse victim depended on the number of occurrences; even if the contract was ambiguous, District of Columbia law required the court to construe such ambiguity against insurer. Essex Ins. Co. v. Doe ex rel. Doe, 511 F.3d 198, 201.

**C.A.D.C.**1997. Com. (a) quot. in ftn. A coal mine operator obtained a number of indemnity bonds in order to fulfill its self-insurance responsibilities under the Black Lung Benefits Act. When the mine operator filed for bankruptcy, its surety was obligated to pay covered claims under the bond. After the Labor Department was unsuccessful in its attempts to get the surety to pay outstanding claims, it sued the surety to obtain payment. The district court held that the surety was liable for all claims


 

outstanding during the bond period. The court of appeals disagreed, holding that the surety was liable only for those claims that accrued during the bond period. On remand, the district court required that a miner's last year of employment with the mine operator—rather than his first year of employment—fell within the bond period in order for the claim to accrue during that period. This court vacated and remanded for the district court to decide the trigger year intended by the parties to the bond agreement. The court held that its previous opinion did not address the issue of which year should be considered to mark the accrual point, so to the extent that the district court believed it was compelled by the appellate court's opinion to choose a miner's last year of employment, it did so in error. It noted that the canon of construction known as contra proferentem was not a sufficient ground by itself for rejecting the government's interpretation of the bond language. U.S. v. Insurance Co. of North America, 131 F.3d 1037, 1043.

**C.A.D.C.**1996. Cit. in headnotes, quot. in disc., com. (a) quot. in disc. Air carriers brought suit seeking review of orders of the Department of Transportation (DOT) requiring them to continue to provide air service under certain subsidy agreements even though DOT had unilaterally reduced the subsidies payable under those agreements. District court denied carriers' request for a restraining order and transferred the case. This court set aside DOT's orders and remanded, holding that the subsidy agreements were contracts subject to normal principles of contract interpretation, and that the carriers' proffered interpretation of the termination clauses in those contracts was most consistent with the apparent intentions of the parties when they entered into the contracts. The court noted that the principle of contra proferentem would compel the same result, since DOT drafted the subsidy agreements, including the termination provisions. Mesa Air Group, Inc. v. Department of Transp., 87 F.3d 498, 499, 506.

**C.A.D.C.**1984. Cit. in disc. A credit cardholder sued the issuer under statute and common law for alleged wrongful cancellation. The district court granted the defendant's motion for summary judgment. This court reversed and remanded, holding that a contract is to be construed against its drafters and that a contract of adhesion should be strictly interpreted. Gray v. American Exp. Co., 743 F.2d 10, 18.

**C.A.D.C.**1984. Cit. in sup., com. (a) cit. in ftn. in disc. The plaintiff sought the review of a Federal Energy Regulatory Commission's ruling permitting a unilateral rate increase by intervenor power company. The court affirmed the ruling. Noting that a party with equal bargaining power will be held to the letter of the language it has drafted, the court held that, in interpreting the agreement between the two power companies, the FERC was not required to examine extrinsic evidence because the intended meaning was apparent from a textual analysis of the agreement. When the meaning of the language is sufficiently clear, said the court, questions of contract interpretation are issues of law. Ohio Power Co. v. F.E.R.C., 744 F.2d 162, 167.

**C.A.Fed.**

**C.A.Fed.**2006. Com. (a) cit. but dist. Contractor that agreed to provide accounting services for the United States Department of Housing and Urban Development (HUD) appealed contracting officer's refusal to retroactively reprice task orders completed under the parties' contract, based on allegedly ambiguous language in a modification to the contract. The Board of Contract Appeals denied contractor's request. Affirming, this court held that the language at issue was clear on its face, was not ambiguous, and did not provide for retroactive pricing. The court rejected contractor's argument that the modification had to be construed against HUD as the drafter under the doctrine of contra proferentem, reasoning that the doctrine was a rule of last resort that was inapplicable here, where the language of the contract itself answered the question of retroactivity. Gardiner, Kamya & Associates, P.C. v. Jackson, 467 F.3d 1348, 1353.

**U.S.Cl.Ct.**

**U.S.Cl.Ct.**1984. Cit. in disc. The plaintiff sought a refund of all income tax paid on income derived from employment with the Panama Canal Commission. The plaintiff argued that an Implementation Agreement accompanying the Panama Canal Treaty exempted Commission employees from federal income tax. Both parties filed cross motions for summary judgment. The court found for the plaintiff, holding that the language of the agreement was unambiguous. Even if the language were subject to two interpretations, said the court, the United States was the party that proffered the language and, therefore, all ambiguities must


 

be resolved against it. Coplin v. United States, 6 Cl.Ct. 115, 149, reversed 761 F.2d 688 (Fed.Cir.1985), judgment affirmed 479 U.S. 27, 107 S.Ct. 347, 93 L.Ed.2d 206 (1986).

**U.S.Ct.Cl.**

**U.S.Ct.Cl.**1977. Section 232 of Tentative Draft 5 which is now Section 206 of the Official Draft cit. in ftn. but dist. Plaintiff, a contractor, entered into a construction contract with the United States Navy to build a training center. Construction was not completed on time due to, among other things, the government's decision concerning the method of constructing the upper floors of the building. The contract's references to combination floor construction included the phrase "providing monolithic floor construction integral with supporting beams and columns." The plaintiff elected to use the combination floor construction method and submitted drawings which showed that the plaintiff would not be casting the floors and beams monolithically, but would use instead a construction joint to make them integral. The defendant claimed that the use of construction joints was impermissible under the contract and insisted that monolithic construction of the floors and beams was required. Under protest, the plaintiff complied and constructed the floors and beams monolithically. The plaintiff sought an equitable adjustment for the increased cost of complying with the defendant's instructions. The trial judge concluded that the defendant's insistence on a monolithic construction method was allowed, and the defendant's cross-motion for summary judgment was granted. The plaintiff appealed and claimed that the above quoted phrase from the contract emphasized the word "integral", and, therefore, the contract permitted the plaintiff to employ any method which would achieve integration; and that the defendant required that only the floor construction be monolithic, and, therefore, could not properly insist on wholly monolithic construction and was obligated to approve any construction method achieving integration. The plaintiff also claimed to be permitted to adopt any reasonable construction of such an ambiguous contract provision. The defendant responded, and the Court of Claims agreed, that when the contract is read as a whole only one construction method is specified: that integration was to be achieved through monolithic construction. Therefore, the court held, inter alia, that under the proper construction of the contract the combination flooring system was subject to the term: "Unless otherwise indicated, all construction shall be monolithic." The court also found that, in view of specifications incorporated by reference into the contract, the use of the word "integral," which could mean monolithic, did not change the requirement of the contract read as a whole, that construction joints would not be permissible. The court agreed with the trial court that the defendant acted within its rights under the contract when it insisted upon monolithic construction of floors and beams, and, therefore, the plaintiff was not entitled to an adjustment for being denied permission to construct the floors according to its proposed plans. Framlau Corp. v. United States, 215 Ct.Cl. 185, 568 F.2d 687, 690.

**Ct.Fed.Cl.**

**Ct.Fed.Cl.**2006. Cit. in ftn. Construction contractor sued government seeking, in part, recovery of the excess costs incurred on behalf of its subcontractor through government's insistence on profilograph testing to evaluate the smoothness of concrete pavement being installed. Granting judgment for plaintiff, this court held, inter alia, that there was no patent ambiguity in the contract and profilograph testing was not required where the contract merely stated that the contractor "may" furnish profilograph testing; as the non-drafting party, contractor had no reason to inquire regarding this language, as it was not ambiguous. Ace Constructors, Inc. v. U.S., 70 Fed.Cl. 253, 288.

**Ct.Fed.Cl.**2005. Quot. in ftn. Timber-harvesting contractors sued United States Forest Service for breach of contract after forest fire destroyed certain areas of forest and environmental group's legal action caused Forest Service to suspend, and then terminate, harvesting contracts. Granting in part government's cross-motion for summary judgment, this court held, inter alia, that, read as a whole, the contract provided that catastrophe-affected timber did not automatically become included as part of the timber that contractors were authorized to harvest; the doctrine of contra proferentem, which placed the risk of ambiguity on drafter in case of two reasonable interpretations, did not apply where contractors' interpretation contradicted plain language of contract and failed to give meaning to a contractual provision. Trinity River Lumber Co. v. U.S., 66 Fed.Cl. 98, 103.

**Ct.Fed.Cl.**1996. Cit. in headnote, quot. in ftn. Companies with oil and gas leases granted by the government pursuant to the Outer Continental Shelf Lands Act (OCSLA) sued government for breach of contract, arguing that subsequent passage of


 

the Outer Banks Protection Act (OBPA), which interfered with the OCSLA and severely restricted companies' lease rights, constituted a material breach. Granting companies' motion for summary judgment, the court held that application of the OBPA was not within the parties' objectively manifested intent, as indicated by contract language referring to future action based on regulations in existence upon the effective date of the leases; contract interpretation did not require extrinsic evidence, but even if such evidence was admitted, the result would be the same because the agreement's terms would be construed against government, the drafter; and passage of the OBPA constituted a material breach of contract, as it prevented government from considering companies' plans of exploration. The court declined to decide whether enactment of the OBPA was also a breach of government's implied duty of good faith and fair dealing. Conoco v. U.S., 35 Fed.Cl. 309, 311, 325.

**N.D.Ala.**

**N.D.Ala.**2000. Quot. in ftn. Sellers of a hazardous-waste-recycling facility sued facility's former owner and customers of current owner, under the Comprehensive Environmental Response, Compensation, and Liability Act, seeking reimbursement of cleanup costs. Customers brought third-party claims against current owner. This court denied sellers' motion for partial summary judgment and granted current owner summary judgment. The court held, inter alia, that the term "sole expense," as used in the remediation agreement requiring plaintiffs to indemnify current owner from damages arising from environmental conditions at the site, was not ambiguous; thus no parol evidence, in the form of self-serving affidavits from plaintiffs' attorneys who assisted in drafting the agreement, was needed to ascertain the parties' intentions. Southdown v. Allen, 119 F.Supp.2d 1223, 1235.

**D.Ariz.**

**D.Ariz.**2009. Com. (a) quot. in sup. Insured's trustee brought breach of contract claim, inter alia, against insurer, after it denied coverage to insured under a "home health care" insurance policy on grounds that insured was a resident of a center for directed care that did not have an independent living section, and thus insured was living in a "nursing facility" and not a "home" as required by the policy. Granting plaintiff's motion for summary judgment on the claim, this court held that the term "nursing facility" was ambiguous and thus had to be construed against insurer as the drafter. The court explained that its review of state legislation, social policy, and the transaction as a whole did not resolve the ambiguity, and in any event weighed against insurer's proposed construction of the term. Bjornstad v. Senior American Life Ins. Co., 599 F.Supp.2d 1165, 1172.

**N.D.Cal.**

**N.D.Cal.**2001. Quot. in sup. Owner of patent for signal protocol technology created to increase volume and speed of communications between computer components sued component manufacturer for infringement. Alleged infringer argued that the technology could be practiced under reciprocal royalty-free patent license. Both parties moved for summary judgment. Granting alleged infringer summary judgment, this court held that, to the extent ambiguities existed in license drafted by patent owner regarding which features of product were licensed, those ambiguities would be construed against the patent owner. Intel Corp. v. VIA Technologies, Inc., 174 F.Supp.2d 1038, 1051, judgment affirmed 319 F.3d 1357 (Fed.Cir.2003).

**D.Del.**

**D.Del.**1991. Quot. in disc., com. (a) quot. in disc. Several regional bottlers sued a soft drink producer for breach of contract in failing to supply them with diet soda syrup on the same terms as regular soda syrup. The court held that the producer did not hold the soft drink trademark in trust for the benefit of the bottlers; a trust was neither created expressly by the contracts nor created constructively by the relationship between the parties. In interpreting the contracts, the court gave the greatest weight to the contracts' express language. It concluded that, since the unamended bottling contracts discussed only cola syrup with a specified quantity of sugar, the plaintiff bottlers with the unamended contracts were not entitled to purchase diet syrup. However, the court found that the contracts of the plaintiff bottlers who had negotiated amended agreements allowing the producer to substitute "another sweetening ingredient" for sugar included diet syrup. It granted those plaintiffs declaratory and injunctive


 

relief. Coca-Cola Bottling Co. v. Coca-Cola Co., 769 F.Supp. 671, 737, affirmed 988 F.2d 414 (3d Cir.1993), cert. denied 510 U.S. 908, 114 S.Ct. 289, 126 L.Ed.2d 239 (1993).

**D.Del.Bkrtcy.Ct.**

**D.Del.Bkrtcy.Ct.**2002. Quot. in sup. Claimant sought certification of creditor class to assert class claim against Chapter 11 debtor-lenders for violation of Equal Credit Opportunity Act notice requirements. Denying claimant's motion for certification, this court held that individualized written and oral inquiries required for each class member prevented court from certifying class; and agreement to arbitrate signed by creditors would be interpreted against debtors as drafters. In re United Companies Financial Corp., 277 B.R. 596, 603.

**D.Del.Bkrtcy.Ct.**1991. Cit. in sup. A dairy farmer and certain investors entered into a services contract, which provided that the farmer would assist in purchasing the dairy herd, and would manage, maintain, and expand the herd as well as improve its quality. Disease struck the herd and various other difficulties were encountered by the farmer, resulting in the execution of a termination agreement, shortly after which the farmer declared bankruptcy. The farmer objected to the investors' proof of claim for interest payments due under the termination agreement, and sought turnover of feed monies owed by the investors. The investors counterclaimed for breach of contract, alleging that the farmer had failed to comply with the strict language of the services agreement and had mismanaged the herd. This court disallowed the breach of contract claim, rejecting a restrictive reading of the agreement in favor of a fair, reasonable, and practical construction under the contract's plain language. The court determined that any ambiguities would be resolved against the attorney investor who drafted the agreement, and concluded that the investors' failure to exercise an option to cancel the deal also supported a fair and reasonable construction of the terms in the contract. Matter of Burger, 125 B.R. 894, 903.

**D.D.C.**

**D.D.C.**2016. Cit. in sup.; com. (a) cit. in sup. Employee filed three separate administrative complaints and this federal-court action against employer, alleging discrimination and retaliation. The parties entered into a settlement agreement regarding plaintiff's third administrative complaint, dismissing plaintiff's complaint and disposing of all the issues that were raised or could have been raised prior to the agreement's effective date. This court granted defendant's motion for summary judgment, holding that plaintiff's claims were precluded by the settlement agreement because they were raised prior to the agreement's effective date. The court rejected plaintiff's reliance on the principle of contra proferentum, and explained, citing Restatement Second of Contracts § 206, that the principle was inapplicable because the agreement did not contain an ambiguity that had to be resolved. Guerrero v. Vilsack, 153 F.Supp.3d 228, 232.

**D.D.C.**2015. Quot. in case quot. in sup.; com. (a) cit. and quot. in sup. Trustee of failed thrift's residential mortgage-backed securities brought a breach-of-contract action against bank and Federal Deposit Insurance Corporation (FDIC) that had sold substantially all of thrift's assets and liabilities to bank under a purchase-and-assumption agreement, seeking to enforce thrift's obligation to repurchase securities. This court granted in part summary judgment for bank, holding that bank did not assume thrift's unbooked mortgage-repurchase liabilities. The court determined that the agreement unambiguously transferred only booked liabilities, and noted that, if the agreement was construed under Restatement Second of Contracts § 206 against FDIC, the drafter of the agreement, the result would have been the same. Deutsche Bank National Trust Company v. Federal Deposit Insurance Corporation, 109 F.Supp.3d 179, 211.

**D.D.C.**2010. Com. (a) quot. in sup. Risk-retention group sued insurance broker, alleging that defendant breached the parties' administrative services agreement, under which defendant was to serve as group's insurance program administrator. This court denied defendant's motion to compel arbitration and stay proceedings, holding, inter alia, that the preponderance of the extrinsic evidence did not establish that the parties intended to submit to mandatory arbitration. The court noted that defendant could not salvage its motion by invoking the doctrine of contra proferentem to strongly construe any ambiguity as to the arbitration


 

clause's meaning against plaintiff, because plaintiff had no direct role in selecting the language for the agreement, and thus could not be said to be the draftsman of the agreement. PCH Mut. Ins. Co., Inc. v. Casualty & Surety, Inc., 750 F.Supp.2d 125, 148.

**D.D.C.**2006. Quot. in disc. Putative class of African-American Special Agents brought Title VII action against the Drug Enforcement Agency (DEA), alleging discrimination related to DEA's promotion practices. This court denied plaintiffs' request for injunctive relief in connection with a stipulation agreement, approved earlier by the court, providing a process for promotion to remedy discrimination. The court found that there was no meeting of the minds regarding a certain key footnote added to the agreement, and, therefore, the agreement was not a binding or enforceable consent decree. Although interpretation against the party who drafted an agreement was the general rule when choosing among the reasonable meanings to be given to a term of the agreement, here, “conscious ignorance,” where plaintiffs were made aware of the footnote and chose not to seek clarification of its meaning, could not support enforcement of plaintiffs' mistaken interpretation. Segar v. Ashcroft, 422 F.Supp.2d 117, 127.

**D.D.C.**2003. Quot. in ftn. in sup. In dispute involving partnership agreement, plaintiffs petitioned to correct, modify or vacate arbitration award, seeking an order that the arbitration was nonbinding. This court denied plaintiffs' motion, confirmed the arbitration award, and dismissed plaintiffs' claims as to all defendants. The court said that defendants' failure to include in the arbitration clause express language like “binding” or “final” did not indicate an intent that the arbitration would not be binding. Bryson v. Gere, 268 F.Supp.2d 46, 52.

**D.D.C.**1990. Cit. in sup. An insured who was sued for property damage caused by asbestos sued its liability insurers, seeking a determination that it was entitled to coverage under the policies. The defendants contended that an endorsement to the policies excluding coverage for the “cost of removing, nullifying or cleaning up seeping, polluting or contaminating substances” barred coverage. The plaintiff argued that the exclusion did not apply. This court granted the plaintiff summary judgment, holding that the defendants failed to raise the exclusion in a timely manner and had therefore waived any defense based on it. Moreover, aside from the waiver issue, the court concluded that there was no genuine dispute that the exclusion, when read in the context of the entire endorsement, applied only to oil and gas operations, not property damage caused by asbestos, and noted that, in choosing between reasonable and conflicting interpretations of a policy provision, it must liberally construe the policy in favor of the insured, adopting the interpretation sustaining the claim for indemnity. Carey Canada, Inc. v. California Union Ins. Co., 748 F.Supp. 8, 15.

**N.D.Ill.**

**N.D.Ill.**1992. Cit. in appendix to op., com. (a) cit. in appendix to op. Former corporation president sued the corporation for, inter alia, breach of contract arising out of defendant's denial of plaintiff's severance compensation following a change in control of the corporation. Rejecting the magistrate judge's recommendation that summary judgment be granted for plaintiff, the court denied in part the parties' cross-motions for summary judgment and held that whether plaintiff, whose office was located in Michigan, and defendant intended to enter into a severance compensation agreement whereby plaintiff would receive a substantial monetary benefit upon the occurrence of an event, the closing of the corporation's principal executive offices in Boston, that would have no bearing on the job performed by plaintiff raised genuine issues of material fact. The court stated that, to decipher the actual expectations of the parties, it must look to the negotiation, bargaining, and past conduct of the parties and to the context in which the agreement was drafted. Grun v. Pneumo Abex Corp., 808 F.Supp. 632, 643.

**N.D.Ill.**1986. Com. (a) cit. in sup. The limited partner to a real estate partnership sought to obtain distribution of the proceeds of a sale of property upon dissolution of the partnership according to the provisions of the partnership agreement. This distribution would provide the limited partner with an extraordinary profit in comparison to its initial investment, while the general partners would suffer a loss, because of distributions based on net proceeds from the sale of real estate that formed the basis of the partnership without accounting for capital contributions. The district court granted the limited partner's motion for summary judgment, holding that the relevant provisions of the general partnership agreement, which called for the limited partner to receive a specified percentage of a sale before paying any capital contribution, was not ambiguous and vague, and thus, was not to be construed against the limited partner as draftsman. Northwestern Nat. Life Ins. Co. v. Comm, 627 F.Supp. 502, 507.


 

**N.D.Ill.Bkrtcy.Ct.**

**N.D.Ill.Bkrtcy.Ct.**1995. Quot. in sup. Debtor airline sued potential buyer of its assets on theories of, inter alia, breach of contract and promissory estoppel, arguing that buyer breached two enforceable agreements, one for the sale of its gate assets, the other for the sale of its nongate assets. The court entered judgment for buyer as to the nongate assets, holding that no contract existed because debtor failed to satisfy a number of conditions precedent to formation that it had included in the document. The court also found in buyer's favor on the promissory estoppel charge, concluding that statements made concerning the acquisition of debtor's nongate assets were ambiguous and did not rise to the level of certainty necessary to sustain this claim. As to the gate assets, however, the court held that buyer breached an agreement to reimburse debtor for arrears payments it made to the city in connection with airport gate leases, and ordered buyer to pay sums equal to what debtor would have received under the contract, less the amount it recovered or expected to recover from mitigating damages. In re Midway Airlines, Inc., 180 B.R. 851, 917.

**N.D.Iowa**

**N.D.Iowa,** 2006. Quot. in ftn. Criminal defendant in a drug prosecution moved for specific performance of a plea agreement that he had entered into with the federal government, and for dismissal of his indictment. This court granted defendant's motion, holding, inter alia, that government breached the plea agreement by seeking the instant indictment because the agreement clearly barred government from charging defendant with additional Title 21 crimes arising from information in the government's possession at the time the agreement was entered; the court noted that, even if the agreement had been ambiguous, any ambiguities were to be construed against the drafter, which, in this case, was the government. U.S. v. Bradford, 433 F.Supp.2d 1001, 1004.

**D.Kan.**

**D.Kan.**1999. Com. (a) quot. in disc. Plaintiff railroad brought suit to recover damages arising from defendant railroad's alleged breach of the parties' locomotive-interchange contract. The court entered summary judgment for plaintiff on liability and, following a bench trial on damages, awarded plaintiff monetary damages and prejudgment interest. The court applied the doctrine of contra proferentem to resolve ambiguities in the contract against plaintiff as the drafter of the contract. Burlington North. & Santa Fe Ry. Co. v. Kansas City Ry. Co., 73 F.Supp.2d 1274, 1282.

**D.Kan.**1995. Cit. in sup. Licensee sued holder of patent for a declaratory judgment that the parties' license agreement granting licensee the rights to manufacture, use, and sell conveyor systems incorporating inventions claimed in the patent was worldwide in scope. Entering judgment for plaintiff, the court held that the parties intended to grant plaintiff licensing rights in foreign countries, not just in the United States. The court said that, to the extent that the geographical scope of the license agreement was unclear, this aspect of the contract should be construed against defendant, the drafter of the document. Mid-West Conveyor Co., Inc. v. Jervis B. Webb Co., 877 F.Supp. 552, 560, affirmed 92 F.3d 992 (10th Cir.1996).

**D.Md.**

**D.Md.**1996. Cit. generally in disc. Saudi Arabian company that contracted to serve as the European/Middle Eastern agent for a Delaware corporation that manufactured prepaid telephone calling cards sued corporation and its apparent subsidiary for, inter alia, breach of contract, misrepresentation, and fraudulent inducement. Because the contract, which was integrated and included an arbitration clause, stated that corporation's affiliates were part of the agreement, company sought to pierce the corporate veil in order to hold subsidiary liable. Corporation and subsidiary both moved to dismiss. Denying the motions but treating corporation's motion as one to compel arbitration, the court held that the contract terms, when construed against corporation as the drafting party, militated in favor of arbitration. Furthermore, at trial, company would be allowed to present extrinsic evidence


 

in an attempt to clarify the meaning of the term "affiliate" as used in the agreement between it and corporation. Alamria v. Telcor Intern., Inc., 920 F.Supp. 658, 663.

**D.Mass.**

**D.Mass.**2002. Cit. in sup. Employer brought suit against former officer, seeking a declaratory judgment that defendant was not entitled to the benefits outlined in an amendment to his employment agreement. Allowing defendant's motion to compel arbitration and stay judicial proceedings pending arbitration, the court held, inter alia, that the arbitration clause in the employment agreement would not be construed against defendant as drafter of the agreement under the doctrine of contra proferentem, since there was only one reasonable meaning of the clause. Raytheon Co. v. Donovan, 208 F.Supp.2d 99. 105.

**D.Mass.**1999. Cit. in disc. Two insurance companies and their subsidiaries sought to compel arbitration of 17 actions brought against them in state court by former general managers, who alleged that their employment contracts were unlawfully terminated following a merger between the insurance companies. This court granted in part the motions of the former employees to dismiss for lack of standing in the 15 cases in which the only defendant that was a member of the National Association of Securities Dealers had been dismissed from the underlying state cases. The court stated that the general manager agreement imposed separate, rather than collective, obligations on the defendant entities named as parties. Paul Revere Variable Annuity Insurance Company v. Thomas, 66 F.Supp.2d 217, 227, affirmed 226 F.3d 15 (1st Cir.2000). See above case.

**E.D.Mich.**

**E.D.Mich.**2016. Cit. in case cit. in sup. (general cite). Employer filed an action against labor union that represented some of its employees, seeking to vacate an arbitration award that held that, under the parties' collective-bargaining agreement, employees who worked 40 hours or more in a workweek were entitled to be paid at an overtime rate for vacation and holiday time during the same week. This court granted summary judgment for union, holding that the arbitrator acted within the scope of his authority in interpreting the agreement. The court reasoned that, in the context of the agreement, together with ordinary principles of contract interpretation, the arbitrator's construction of the agreement's provisions was consistent with the Restatement Second of Contracts, which provided that, when a general contractual provision arguably conflicted with a more specific provision on the same topic, the specific provision controlled. Pinnacle Foods Group, LLC v. United Dairy and Bakery Workers Local 87, 186 F.Supp.3d 722, 729.

**W.D.Mich.**

**W.D.Mich.**1993. Cit. in disc. The trustee of an ERISA health benefit plan sued a participant and his counsel for full reimbursement of benefits. This court, granting summary judgment for the plan and denying summary judgment for the participant's counsel on counsel's counterclaim, held, inter alia, that, under the terms of a subrogation agreement that was a specifically negotiated modification of general language used by the plan, participant's counsel could not divide damages recovered from a third-party tortfeasor between the participant and the plan and then recover his fee from both shares. Rather, said the court, he was required to reimburse the plan fully after taking his fees from the entire settlement. It noted that the contract language should be construed against counsel, since counsel drafted the language in question. Quade v. Anderson, 829 F.Supp. 220, 223.

**D.Minn.**

**D.Minn.**2000. Cit. in disc. Former employees brought an ERISA action to restore retirement benefits under an early retirement program offered by their employer and administered by employer's retiree health-care plan. This court granted in part and denied in part the parties' motions for summary judgment, holding, inter alia, that the releases signed by plaintiffs in exchange for the right to participate in the program conferred upon them an entitlement to vested enhanced medical benefits, since that was


 

a reasonable expectation under the contracts, and that any ambiguity in the releases would be construed against defendants. Stearns v. NCR Corporation, 97 F.Supp.2d 954, 966.

**D.Minn.Bkrtcy.Ct.**

**D.Minn.Bkrtcy.Ct.**1993. Quot. in sup. Shortly after their Chapter 11 plan was confirmed, debtors brought suit seeking to avoid and recover a preferential transfer to a bank. This court granted bank summary judgment, holding that, while the court had jurisdiction to decide preference actions whenever brought, debtors who brought preference actions post-confirmation must specifically and unequivocally draft a plan provision notifying reasonable readers of the plan of their intention, and the recovery of the avoided preference must be for benefit of estate and not debtor. Here, debtors' plan did not retain the preferences nor did their plan provide that their recovery would benefit their estate or their creditors. Noting that ambiguities in a Chapter 11 plan were interpreted against plan drafter, the court stated that debtors' plan was ambiguous and did nothing to alert a reasonable creditor of potential liability or recovery arising from postpetition preference actions. In re Harstad, 155 B.R. 500, 511.

**W.D.Mo.**

**W.D.Mo.**2000. Com. (a) quot. in case cit. in disc. Insured sued insurer for fraudulent inducement and breach of contract in connection with insurer's sale of a "vanishing premium" life insurance policy. Denying plaintiff's amended motion for class certification, the court held, inter alia, that consideration of extrinsic evidence, which would likely be necessary to prove the ambiguity of the policy provisions, rendered the claims individualized and not reasonably susceptible to class-action treatment. Adams v. Kansas City Life Insurance Company, 192 F.R.D. 274, 281.

**D.Neb.**

**D.Neb.**1990. Quot. in disc., Rptr's Note quot. and cit. in disc. A union sued two employers belonging to a multiemployer bargaining unit for breach of contract, alleging that the employers were obligated under an amendment to the contract, executed after the employers left the bargaining unit, to institute the withholding of a designated amount from the wages of union employees to be turned over to the union as dues, a process known as administrative checkoff. This court found for the defendants, stating that the only contract binding the defendants did not provide for administrative checkoff. Moreover, the defendants' refusal to accede to the plaintiff's demands for the implementation of such a checkoff was not a breach of that agreement. The court said, inter alia, that the contract was not to be construed in the plaintiff's favor, even though drafted by the defendants, since the contract was jointly negotiated by both parties, and that to read the phrase "wages and fringe benefits" as encompassing administrative checkoff, was unreasonable. Local No. 571 v. Hawkins Const. Co., 727 F.Supp. 537, 542, 543, decision affirmed in part, remanded in part 929 F.2d 1346 (8th Cir.1991).

**D.Neb.**1974. Section 232 of Tentative Drafts 1 through 7, Revised and Edited, which is now Section 206 of the Official Draft quot. and quot. part of com. a and fol. This was a tort action arising out of a two car automobile collision. The plaintiff was suing the company whose employee was the driver of the car which collided with plaintiff's car and severely injured plaintiff's husband, who is now incompetent. The compensation carrier for the husband's employer was a nominal defendant but its counsel was working closely with plaintiff's counsel in the prosecution of the suit. The parties sought court approval of a settlement which was reached. At issue, however, was the determination of attorneys' fees and expenses. Carrier's counsel contended that an alleged contract between both counsel provided that the fee would be split equally; plaintiff's counsel contended that the apportionment of the fee was for the court's discretion as per a statute. After the court held that the settlement was fair and reasonable, it held that there was indeed a contract between the counsel to split the fee evenly, that the statute allowing court allocation of attorneys' fees specifically mentions this method in the absence of agreements between counsel, that the contract would be construed against plaintiff's counsel who was the source of the writing, and that therefore the fee would be split equally. Kitchin v. Burlington Northern, Inc., 382 F.Supp. 42, 49.


 

**D.N.J.**

**D.N.J.**1997. Cit. in disc. Terminated fast-food restaurant worker sued former employer and supervisors for, inter alia, sexual harassment and retaliation in violation of Title VII and the New Jersey Law Against Discrimination (NJLAD). Defendants moved to dismiss or, alternatively, to compel arbitration pursuant to the arbitration agreement included in plaintiff's signed employment application. Granting in part and denying in part the motion to dismiss and denying the motion to compel arbitration, the court held that, while there was no individual liability under Title VII, individual liability could be imposed under the NJLAD for affirmative misconduct, and that the retaliation claim survived defendants' motion to compel arbitration because the arbitration agreement, which was ambiguous with respect to claims arising from violations of civil rights statutes, would be construed against the drafting defendant. Caldwell v. KFC Corp., 958 F.Supp. 962, 974.

**D.N.J.**1996. Cit. in headnote, cit. in ftn. Purchasers of business sued sellers for breach of contract and fraud, and asserted a claim for indemnification. Sellers moved to compel arbitration pursuant to the applicable provisions of the parties' merger agreement. Unable to compel arbitration in the parties' chosen forum of Philadelphia, the court held that the claims for breach of contract and indemnification were arbitrable and would be stayed pending the completion of arbitration, that the claim for fraud would be stayed as well, and that venue would be transferred to the Eastern District of Pennsylvania. The court rejected the argument that the claims were not arbitrable because purchasers were seeking remedies beyond those provided for in the merger agreement, explaining that the agreement would be construed against purchasers as the drafting parties, and that, even if purchasers' "excess remedies" argument was valid, a stay was still appropriate because an arbitration decision could have preclusive effect, which would facilitate a collection suit for full compensation. Optopics Laboratories Corp. v. Nicholas, 947 F.Supp. 817, 817, 822.

**E.D.N.Y.**

**E.D.N.Y.**2005. Cit. in disc. Bank incorporated in the Philippines sought to enforce the terms of a guarantee agreement against New York resident that had guaranteed a defaulting Philippine-located garment manufacturer's obligations. Granting guarantor's motion to dismiss, this court held, inter alia, that it lacked jurisdiction to hear this case because the forum-selection clause in the agreement conferred mandatory exclusive jurisdiction upon the courts of Makati, Metro Manila, Philippines. Additionally, the bank drafted the agreement and presented no evidence to indicate that the law of the Philippines differed from United States contract law in providing that ambiguous language was to be construed against the interests of the drafter. The HongKong and Shanghai Banking Corporation Limited v. Suveyke, 392 F.Supp.2d 489, 491.

**E.D.N.Y.Bkrtcy.Ct.**

**E.D.N.Y.Bkrtcy.Ct.**1982. Cit. in sup. The debtors brought a Chapter 13 proceeding, the effect of which was to put a stay upon a mortgagee's foreclosure action on the debtors' principal residence. The mortgagee originally opposed confirmation of the debtors' plan, which had as its main objective curing arrearages on the mortgage. However, the parties eventually resolved all differences between themselves, except the figure, if any, to be allowed the mortgagee for attorneys' fees as part of the claim to be paid under the plan. The court first noted that such fees should not be allowed except as they were provided for under the agreement under which the claim arose. The agreement here provided for attorneys' fees for remedy of any default. Since this provision appeared on a printed form supplied by the mortgagee, the court held that its terms were to be strictly construed against the mortgagee. The court felt that a proceeding to foreclose a mortgage did not remedy a default under a mortgage, and therefore denied the claim for attorneys' fees. In re Roberts, 20 B.R. 914, 921.

**N.D.N.Y.**

**N.D.N.Y.**1984. Cit. in sup. Trustee of a bankrupt supplier sued a subcontractor to recover money allegedly due under a contract to supply labor and materials for a ventilation system. The parties' contract contained no provision as to progress payments, but the subcontractor argued that the contract incorporated by reference an additional document setting forth "general conditions,"


 

including provisions for progress payments to subcontractors. The district court stated that the term "specifications" in the parties' contract referred only to specific technical instructions to be followed by the supplier; thus the supplier was not bound by the general provisions regarding payment, and the subcontractor breached the contract by failing to make timely progress payments. The court, however, adopted the bankruptcy court's order dismissing the complaint. While the supplier was entitled to damages for breach of contract, it could not prove that it would have realized any profit in completing the contract. In re U.S. Air Duct Corp., 38 B.R. 1008, 1013.

**S.D.N.Y.**

**S.D.N.Y.**2005. Quot. in disc. After defendant pleaded guilty to conspiring to distribute a controlled substance, government moved to hold defendant in breach of plea agreement, adjourn sentencing, and hold hearing to prove facts that would enhance sentence recommended by sentencing guidelines. Denying the motion, this court held, inter alia, that defendant's sentencing letter, which called court's attention to its authority under recent case law to permit imposition of non-guideline sentence, did not breach provisions of plea agreement waiving right to constitutionally challenge sentencing guidelines and granting consent to be sentenced pursuant to guidelines; plea agreement drafted by government had to be strictly construed against government. U.S. v. Cosimi, 368 F.Supp.2d 345, 352.

**S.D.N.Y.**2003. Com. (a) quot. in disc. Investor sued venture capital fund and others for fraudulent inducement. Defendants moved to compel arbitration in Bahamas pursuant to fund's partnership agreement; plaintiff cross-moved to compel arbitration in New York. This court denied plaintiff's motion to compel arbitration in New York, holding that partnership agreement's arbitration clause was the controlling provision as to the dispute and reflected terms by which parties agreed to be bound. The court rejected plaintiff's assertion that, since court lacked jurisdiction to compel arbitration in Bahamas, it should enforce agreement to arbitrate in New York in accordance with language in fund's confidential information memorandum (CIM). The CIM was designed as a summary of partnership agreement's corresponding provision, not an independent contractual obligation. DaPuzzo v. Globalvest Management Co., L.P., 263 F.Supp.2d 714, 729.

**S.D.N.Y.**2000. Quot. in disc., com. (a) quot. in ftn. Fabric buyer under an exclusive distribution agreement sued sellers for breach of contract; sellers counterclaimed for breach of contract. This court granted buyer's motion in limine prohibiting sellers from introducing parol evidence, holding that it was not commercially reasonable to require buyer to increase its purchases of first-quality fabrics by 15% per year if sellers had no obligation to actually deliver the goods ordered by buyer. The court stated that because sellers drafted the distribution agreement, any ambiguity therein should be construed against their interests, assuming, arguendo, that such ambiguity was present. Sellers could not avoid their obligations under contract by postulating an unreasonable interpretation of contract terms and seeking to muddy the waters further with parol evidence. C.P. Apparel Mfg. Corp. v. Microfibres, Inc., 210 F.Supp.2d 272, 276.

**S.D.N.Y.**1999. Cit. in ftn. Automobile franchisee sued franchisor, which had threatened to terminate franchisee's distributorship. Denying franchisee's motion for a preliminary injunction, the court held, in part, that although franchisee was likely to succeed on the merits of its claim that franchisor's demand that transfer charges under letters of credit be imposed on franchisee would violate franchisee's rights under the contract, franchisee's remedy was money damages, rather than injunctive relief. The court noted that the contract, which was silent as to transfer charges, had to be construed against franchisor-drafter. Subaru Distributors Corp. v. Subaru of America, Inc., 47 F.Supp.2d 451, 471.

**S.D.N.Y.**1988. Cit. in disc. A small publishing house agreed with the widow and children of a recently deceased Pulitzer Prize-winning author to publish a volume of the author's uncollected works. When it became apparent to the widow and children that the publisher intended to include early stories considered inferior by the author in a collection more extensive than the author's family had envisioned, the family sought a preliminary injunction against publication and sued for copyright infringement. The court granted a temporary injunction pending a decision in an Illinois circuit court as to whether the widow contractually intended to license the stories to the defendant for publication. The court said that since the publishing agreement, which was


 

drafted by the publisher, was ambiguous, it should be construed against the drafter and that it seemed likely that the plaintiffs would prevail on the copyright infringement claim before this court. Cheever v. Academy Chicago, Ltd., 690 F.Supp. 281, 287.

**S.D.N.Y.**1987. Cit. in sup. After certain bonds that he had purchased became worthless, a securities customer sued his stockbroker and two brokerage firms for securities fraud. Immediately after the customer filed suit, the defendants attempted to enforce the arbitration clause in the customer's agreement with the defendant firm that had acted as the clearing broker for the other defendant firm, which had acted as the introducing broker in all of the plaintiff's transactions. This court granted in part and denied in part the defendants' motion for a stay of trial pending arbitration, holding, inter alia, that because the agreement between the customer and the clearing broker did not even refer to the other defendants, those other defendants were merely incidental beneficiaries to the contract and as such they could not enforce the arbitration agreement against the plaintiff as third-party beneficiaries. Lester v. Basner, 676 F.Supp. 481, 484-485.

**S.D.N.Y.**1983. Cit. but dist. A loan agreement drafted by the plaintiff lenders provided that the defendant borrower would pay "all expenses legal or otherwise" incurred by the lenders in enforcement of the agreement. When the borrower defaulted, the lenders brought this action. The court granted the lenders' motion for summary judgment and allowed the lenders to recover for attorneys' fees. This court rejected the borrower's assertions that the contract terms "all expenses legal or otherwise" were ambiguous and therefore were to be construed against the lenders. The court found that the contract language clearly expressed the intent of the parties at the time the contract was made to provide for the reimbursement of the lenders' attorneys' fees in the event of litigation. Libra Bank v. Banco Nacional de Costa Rica, 570 F.Supp. 870, 893.

**S.D.N.Y.Bkrtcy.Ct.**

**S.D.N.Y.Bkrtcy.Ct.**1996. Quot. in sup. In Chapter 11 proceedings involving cargo shipping company, a disbursement trust was established to deal with the numerous personal injury claims filed by employees who claimed to have been exposed to asbestos-containing materials in the years they worked for debtor. Trustee then brought this declaratory judgment action to determine the rights of the trust under insurance policies issued by a maritime insurer to debtor. Specifically, insurer and employees, who were granted leave to intervene, disagreed as to the interpretation to be accorded "occurrence," as that term was used in the policies. On remand from the district court, this court held, inter alia, that it was constrained to construe ambiguous terms against insurer as the drafting party and define "occurrence" as the general presence of asbestos on debtor's ships. In re Prudential Lines, Inc., 202 B.R. 13, 23-24.

**S.D.N.Y.Bkrtcy.Ct.**1987. Cit. in disc. The trustee of a debtor seafood corporation sued a bank, alleging that the debtor had made a preferential payment to the bank creditor. This court granted summary judgment to the bank, holding that the security agreement the debtor executed with the bank was valid because the debtor's officers had signed the agreement with a present intent to authenticate, and that the security agreement gave the bank a security interest in the debtor's assets. The court rejected the trustee's argument that the parole evidence rule barred evidence of the parties' intent in the absence of the debtor's name on the security agreement, reasoning that the extrinsic evidence was necessary because the written agreement was ambiguous, and the evidence was not offered to vary or contradict its terms, but to explain the intent of the parties. In re Kam Kuo Seafood Corp., 76 B.R. 297, 302.

**S.D.N.Y.Bkrtcy.Ct.**1983. Cit. in sup. A lessee filed a petition for reorganization. After an auction of the leasehold, it moved to assume and assign the lease to the highest bidder. The landlord argued that the bidder would not be able to comply with the "high caliber" clause of the lease, though the bidder could give assurances of compliance with the use and financial requirements of the lease, and the lease required landlord consent to alterations. This court approved the assignment of the lease. While leases in this jurisdiction were generally interpreted according to their plain meaning, in this case there was ambiguity. This court construed the ambiguity of the "high caliber" clause against the landlord and held that the assignment of the leasehold to the bidder would not violate the terms of the lease. In re Evelyn Byrnes, Inc., 32 B.R. 825, 832.


 

**W.D.N.Y.**

**W.D.N.Y.**2012. Cit. in disc. Company sued purchaser of its subsidiary, alleging that purchaser unlawfully withheld funds due under the sales agreement; purchaser counterclaimed for breach of contract, claiming, inter alia, that company failed to adequately disclose subsidiary's liabilities. Denying both parties' motions for summary judgment, this court held that, in the absence of persuasive authority and relevant argument on the matter of whether, under the terms of the sales agreement, information that plaintiff allegedly withheld was "materially adverse" to subsidiary's bottom line, it could not rule as a matter of law on whether the agreement was breached. The court noted that ambiguity created by language in the agreement was construed against defendant as the drafter, but, even so construed, it was unclear how to determine what constituted a "materially adverse effect." Alliance Industries, Inc. v. Longyear Holdings, Inc., 854 F.Supp.2d 321, 332.

**N.D.Ohio**

**N.D.Ohio,** 2010. Quot. in case quot. in disc. Successor of asphalt paving company sued producer and distributor of construction aggregate, alleging breach of contract and promissory estoppel. While granting summary judgment for defendant based on the statute of limitations, this court held, among other things, that genuine issues of material fact existed as to whether a meeting of the minds occurred and whether conditions related to the purported contract were satisfied. In making its decision, the court cited a Sixth Circuit case summarizing general principles of Ohio contract law, including that, while the rule of contra proferentem provided that an ambiguity in a writing was generally interpreted against the drafter and in favor of the nondrafting party, this did not allow a court to adopt an unreasonable interpretation of the contract. Cranpark, Inc. v. Rogers Group, Inc., 721 F.Supp.2d 613, 621.

**N.D.Ohio Bkrtcy.Ct.**

**N.D.Ohio Bkrtcy.Ct.**1997. Cit. in disc. Debtors, who converted their case from Chapter 13 to Chapter 7, moved for an order directing the IRS to release its lien on their property. Denying debtors' motion, the court refused to require the IRS to remove its lien based on debtors' confirmed Chapter 13 plan, which stated that the IRS's claim was “totally unsecured.” The court said that debtor, as the drafter of the plan, bore the burden of any ambiguity, and it would be improper to cause the IRS to remove its lien where the plan had not specifically directed it to do so. In re Pearson, 214 B.R. 156, 161.

**N.D.Ohio Bkrtcy.Ct.**1996. Cit. in disc. Chapter 13 debtors objected to a creditor's proof of claim. This court entered an order allowing creditor to amend its proof of claim, holding that the provisions of the confirmed Chapter 13 plan did not bind the creditors. The court agreed with creditor's argument that there was not sufficient notice given to the confirmation of the debtors' plan, and therefore creditors could not be bound by it. It noted the general proposition that debtors will bear the burden of any ambiguity in the plan which they draft. In re Leis, 198 B.R. 257, 261.

**N.D.Ohio Bkrtcy.Ct.**1996. Cit. in disc. After the termination of their sales relationship, a salesperson of photographic equipment for a marketing company disposed of photographic equipment samples by selling them rather than returning them to the company. When the salesperson filed for Chapter 7 bankruptcy, the company filed an adversary proceeding to determine the dischargeability of the salesperson's debt to the company for the value of the samples. This court ordered that the debt was dischargeable, holding that creditor failed to prove that debtor acted with the requisite fraudulent intent necessary to show embezzlement by the sale of the photographic equipment. The commission agreement appeared to allow a salesperson to either return the samples, or to retain and be liable for them. Since the company drafted the commission agreement, it bore the burden of any ambiguity. In re Mills, 210 B.R. 289, 293.

**S.D.Ohio**


 

**S.D.Ohio,** 2009. Quot. in disc. Patent holder sued rival for breach of a patent-infringement settlement agreement between the parties that called for defendant to escrow funds that would become available pending a possible patent reexamination proceeding. Granting summary judgment for plaintiff, this court held, inter alia, that because defendant substantively failed to follow the unambiguous terms of the agreement, it breached the contract and the escrow funds were due immediately to plaintiff; although the court found no ambiguity in the agreement here, it noted that where there were two reasonable contract interpretations, the meaning was generally preferred that operated against the party who supplied the words. Star Lock Systems, Inc. v. TriTeq Lock and Sec., L.L.C., 631 F.Supp.2d 935, 939.

**S.D.Ohio,** 1998. Cit. in headnote and disc. A hospital nurse who contracted Lyme Disease sued her employer's insurer for ERISA violations, payment of long-term disability payments, and breach of fiduciary duties. The hospital had switched insurance carriers, and the former insurer had continued to pay plaintiff disability benefits for about one year. This court upheld insurer's denial of long-term disability benefits and denied plaintiff's motion for summary judgment on the breach of fiduciary duties claim. The court held, inter alia, that although plaintiff may well have been covered or eligible for coverage under the policy during her return to active work, she did not become covered or eligible during that limited time span. The court applied a de novo review of the policy, because the current insurer did not have the discretion to determine eligibility under or to interpret the terms of the former insurer's policy. Washburn v. UNUM Life Ins. Co. of America, 43 F.Supp.2d 848, 850, 856, affirmed 210 F.3D 373 (6th Cir.2000).

**S.D.Ohio,** 1984. Quot. in sup. A collective bargaining agreement between the general contractor on a construction project and the building and construction trades council and their affiliated unions covered all work to be done on a project. The agreement prohibited strikes and work stoppages of any kind. Eight days after construction began, the boilermakers, millwrights, and ironworkers walked off the job in a work jurisdiction dispute, resulting in a work stoppage. The ensuing litigation included a suit by the sheet metal subcontractor against the millwrights under the Labor Management Relations Act (LMRA). The LMRA provides that if a collective bargaining agreement provides for mandatory arbitration of certain disputes under the agreement, contractual remedies must first be exhausted. The arbitration provision in this case excluded questions of jurisdiction on work and provided a separate mechanism for those disputes. This court awarded a judgment to the subcontractor after concluding that the subcontractor's failure to comply with a provision of the project agreement that each subcontractor shall become signatory and a party to the agreement by signing an attached letter of assent did not preclude the subcontractor from accepting the offer orally, which happened in this case. United Broth. of Carpenters v. Backman Sheet Metal, 598 F.Supp. 212, 219.

**W.D.Okl.**

**W.D.Okl.**2000. Com. (a) cit. and quot. in ftn. Chapter 7 debtors listed their credit-card debt as unsecured and claimed their refrigerator as exempt under Oklahoma law, without objection, and then moved to avoid creditor appliance store's lien on the refrigerator. Creditor objected to the claim of exemption and opposed debtors' motion. This court determined that the creditor did not have a security interest in the refrigerator, because the language included in the credit application did not sufficiently identify the collateral at issue under the Oklahoma Uniform Commercial Code. Furthermore, since the agreement was one of adhesion, ambiguous language would be construed strongly against the drafter. In re Shirel, 251 B.R. 157, 160.

**D.Or.**

**D.Or.**2015. Quot. in disc. Former officer, director, and co-founder of bank, who was indicted for conspiracy to commit bank fraud, filed an action against bank, alleging, among other things, that, under bank's articles of incorporation, he was entitled to advancement of reasonable expenses that he would incur in his defense of the criminal action. After a bench trial, this court held that, although the relevant provision of the articles of incorporation was ambiguous, that ambiguity had to be resolved in favor of plaintiff under a maxim of construction set forth under a state statute. The court noted, however, that it could not apply the maxim of contract interpretation set forth in Restatement Second of Contracts § 206, which interpreted contract ambiguities against the drafter, because neither party submitted evidence regarding who drafted the articles of incorporation. Heine v. Bank of Oswego, 144 F.Supp.3d 1198, 1214.


 

**E.D.Pa.**

**E.D.Pa.**2011. Cit. in case quot. in sup., com. (a) quot. in sup. Former employer sued former employee and competitor, alleging that employee's new employment at competitor violated her noncompetition agreement with employer and made it more likely that she would use employer's trade secrets for competitor's benefit. Denying employer's request for a preliminary injunction, this court held that employee's job at competitor did not run afoul of the noncompetition agreement, because that job involved pharmaceutical coatings and colorants, which was not the same "technical area" as her job with employer, which involved food coatings and colorants. The court noted that employer had complete control over the content of the employment agreement that employee signed, and that it could have chosen a more specific phrase than "technical area." Colorcon, Inc. v. Lewis, 792 F.Supp.2d 786, 797, 798.

**E.D.Pa.**2007. Com. (a) to Rptr's Note quot. in sup. Insurer sued insureds, seeking a declaratory judgment and injunctive relief to establish the parties' rights and obligations under a life-insurance contract, including whether insureds had the right to make daily transfers into or out of investment options for purposes of market timing. Denying defendants' motion for summary judgment, this court held, inter alia, that the rule of contra proferentem, which required contractual ambiguities to be construed in favor of the insured and against the insurer that drafted the contract, did not apply where, as here, there was evidence of the parties' negotiations and intentions in entering the contract, and the party asserting the rule, a sophisticated investor, took an active role in the drafting process. Prudential Ins. Co. of America v. Prusky, 473 F.Supp.2d 629, 639.

**E.D.Pa.**2004. Cit. in disc. Former employee sued employer for ERISA violations, alleging that when defendant sold the stock of its subsidiary, plaintiff was terminated under the terms of subsidiary's severance-pay policy, and that defendant was responsible for payment of his severance pay under the stock-purchase agreement. This court granted defendant summary judgment, holding, inter alia, that although plaintiff might have been entitled to severance benefits under the policy, because he experienced a termination of employment and the subsidiary underwent a reorganization under terms of termination policy, he failed to prove that he was an intended third-party beneficiary of the stock-purchase agreement. The court noted that contract ambiguities were construed against the drafter. La Fata v. Raytheon Co, 302 F.Supp.2d 398, 408, affirmed 2005 WL 1925445 (3d Cir.2005).

**E.D.Pa.**1992. Quot. in disc. The copilot of a personal aircraft sued the executors of his deceased employer's estate, pursuant to ERISA, for pension benefits that allegedly vested in him during his employment. Entering judgment for defendants on plaintiff's ERISA claims, this court held, inter alia, that even if the employer had established a pension plan, there was insufficient evidence to prove that plaintiff was either eligible for, or participated in, the alleged plan. The court noted that, assuming, arguendo, the existence of a plan, plaintiff did not produce any ambiguous eligibility criteria for participation in the alleged plan for the court to interpret in his favor, and the court could not interpret the only criterion plaintiff did produce, that all employees were eligible, since that was clearly not intended by his employer. McVeigh v. Philadelphia Nat. Bank, 796 F.Supp. 173, 176.

**E.D.Pa.**1981. Cit. in disc. An excess insurer brought a declaratory judgment action against its insured and the insured's primary insurers, alleging that they had improperly exhausted the primary liability limits, thus prematurely calling on the excess carrier to fulfill its obligations. The insured counterclaimed against the excess carrier, asking for a declaration that the excess coverage covered injuries caused by exposure to asbestos during the policy period: the insured also cross-claimed against the primary insurers for a declaration that those insurers owed a continuing duty to defend despite exhaustion of the primary liability fund. On cross motions for summary judgment, the court first ruled that the primary insurers had a continuing duty to defend. It reached this conclusion after rejecting the insured's contention that it was the intended beneficiary of an agreement between the primary carriers that allocated the duty to defend among those carriers. The court instead based its ruling on the existence of an ambiguity in the contract provision detailing the the duty to defend, which it construed against the insurers. As additional support for the ruling, the court held that Pennsylvania law precluded insurers from abandoning pending suits when their policy limits were exceeded. The court also ruled that the excess insurer was obligated to indemnify the insured for liability caused by asbestos exposure during the policy period. It thereby rejected the excess insurer's contention that its obligations arose only in respect to injuries actually manifesting themselves during the policy period. In support of this ruling, the court held that


 

exposure, even before manifestation of an asbestos-related illness, was a cause-in-fact of the illness, and that the terms of the excess insurer's policy dictated coverage arising from such causal events. Commercial Union Ins. v. Pittsburgh Corning Corp., 553 F.Supp. 425, 429.

**E.D.Pa.Bkrtcy.Ct.**

**E.D.Pa.Bkrtcy.Ct.**2010. Cit. in case cit. in ftn. §§ 201-206; com. (a) quot. in sup. Architectural firm moved for relief from automatic stay, alleging that it was the owner of certain architectural plans it had prepared for debtor's construction project. Granting the motion, this court held that firm's ownership claim over the plans was superior to debtor's claim. Reasoning that the contract between the parties was ambiguous as to when ownership of the plans was to pass from firm to debtor, and that neither a textual examination of the contract nor the extrinsic evidence presented by the parties clarified the parties' intentions, the court applied the doctrine of contra proferentem and construed the ambiguity against debtor, as the drafter of the contract. In re Northwest 15th Street Associates, 435 B.R. 288, 298, 303.

**E.D.Pa.Bkrtcy.Ct.**2009. Cit. in sup. §§ 201-206, com. (a) quot. in sup. and cit. in case cit. in ftn. Chapter 13 debtor obtained confirmation of a plan providing, among other things, for him to litigate in state court the validity of his purported rescission of a mortgage on his and his wife's primary residence, for mortgage lender's claim to be paid after the conclusion of that litigation, and for the automatic stay to remain in place with respect to the mortgage on the residence until the resolution of that litigation. After the state court granted lender's motion for judgment on the pleadings, this court, on reconsideration, granted lender's motion for relief from the automatic stay, holding that it would invoke the doctrine of contra proferentem against debtor, as the drafter of the plan, in light of the fact that the plan's provisions with regard to the automatic stay were ambiguous and susceptible to two contrary, plausible interpretations, both of which could be supported by accepted principles of contract interpretation. In re Stuart, 402 B.R. 111, 128, 131.

**E.D.Pa.Bkrtcy.Ct.**1987. Com. (a) quot. in disc. The final agreement between a terminal operator and a coal company was written by the terminal operator's attorney, although it was largely based on a previous draft by the coal company's counsel. In response to a suit by the terminal operator alleging a prepetition breach of contract by the coal company debtor, the bankruptcy court found for the defendant based on the language of the contract. The district court ruled that the agreement was ambiguous and remanded the matter for consideration of extrinsic evidence. Although still finding for the defendant, this court noted that the defendant's argument that ambiguous contract language should be construed against the drafter was weakened by the contribution made to the drafting by the defendant's counsel. In re F.A. Potts and Co., Inc., 70 B.R. 894, 904.

**W.D.Pa.**

**W.D.Pa.**2018. Quot. in sup. Mineral lessors filed a class action for breach of contract against lessee, alleging that lessee failed to fund draft instruments that it had issued to lessors as payment of bonuses due under the leases. This court denied in part lessee's motion for summary judgment, in which lessee argued that the leases failed for lack of consideration, holding that the transaction documents, when construed collectively, could reasonably be viewed as providing valid consideration to each lessor in the form of a conditional promise of future payment. The court reasoned, in part, that the documents were ambiguous and that the ambiguity could not be conclusively resolved in lessee's favor by a resort to the relevant extrinsic evidence; consequently, the documents had to be construed in favor of lessors and against lessee under Restatement Second of Contracts § 206, because lessee supplied the form documents that the parties used in entering into the transactions. Walney v. SWEPI LP, 311 F.Supp.3d 696, 709.

**W.D.Pa.**2016. Cit. in sup. Nursing-home resident's son individually and as personal representative of resident's estate brought wrongful-death and survival claims against nursing home, alleging that defendant was negligent in its care of resident, which led to resident's ulcer worsening, additional health complications, and death. This court denied defendant's motion to dismiss, holding that an arbitration agreement that son signed on resident's admission to the home did not waive son's right to a jury trial for his survival claim and, even though son contracted away resident's right to a jury trial for his wrongful-death claim, resident's


 

claim would not be dismissed, because it could not be severed from son's claim. Citing Restatement Second of Contracts § 206, the court construed ambiguities in the agreement's choice-of-law provision against the drafter, and concluded that Pennsylvania law—which held that wrongful-death and survival claims could not be severed from another—applied to the agreement. Grkman v. 890 Weatherwood Lane Operating Company, LLC, 189 F.Supp.3d 513, 526.

**D.P.R.**

**D.P.R.**1997. Quot. in sup., cit. in ftn. in sup., com. (a) quot. in ftn. in sup. A stock brokerage firm filed an action to permanently stay arbitration proceedings instituted against it by investors and to dismiss the claims on statute-of-limitations grounds, arguing that the parties' client agreement adopted as binding New York's rule that threshold statute-of-limitations questions were for the courts. Denying relief to the firm, the court held, inter alia, that the adjudication of the firm's statute-of-limitation defenses was for the arbitrator, rather than for the courts, since the client agreement's choice-of-law clause providing for the applicability of New York law was not so clear as to overcome the presumption that statute-of-limitations questions were arbitrable. The court stated that ambiguous terms in the agreement should be interpreted against the firm, which drafted the agreement without any input from defendant investors. Dean Witter Reynolds, Inc. v. Sanchez Espada, 959 F.Supp. 73, 81.

**D.P.R.**1986. Cit. in sup. A banking insurance company sued an investment company and its personal guarantors to collect loans and promissory notes that were acquired as assets from a failed financial institution. Granting partial summary judgment to the defendants, this court held that the guarantors were not liable for the investment company's subsequent loans because the letter of guaranty was limited in scope, by its own terms, to a loan for a specific project. Federal Deposit Ins. Corp. v. Rivera-Arroyo, 645 F.Supp. 511, 515.

**D.R.I.Bkrtcy.Ct.**

**D.R.I.Bkrtcy.Ct.**1991. Cit. in disc. Chapter 7 trustee and debtors sued boat seller, alleging that seller had fraudulently misrepresented boat's condition, thereby inducing debtors to purchase it. Debtors assumed sellers' mortgage note, which called for bank to receive attorney fees up to 18%, as well as the guaranty on the note, which limited the attorney fees to 5% of the amount due. Bankruptcy court held defendant liable for damages proximately resulting from the misrepresentations and it awarded punitive damages. It also awarded attorneys fees in the amount of $35,000. District court remanded, directing bankruptcy court to determine whether legal fees should be based upon terms of guaranty, or according to the note. Construing the ambiguity of the conflicting contract terms between the terms of the note and the guaranty against the bank, which drafted the documents, this court held, inter alia, that the guaranty's 5% fee cap set the limit of allowable attorney fees. In re Reposa, 155 B.R. 809, 813, vacated 153 B.R. 607 (D.R.I.1993).

**E.D.Tex.**

**E.D.Tex.**1983. Cit. in disc. On remand after appeal, the federal district court entered judgment for the plaintiff in a suit against his former employer to recover benefits under the company's permanent and total disability plan. The Employee Retirement Income Security Act displaced otherwise governing state law. The company violated the employee's federal and common law rights in denying the employee benefits under the Act, because his disability commenced while he was an eligible employee of the company. Under the plain language of the employee welfare benefit plan, the plan could not be a bargained-for element of the employee's compensation package and at the same time not binding on the company. The word “voluntary” in the agreement did not mean that the company could refuse to make payments at its whim, but that the company was not bound by the contract to provide the plan as part of a later collective bargaining agreement. This interpretation of the contract was consistent with all the memorandum agreements involved in the transaction, gave a reasonable, lawful, and effective meaning to all the terms, and operated against the party who drafted the contract. Hayden v. Texas-U.S. Chemical Co., 557 F.Supp. 382, 389.

**N.D.Tex.Bkrtcy.Ct.**

**N.D.Tex.Bkrtcy.Ct.**2012. Com. (a) cit. in case cit. in sup. After Chapter 11 debtors rejected their executory growers agreements with various chicken growers, debtors sought to summarily disallow rejection-damages claims asserted by growers. Denying in part debtors' motion for summary judgment, this court held, inter alia, that, under the "Cost Improvement Program" provision of the parties' contracts, debtors could not freely terminate their contracts with growers "between flocks" (i.e., after a flock was settled and before a new flock was placed), concluding that, although the provision was not free of ambiguity, the clear implication was that a grower that successfully completed the cost improvement program would not be subject to termination. The court noted that, as the contracts were drafted by debtors without negotiation over their terms, whatever ambiguity there was in the provision had to be resolved against debtors. In re Pilgrim's Pride Corp., 467 B.R. 871, 878.

**S.D.Tex.**

**S.D.Tex.**2008. Quot. in sup. Surety authorized by the Department of Treasury to issue immigration delivery bonds and surety's authorized agent sued the Department of Homeland Security regarding more than 1,400 immigration bond breach determinations. Granting in part plaintiffs' motion for summary judgment, this court held, among other things, that the parties' bond contracts required that defendant, in order to fulfill the requirement that it make a timely demand to produce the alien who was released on bond, provide notice of a demand for delivery to both the obligor and the agent if an address was provided for both on the bond form and the form indicated that both addresses should be used for notice purposes by a checked box; a contract was to be interpreted against the drafter, here, defendant, and, if it were interpreted to require notice only to the obligor, the contract's “address to be used for notice purposes” language would be rendered entirely superfluous. Safety Nat. Cas. Corp. v. U.S. Dept. of Homeland Sec., 711 F.Supp.2d 697, 717.

**S.D.Tex.Bkrtcy.Ct.**

**S.D.Tex.Bkrtcy.Ct.**2009. Com. (a) cit. in sup. Chapter 11 debtors in a jointly administered bankruptcy case sought permission to use the cash collateral of one debtor, which consisted solely of rental income from a shopping center, to pay both debtors' continuing obligations during the pendency of their case. This court overruled an objection filed by lender/secured creditor that had been assigned the rents, holding that the rents were property of the estate because the loan documents contemplated a collateral assignment of the rents, leaving fee to the rents in the debtors with lender retaining a security interest, rather than an absolute assignment. The court construed the loan documents against lender under the doctrine of contra proferentem, noting that lender, an entity sophisticated in its financial dealings, had dealt with rental assignments before and was in the best position to be aware of potential ambiguities in the documents and the potential exposure that such ambiguities could create. In re Las Torres Development, L.L.C., 408 B.R. 876, 884.

**W.D.Tex.**

**W.D.Tex.**2005. Quot. in ftn. Electronics seller sued purchaser, its sister company, and its two shareholders/officers/directors, based on various contractual and tort theories. After accepting purchaser's offer of judgment, seller refused to approve the form of judgment submitted by purchaser, and asked the court to rule that the offer of judgment was only intended to apply to purchaser itself, and not to the other defendants. Entering judgment in favor of seller, this court found, inter alia, that, because the plain meaning of the offer's language was that the judgment applied against purchaser only, the court was not required to examine extrinsic evidence. The court noted that even if it had determined that the offer was ambiguous, it would have construed it against purchaser, as drafter, and thus reached the same result. Arrow Electronics, Inc. v. Hecmma, Inc., 500 F.Supp.2d 648, 654.

**E.D.Va.**


 

**E.D.Va.**2006. Cit. in case quot. in sup., com. (a) quot. in case quot. in sup. Consumer credit-card debtors brought class action against credit-card issuer's debt collector, alleging various violations of the Fair Debt Collection Practices Act. Denying collector's motion to compel arbitration under the credit-card agreement between issuer and debtors, this court concluded, inter alia, that, even if the agreement's arbitration provision was construed as urged by defendant such that defendant was issuer's agent, rather than just a "debt collector," and was thus a third-party beneficiary of the arbitration provision, the provision would then be ambiguous; consequently, such ambiguity, under basic contract law, would be construed against defendant as the drafter's agent, and arbitration would not be compelled. Karnette v. Wolpoff & Abramson, L.L.P., 444 F.Supp.2d 640, 647.

**D.V.I.**

**D.V.I.**1992. Quot. but dist., com. (a) cit. in sup. Cargo owners sued subcharterer, among others, alleging that cargo loss was caused by defendant's negligent repair of ship in St. Thomas. The court granted defendant's motion to dismiss on ground that forum-selection clause in bills of lading governing shipment of plaintiffs' cargo required that all disputes must be litigated in Italy. The court noted that limiting the clause to ship's owner would render it meaningless, since it would be inapplicable to subcharterer, who was immediately responsible for the cargo. It noted, moreover, that there appeared no reason why the clause should not be valid when the selected forum, Italy, was the home of the subcharterer and the destination of some of the goods covered by the bills of lading and Italy had enacted rules similar to those that plaintiffs argued should apply. Fabrica De Tejidos La Bellota S.A. v. M/V MAR, 799 F.Supp. 546, 557.

**E.D.Wis.Bkrtcy.Ct.**

**E.D.Wis.Bkrtcy.Ct.**2010. Cit. in case quot. in sup., com. (a) quot. in ftn. After the winning bidder at a foreclosure sale on homeowners' residence backed out of the sale and forfeited its down payment, homeowners filed for bankruptcy under Chapter 13 and proposed a reorganization plan in which they would, in addition to maintaining their current mortgage payments, cure their prepetition defaults as reduced by the amount of the forfeited funds; debtors' mortgage lender objected, arguing that the forfeited funds should be treated as a payment against principal. After a bench trial, this court ordered that the forfeited funds would be applied to the arrearages set forth in lender's proof of claim, holding that the language of the note and mortgage clearly intended that only specific payments would be applied to principal and that all others would be handled in accordance with the broader contractual provision directing that payments be applied to periodic payments (of principal and interest) in the order they came due. The court noted that, even if the provisions could be regarded as ambiguous, as a rule of contract construction, the loan documents had to be construed against the party that supplied the words, which in this case was lender. In re Holmdahl, 439 B.R. 876, 883.

**W.D.Wis.Bkrtcy.Ct.**

**W.D.Wis.Bkrtcy.Ct.**2012. Cit. in case quot. in sup. After mortgage lender denied Chapter 13 debtors' loan modification request, debtors objected to lender's claim for the balance of monthly payments that had been reduced under a prepetition mortgage forbearance agreement. This court, finding the agreement ambiguous and thus construing it against lender as the drafter, held that the balance of the payments reduced by the agreement did not constitute mortgage arrears, and debtors were not obligated to pay the balance in order to cure their mortgage default under their Chapter 13 plan. In re Singer, 469 B.R. 293, 298.

**Ala.**

**Ala.**1989. Cit. in case quot. in sup., com. (a) cit. in case quot. in sup. An agreement of sale for a business stated that the sellers were to indemnify the purchaser for loss, liability, and expense, including attorney's fees, resulting from certain transactions involving the corporation. A suit was brought against the corporation, and the sellers brought this declaratory judgment action to determine whether the purchaser had the right to offset its attorney's fees incurred in the defense of that claim from the monthly installment payments from the sale. The trial court held that the indemnification was not due until after the purchaser had been


 

required to actually pay all attorney's fees, since the contract provision in dispute was drafted by the purchaser, and, therefore, any ambiguity should be resolved in favor of the sellers. This court reversed and remanded, holding that the rule of interpreting ambiguity against the drafter should not apply where both parties were sophisticated business persons advised by legal counsel and the contract was the product of negotiations at arm's length. The court directed the trial court, on remand, to apply the law of contracts regarding ambiguous agreements. Western Sling & Cable Co. v. Hamilton, 545 So.2d 29, 32.

**Alaska,**

**Alaska,** 2013. Quot. in ftn. Ex-husband moved to clarify his alimony obligations to ex-wife under a marital settlement agreement that was adopted by reference in a Florida divorce decree and registered in Alaska; ex-husband had written the date of the parties' youngest child's 18th birthday on the line of the form agreement that was reserved for the alimony termination date, but had referred to their middle child's 18th birthday—an earlier date—on the next line, in a space left blank for "other specifics." The trial court found that the support obligation ended on the earlier date. Reversing and remanding, this court held that the later date controlled, because that term was found on the line specifically designated for the agreement's "termination date," and thus was more important than the contradictory term. In making its decision, the court noted that the rule requiring a contract to be construed against its drafter lent further support to this outcome, and, although that rule was disfavored in the interpretation of marriage settlement agreements under Alaska law, it was available under Florida law. Hussein-Scott v. Scott, 298 P.3d 179, 183.

**Alaska**

**Alaska**, 2011. Sec. and Rptr's Note to com. (a) quot. in ftn. Former wife moved to reduce to judgment the remaining amount owed to her by ex-husband under a settlement agreement that had been incorporated into the parties' divorce decree. The trial court entered judgment against ex-husband. Affirming, this court held that ex-husband's obligation under the settlement agreement to pay former wife $2,000 a month for her share of the stock of two corporations owned by the parties was not contingent on the corporations' profitability. The court noted that, while the general rule was that an ambiguous contract would be construed against its drafter, the trial court in this case properly determined that it was not appropriate to strictly construe ambiguities in the agreement in favor of the nondrafting party (ex-husband), because, in reality, both sides carefully debated the provisions. Cook v. Cook, 249 P.3d 1070, 1078.

**Alaska,** 2009. Quot. in ftn. in sup. Employee sued former employer, seeking to recover unpaid overtime compensation and liquidated damages under the Alaska Wage and Hour Act. The trial court entered an order staying proceedings pending arbitration under an arbitration agreement that was attached to the employee handbook. On appeal, employee argued that the arbitration agreement was unconscionable, and thus unenforceable, as, among other things, it was subject to unilateral change by employer, pursuant to another provision attached to the handbook. Reversing and remanding, this court held that the arbitration agreement was not subject to the clause permitting employer unilateral power to change its policies and practices; since employer drafted the agreement, the interpretation of it that was most favorable to employee was preferred. Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091, 1097.

**Alaska,** 2007. Com. (a) cit. in ftn. in sup. Pizzeria operator sued publisher of telephone directories after errors were discovered in pizzeria's listings, seeking, inter alia, a ruling that defendant's liability was not limited by provisions of an exculpatory tariff filed by the telecommunications provider for whom the directories were published. The trial court denied plaintiff's motion for partial summary judgment concerning the tariff. Reversing and remanding, this court, applying a strict rule of construction, held that the exculpatory tariff applied only to provider and did not protect publisher. The court reasoned that, like a contract, an ambiguous tariff was to be construed favorably to the customer and against the drafter. Uncle Joe's Inc. v. L.M. Berry and Co., 156 P.3d 1113, 1118.

**Alaska,** 2002. Com. (a) quot. in ftn. to diss. op. After commercial tenant failed to pay his business's rent on time, landlord terminated the lease and sued for eviction. Finding that tenant had committed a technical default by failing to pay timely rent but that the default was not material, the trial court declined to order eviction, but directed tenant to reimburse landlord's costs


 

of litigation. Reversing, this court held that, under the applicable terms of the lease, tenant avoided default by tendering late payment before landlord issued a written notice of termination. The dissent argued that tenant's failure to pay rent on time, after his cured failure to pay, was a renewed default, and thus tenant should have been required to reimburse landlord's litigation costs. Rockstad v. Global Finance & Inv. Co., Inc., 41 P.3d 583, 592.

**Alaska,** 1998. Cit. in ftn. Ex-wife moved for approval of a qualified domestic relations order (QDRO) dividing the marital share of ex-husband's retirement and survivor benefits. The trial court granted the motion with respect to the retirement benefits, but denied it to the extent that ex-wife requested survivor benefits. Affirming in part and reversing in part, this court held that the lower court had authority to issue the QDRO, which simply enforced an earlier court order calling for the division of retirement benefits; that, even though ex-wife drafted the retirement-fund agreement, which was ambiguous, the rule mandating construction against the drafter was inapplicable, since the agreement was not a contract of adhesion; and that survivor benefits were an intrinsic part of the retirement benefits earned during the marriage, of which ex-wife was presumptively entitled to an equal share. Zito v. Zito, 969 P.2d 1144, 1147.

**Alaska,** 1988. Com. (a) cit. in ftn. to diss. op. After three police officers entered a homeowner's property under the pretext of investigating a possible robbery and searching for two suspects, the officers arrested the homeowner for driving while intoxicated and resisting arrest. The arrestee sued the police officers for abuse of process, false arrest, and civil rights violations. The trial court dismissed the plaintiff's complaint without opinion. Affirming in part, reversing in part, and remanding, this court held that the civil rights claim was barred by the applicable two-year statute of limitations but that the claims for abuse of process and false arrest were timely under the applicable three-year statute of limitations for actions against peace officers. The court said that an abuse of privilege to arrest had the same effect as an abuse of process. The dissent argued that the two-year statute of limitations should be applied to all of the plaintiff's claims, which would then be time barred. According to the dissent, the principle that statutes are construed to accomplish their purposes has primacy over the principle that, of two constructions as to the applicable period of limitations, the one that gives the longer period is to be preferred. The dissent compared its argument to contract interpretation whereby the intention of the parties has primacy over the rule of construction that ambiguities are interpreted against the draftsman. Jenkins v. Daniels, 751 P.2d 19, 25.

**Alaska,** 1986. Com. (g) cit. in ftn. The seller of an apartment building sued the purchaser for reformation and payment of accrued interest or for the return of the property. The trial court found the contract entered into by the parties unconscionable and reformed it accordingly. Affirming, this court stated that the trial court's determination of unconscionability was amply supported, that the reformation of the contract brought it into conformity with minimal standards of conscionability, and that the trial court did not abuse its discretion in disallowing the purchaser's laches defense. Vockner v. Erickson, 712 P.2d 379, 384.

**Ariz.**

**Ariz.**1989. Cit. in disc. and quot. in ftn. A motorist who was hit by a drunk driver in a car accident sued the driver and received a compensatory and punitive damages judgment. He could not obtain his punitive damages award from the drunk driver's insurer, so he sued his own insurer under his underinsured motorist policy. The policy's terms were conflicting, covering only bodily injury damages, but also allowing payment for all damages owed to the insured driver. The trial court held that the defendant was liable to pay the punitive damages, interpreting the ambiguous policy language in favor of coverage. The intermediate appellate court reversed, holding that the policy language specifically covered only bodily injury compensation and did not cover punitive damages. Affirming with modifications and reversing the trial court, this court held that the defendant was not liable to pay the punitive damages because it did not specifically contract to do so. The court stated that public policy and legislative goals did not demand that the ambiguous policy language be construed against the victim's insurer, especially since punitive damages are not compensatory and are meant to punish the negligent tortfeasor. State Farm Mut. Auto. Ins. Co. v. Wilson, 162 Ariz. 251, 782 P.2d 727, 733.

**Ariz.**1983. Cit. in disc., com. (a) cit. in disc. An employment contract provided that the employer would pay the employee commissions on property sales made by personnel under the employee's supervision. After the employment contract was formed,


 

the employer company formed subsidiaries, one of which this employee supervised. The employee brought this action to recover unpaid commissions. The trial court awarded the employee commissions on sales by personnel of the parent company but denied him commissions on subsidiary sales. The appellate court affirmed. This court reversed and held that the ambiguity in the standard sales representative employment contract drafted by the employer's legal staff must be construed against the employer. Abrams v. Horizon Corp., 137 Ariz. 73, 669 P.2d 51, 57.

**Ariz.App.**

**Ariz.App.**1986. Quot. in ftn. An insurance agent who was being sued by a homeowner was defended by a professional errors and omissions (peo) insurer. The peo insurer sued the agent's insurance company for attorney's fees and costs pursuant to an indemnity contract. The trial court awarded the peo insurer summary judgment. Affirming the trial court's determination that the peo insurer was entitled to indemnification from the insurance company for attorney's fees and costs, this court remanded the case for a determination of whether any act by the insurance agent contributed to the insurance company's potential liability in the homeowner's lawsuit. The court reasoned that an indemnitee must be proven to be free of negligence to receive indemnity. INA Ins. Co. v. Valley Forge Ins. Co., 150 Ariz. 248, 722 P.2d 975, 979.

**Cal.**

**Cal.**2016. Cit. in sup.; com. (a) quot. in sup. Former employee filed a putative class action against former employer, alleging that he and other employees were subjected to discrimination, harassment, and retaliation. The trial court granted defendant's motion to compel arbitration based on three arbitration agreements that plaintiff was required to sign on his first day of employment, and found that class arbitration was not available; the court of appeals reversed in part. This court affirmed, holding that the issue of whether a court or an arbitrator decided if an arbitration agreement permitted or prohibited a classwide arbitration was a matter of contract interpretation. The court noted, citing Restatement Second of Contracts § 206, Comment *a*, that ambiguities in contracts should be construed against their drafters, and determined that the provisions in this case allocated the decision to an arbitrator rather than reserving it for a court. Sandquist v. Lebo Automotive, Inc., 376 P.3d 506, 514.

**Cal.App.**

**Cal.App.**2000. Com. (a) quot. in disc. Former employer brought suit for, in part, misappropriation of trade secrets against former employees. After the trial court entered judgment for defendants, it awarded them attorney's fees; on appeal, plaintiff contested the fees award. Affirming, this court held, inter alia, that a clause in the employment contract authorizing the award of legal fees to plaintiff in litigation brought to prevent wrongful disclosure of information by defendants was at least ambiguous as to whether it was an attorney's fees provision, and had to be construed against plaintiff, which drafted the clause, as a fees provision for purposes of application of the attorney's fees reciprocity statute, thus entitling defendants to the fees award. International Billing Services, Inc. v. Emigh, 84 Cal.App.4th 1175, 1184, 101 Cal.Rptr.2d 532, 538.

**Cal.App.**1993. Cit. in disc. A securities brokerage moved to correct an arbitration award in favor of an investor on a securities fraud claim. Affirming confirmation of the award, this court held, inter alia, that the investor did not waive her right to punitive damages by signing a cash account agreement providing that all disputes would be resolved by means of arbitration subject to New York law, as the agreement did not expressly address the issue of punitive damages, and the investor, a California resident, could not have been expected to know that New York prohibited arbitrators from awarding punitive damages. J. Alexander Securities, Inc. v. Mendez, 17 Cal.App.4th 1083, 1094, 21 Cal.Rptr.2d 826, 832, cert. denied _ U.S. _, 114 S.Ct. 2182, 128 L.Ed.2d 901 (1994).

**Colo.App.**


 

**Colo.App.**2010. Cit. in disc. Borrower who defaulted on a loan for the construction of a luxury home sued lender, alleging that lender breached the parties' contract and committed fraud in connection with its sale of the loan to a nonparty purchaser when it told the purchaser that the loan had a special 36% default interest rate. The trial court entered judgment for lender. Reversing and remanding, this court held that the loan agreement was ambiguous because it contained inconsistent provisions regarding the interest due upon borrower's default, and Colorado's Credit Agreement Act did not preclude the admission of extrinsic evidence relevant to resolving that ambiguity. The court rejected borrower's argument that the ambiguity had to be strictly construed against lender as the drafter of the agreement, reasoning that the *contra proferentem* canon of contract interpretation applied only where there was no extrinsic evidence that would illuminate the parties' intent. Fisher v. Community Banks of Colorado, Inc., 300 P.3d 565, 569.

**Conn.**

**Conn.**1998. Cit. in disc. Owners of brokerage accounts brought suit for an order directing a brokerage firm to proceed with the arbitration of plaintiffs' claims regarding six investment accounts that were maintained with the firm. Defendant moved for partial summary judgment, claiming that all but one of plaintiffs' claims were not arbitrable because they were time-barred by statutes of limitations. Reversing the trial court's grant of defendant's motion, the court held, inter alia, that the language of the arbitration portion of the parties' agreement created an ambiguity as to whether the parties intended that disputes regarding timeliness of claims arising under the contracts would be resolved by arbitration, and that, consequently, as a matter of federal arbitration law and New York contract law, that ambiguity had to be resolved in favor of arbitration of the disputes. The court said that plaintiffs did not draft, edit, or alter the agreement, and, to the extent that defendant drafted the ambiguous contract, it could not now claim the benefit of the doubt regarding the ambiguity. Levine v. Advest, Inc., 244 Conn. 732, 756, 714 A.2d 649, 661.

**Conn.**1996. Cit. in disc. The sole shareholder of a closely held corporation, as named insured, sued a garage insurer to vacate an arbitration award and recover underinsured motorist benefits as an individual and in her capacity as executrix of her husband's estate. The husband, who was the wife's coshareholder, was killed while riding a snowmobile that collided with an underinsured motor vehicle. A panel of arbitrators determined that plaintiff's decedent was not covered under the underinsured motorist endorsement to the policy. Trial court concluded that there was coverage and vacated the arbitration panel's decision. This court affirmed, holding that plaintiff, individually and as executrix of the decedent's estate, was entitled to coverage under the uninsured motorist endorsement. Defendant should not have used an uninsured motorist endorsement containing language oriented toward individuals and family members when the named insured was a corporation, because the policy language injected confusion and uncertainty into the coverage afforded by the policy. Hansen v. Ohio Cas. Ins. Co., 239 Conn. 537, 687 A.2d 1262, 1265.

**Conn.**1991. Cit. in disc. An insured motorist sued his insurance company, seeking to vacate an arbitration award in favor of the insurance company denying the motorist's claim for uninsured motorist coverage. The trial court reserved a question of law for this court. Answering that question, this court remanded to the trial court with directions to vacate the arbitration award for the defendant, holding that an insurer could not, by contract, reduce its liability for uninsured or underinsured motorist coverage. Although the plaintiff could not prevail as a matter of contract law, the court said that a contract requirement of physical contact with an uninsured motorist was inconsistent with statutorily mandated uninsured motorist coverage and therefore the plaintiff could recover on public policy grounds. It stated that the legislative policy mandating insurance protection for someone injured by an identifiable uninsured motorist extended to accidents caused by an unidentified vehicle that had no physical contact with the injured claimant. Streitweiser v. Middlesex Mut. Assur. Co., 219 Conn. 371, 593 A.2d 498, 500.

**Conn.**1981. Cit. in disc. (Cit. section 232 of the Tentative Drafts, which is now section 206 of the Official Draft.) Mortgagee brought an action against the insurer of the mortgaged premises to recover the amount of the adjusted value of the loss insured by the defendant. The defendant filed a third-party complaint against the mortgagor and the mortgagee, and the mortgagee in turn filed a cross complaint against the mortgagor. The case concerned the liability of an insurance company under a mortgage loss payable clause after the mortgagee's foreclosure on the insured property. The lower court entered judgment in the mortgagee's favor against the insurer and in the insurer's favor against the mortgagor, and the insurer appealed. The insurance clause that


 

was at issue is a "standard" or "union" mortgage loss payable clause. This clause, in contradistinction to an "open" loss payable clause, creates a direct contractual relationship between the mortgagee and the insurer. The insurer did not dispute that at the time of the fire loss, the mortgage clause created rights in the mortgagee and that the loss was appropriately adjusted. However, the insurer argued that the mortgagee's subsequent procurement of a decree of strict foreclosure, without timely reservation of a deficiency claim against the mortgagors, extinguished both the mortgage debt and the mortgagee's entitlement to recovery as mortgagee under the mortgage clause. The mortgagee contended, as the trial court concluded, that its rights under the insurance contract vested when the fire loss was adjusted and that those rights were not subject to divestment. The court noted that the difficulties created by the language of the standard loss payable clause were at the heart of the claims to be resolved and that if the wording of the clause is open to two or more reasonable constructions, the clause must be construed against the insurance company that was its draftsman. The court found that, although, under the standard mortgage loss payable clause, neither foreclosure proceedings per se nor extinguishment of the mortgage by foreclosure affects the insurer's liability to the mortgagee, full or partial extinguishment of the mortgage debt itself, whether prior to or subsequent to the loss, will preclude, to the extent thereof, any recovery on the policy by the mortgagee. Since satisfaction of the mortgage debt extinguishes a mortgagee's insurable interest under the mortgage loss payable clause, the court held that the trial court erred in concluding that the mortgagee was entitled to recover the amount at which the fire loss was adjusted, without regard to the judgment of foreclosure. The question remained whether, under the facts of the case, the foreclosure judgment should be deemed in law to represent a full satisfaction of the mortgage indebtedness. The court found that it could not, on the record, determine whether the mortgagee had in fact received full payment of the mortgage debt. Accordingly, the court held that further proceedings were required to determine whether the appropriation by strict foreclosure of the mortgage property had equitably satisfied the mortgage debt. The court noted that, in the event the mortgagee could establish that it had not received full satisfaction from the judgment of foreclosure, it would have the right to recover its loss from the insurer, who in turn would be entitled to recovery from the mortgagors. Burritt Mut. Sav. Bank v. Transamerica Ins., 180 Conn. 71, 428 A.2d 333, 337.

**Del.**

**Del.**2003. Cit. in case cit. in ftn. After three exercise riders were injured when a stray horse collided with them on the racetrack, riders sued track's owners for damages. Insured owners then sued excess-liability insurer that denied coverage due to exclusion for bodily injury to any person practicing or participating in any athletic activity, including horse racing. Trial court granted owners summary judgment. This court affirmed, holding that exclusion in policy for athletic activity did not encompass claims against park for riders' personal injuries. The court stated that the term "practicing" was ambiguous and that trial court did not err by interpreting exclusion in accordance with contract-construction principle that contract ambiguities should be construed against drafter. Twin City Fire Ins. Co. v. Delaware Racing Ass'n, 840 A.2d 624, 630.

**Del.**1996. Cit. in disc. Holders of preferred shares sought a preliminary injunction, to bar the corporation from implementing a recapitalization plan. Trial court enjoined the effectuation of the corporate recapitalization on the ground that the existing conversion rights of preferred stockholders could not be adjusted as set forth in the proposed recapitalization without the consent of the preferred holders. This court affirmed, holding that the existing conversion rights of the preferred stockholders,as ambiguously stated in the Certificate of Designations, should be construed in favor of the preferred holders to require conversion to the common stock that existed before the recapitalization, not the new common stock resulting from the recapitalization. The court applied the contra proferentem principle here only as a last resort because the certificate's language presented a hopeless ambiguity, particularly when alternative formulations indicated that these provisions could easily have been made clear. Kaiser Alum. Corp. v. Matheson, 681 A.2d 392, 398.

**Del.Ch.**

**Del.Ch.**2013. Com. (a) quot. in sup. and cit. in ftn. Minority unitholder in a privately held medical-device company brought a derivative action against company, its board of directors, and certain investors, alleging that directors breached the company's operating agreement when they engaged in financing transactions without obtaining the consent of the common unitholders. This court held that, while directors breached the operating agreement in undertaking the challenged transactions, the breach


 

caused no damage to plaintiff and, therefore, plaintiff was entitled to an award of only nominal damages. The court found that it was appropriate, under the rule of contra proferentum, to interpret the ambiguous terms of the operating agreement against defendants as its drafters and in favor of the meaning that a reasonable investor would attribute to the agreement, noting that an attorney representing one of the defendant investors, which had a stronger bargaining position than company, had participated in drafting the operating agreement. Zimmerman v. Crothall, 62 A.3d 676, 698.

**Del.Ch.**2012. Quot. in ftn. Investors petitioned for an appraisal of their preferred stock in investment bank, claiming that, under bank's certificate of incorporation, they were entitled to automatic redemption of the stock at $100 per share. Granting petitioners' motion for partial summary judgment, this court held, among other things, that the certificate unambiguously provided that an automatic redemption, such as the one in this case, was not contingent upon bank having excess cash available; moreover, even if the certificate was ambiguous, parol evidence in the record also supported the decision in favor of petitioners. The court also noted that, where parol evidence was not available, the doctrine of contra proferentem, under which ambiguities were interpreted against the drafter, could be invoked to resolve ambiguities about the rights of investors in the governing instruments of business entities. Shiftan v. Morgan Joseph Holdings, Inc., 57 A.3d 928, 935-936.

**D.C.App.**

**D.C.App.**1999. Com. (a) quot. in case quot. in disc. Insureds sued insurer, challenging the denial of benefits under an "all-risk" homeowner's insurance policy. Trial court granted insurer summary judgment, holding that recovery for water damage to property located in plaintiffs' basement following a major snowstorm was barred by an exclusion from the policy for certain losses caused by "surface water." This court affirmed, holding that the policy exclusion unambiguously barred plaintiffs' claim. The court rejected plaintiffs' assertion that because the patio was a man-made structure, and not the earth's surface, the water on the patio was not surface water. It noted that the burden was on the insurer to prove that the loss fell within an exclusion. Cameron v. USAA Property and Casualty Insurance Co., 733 A.2d 965, 968.

**D.C.App.**1975. Section 232 of Tentative Drafts 1 through 7, Revised and Edited, which is now Section 206 of the Official Draft cit. in sup. in ftn. and com. a cit. in sup. in ftn. The plaintiff, owner of a cooperative apartment, brought this action against the defendant association to recover damages based on the defendant's failure to repair plumbing in her apartment. The plaintiff claimed that the defendant was obligated to repair the plumbing under the mutual ownership contract, while the defendant argued that the repair was an "interior repair" for which the plaintiff was responsible. The trial court had granted summary judgment to the plaintiff on the issue of liability. Construing the provisions of the contract against the drafter, the court interpreted the phrase "interior repairs" not to include repairs to pipes feeding into an apartment. The trial court held that the award of summary judgment was improperly granted, since the contract was reasonably open to varying interpretations. The issue of liability was remanded to the trial court where a reasonable person standard was to be applied. Then, if no result could be reached, the jury was to apply the rule that ambiguities in a contract are construed strongly against the drafter as a rebuttable presumption. 1901 Wyoming Ave. Cooperative Asso. v. Lee, 345 A.2d 456, 463.

**Ga.**

**Ga.**2019. Quot. in disc. Tenant brought a personal-injury action for claims of negligence and negligence per se against landlord, alleging that defendant's failure to maintain a crumbling portion of a curb in the common area resulted in plaintiff falling and sustaining injuries. The trial court granted defendant's motion for summary judgment. The court of appeals affirmed. This court reversed and remanded, holding that the one-year limitation period in the parties' lease for claims against defendant did not bar plaintiff's action. The court explained that it construed the meaning of the limitation period against defendant, because defendant had moved for summary judgment, and plaintiff's interpretation that the limitation period only applied to contractual claims was not unreasonable under Restatement Second of Contracts § 206, Comment *a*. Langley v. MP Spring Lake, LLC, 834 S.E.2d 800, 804.

**Hawaii,**

**Hawaii,** 2017. Quot. in sup. Mortgage borrower sued mortgage lender and counsel for lender, alleging that defendants wrongfully conducted a non-judicial foreclosure of plaintiff's property. The trial court granted defendants' motions to dismiss. Vacating in part and remanding, this court held that the trial court erred in determining that the power-of-sale clause contained in the parties' agreement did not require defendants to publish postponements of the foreclosure sale. The court reasoned that an ambiguity existed as to whether a new notice had to be published in order to postpone the foreclosure sale, and that, under Restatement Second of Contracts § 206, which provided that an ambiguity in a mortgage instrument had to be construed against the party who drafted the instrument, the ambiguity had to be resolved against defendants, because defendants supplied the words of the contract. Hungate v. Law Office of David B. Rosen, 391 P.3d 1, 11.

**Hawaii,** 2013. Quot. in sup. Lessee of a half-acre portion of an undivided parcel of land sued buyer that purchased the undivided parcel from lessor, seeking specific performance of his right of first refusal under the lease to purchase the leased premises. The trial court entered judgment for defendant. The intermediate court of appeals affirmed. Reversing and remanding, this court held, inter alia, that lessor's decision to sell the undivided parcel was also a decision to sell the leased premises that triggered its (and now defendant's assumed) obligation to perform under the right of first refusal, and the appropriate remedy was specific performance. The court noted that it was reasonable to construe the right of first refusal against lessor, as the drafter, because lessor was in a better position to know which options were available to it for carving out the leased premises, and, if it had intended to exclude the sale of any more than the leased premises as the triggering event, it could have drafted the right of first refusal to specify that. Kutkowski v. Princeville Prince Golf Course, LLC, 300 P.3d 1009, 1019.

**Ill.App.**

**Ill.App.**2002. Com. (a) quot. in disc. Landlord sued tenant to recover for property damage caused by a fire in tenant's apartment. The trial court granted tenant's motion to dismiss. Affirming, this court held, inter alia, that tenant was not liable for negligently caused fire damage to the leased premises because the lease provisions indicated that landlord would insure against the risk of fire loss to its building, and the lease did not evince the parties' intent that tenant would be liable for fire damage due to his negligence. Towne Realty, Inc. v. Shaffer, 331 Ill.App.3d 531, 536, 265 Ill.Dec. 685, 690, 773 N.E.2d 47, 52.

**Ill.App.**2000. Cit. but dist. Mortgagors sued mortgagee for, inter alia, breach of contract, alleging that fax and quote fees constituted a prohibited prepayment penalty. The trial court entered summary judgment for defendant. Affirming, this court held, in part, that the fees were service charges imposed for services rendered and could just as easily have been incurred with payment at maturity, and that, because the terms of the mortgage were unambiguous as to permitted and prohibited fees, there was no reason to interpret the contract against defendant as the drafter. Krause v. GE Capital Mortg. Service, Inc., 314 Ill.App.3d 376, 387, 246 Ill.Dec. 774, 783, 731 N.E.2d 302, 311.

**Ill.App.**1999. Com. (a) quot. in disc. After a car accident, injured driver sued other driver for negligently causing the collision. He later sought a declaratory judgment that the car driven by the tortfeasor was an underinsured motor vehicle and that he was entitled to $400,000 difference between his portion of the settlement with the tortfeasor's insurer and the limits of his underinsured motorist (UIM) coverage, even though the tortfeasor's liability limits exceeded the limits of his UIM coverage. On remand, the trial court granted plaintiff's insurer summary judgment. This court reversed and remanded, holding, inter alia, that the insurer's policy excluded a claim of loss of consortium by plaintiff's wife. Since plaintiff's wife could not recover under the policy, no setoff of the amount paid to her by the other insurer on behalf of the other drivers was required to prevent a double recovery. Smith v. Allstate Ins. Co., 312 Ill.App.3d 246, 253, 244 Ill.Dec. 405, 410, 726 N.E.2d 1, 7.

**Ill.App.**1991. Cit. in disc. After a farmer refused to purchase a combine for which he had signed the seller's purchase order, the seller, a farm implements dealer, sued him for breach of contract. The trial court entered judgment for the plaintiff. Reversing, this court held that no contract existed between the parties because the purchase order, construed against the plaintiff, required the signature of a representative of the plaintiff in order to constitute a valid acceptance of the defendant's offer to buy, and no


 

representative had signed the order. Beard Implement Co., Inc. v. Krusa, 208 Ill.App.3d 953, 153 Ill.Dec. 387, 567 N.E.2d 345, 350, appeal denied 139 Ill.2d 593, 159 Ill.Dec. 104, 575 N.E.2d 911 (1991).

**Iowa**

**Iowa,** 1999. Quot. in part in disc. Insurer sought declaration that it was not obligated to provide coverage for insured, the target of wrongful eviction proceedings brought by lessee's cotenant after insured failed to honor its guarantee of the lease. The trial court entered summary judgment for insured. Reversing and remanding, this court held that coverage was unavailable in the absence of physical harm or property damage causing loss of use of the premises, and that the underlying action, which did not allege any sort of invasion of cotenant's interest in the use and enjoyment of the premises, was more in the nature of a claim for breach of contract than for tort. Continental Ins. Co. v. Bones, 596 N.W.2d 552, 558.

**Ky.App.**

**Ky.App.**2011. Cit. in sup. Former husband filed a postdissolution motion for entry of a qualified domestic relations order regarding the distribution of his pension pursuant to his property-settlement agreement with ex-wife, proposing that the benefit amount payable to her should be zero, based on the payout amount for his age of 46 at the time of the divorce; ex-wife objected, arguing that the payout amount should be based on his age of 55 at the time of his retirement. The trial court construed the agreement as requiring division on the date of retirement. Affirming, this court rejected husband's argument that the doctrine of contra proferentem could not be applied against him, because his attorney had included a clause in the agreement stating that "no provision shall be interpreted against any party because that party or their legal representative drafted the provisions thereof"; to allow that type of clause to effectively control the court's interpretation of a contract in situations where a party had intentionally introduced an ambiguity into a contract would be unconscionable and/or run counter to public policy. McMullin v. McMullin, 338 S.W.3d 315, 322.

**Mass.**

**Mass.**2013. Cit. in sup., quot. in ftn. Buyer who learned after closing that a property he had purchased for use as a six-station hair salon was not zoned for that purpose sued sellers, sellers' broker, broker's real-estate agency, and others, alleging that defendants misrepresented the property's zoning classification. The trial court granted summary judgment for defendants. The appeals court vacated and remanded. Vacating and remanding, this court held, inter alia, that defendants were not entitled to judgment as a matter of law based on an exculpatory clause in the purchase-and-sale agreement, because that clause did not preclude plaintiff's reliance on prior written representations not set forth or incorporated in the agreement. The court noted that, even if it were to conclude that the clause was ambiguous, the result would be the same: because the purchase-and-sale agreement was a standard form prepared by real-estate agency, and because agency represented sellers in the sale of the property, any ambiguity in the agreement had to be construed against sellers and in favor of plaintiff. DeWolfe v. Hingham Centre, Ltd., 464 Mass. 795, 804, 806, 985 N.E.2d 1187, 1195, 1196.

**Mass.**2012. Cit. in disc. Subcontractor sued general contractor for breach of contract, inter alia, alleging, among other things, that general contractor failed to pay him the balance owed under the subcontract. The trial court entered judgment on a jury verdict for plaintiff and awarded damages and attorney's fees. Affirming as to attorney's fees, this court rejected defendant's argument that a provision of the subcontract barred attorney's fees in the event that plaintiff recovered less than the amount claimed, instead favoring plaintiff's argument that such provision applied only to arbitration and not to litigation. The court reasoned that whether the provision applied to litigation was at best ambiguous, and insofar as the provision was ambiguous, it was construed against the drafter, who in this case was defendant. Costa v. Brait Builders Corp., 463 Mass. 65, 76, 972 N.E.2d 449, 458.


 

**Mass.**1972. Section 232 of Tentative Draft 5 which is now Section 206 of the Official Draft cit. in sup. Plaintiff, a former branch manager and salesman, sued his employer for lost commissions in a sale he arranged. Plaintiff's employment contract was amended several times while with defendant. Plaintiff made a substantial sale of computer terminals, and defendant told him the commissions to his office would be $137,000, of which $10,000 would go to plaintiff. Plaintiff disputed the amount he would receive as his share. The court held that plaintiff could testify as to the meaning of the original employment contract since the written employment contract was not integrated, was ambiguous, and was prepared by defendant. Defendant could not contend that plaintiff waived his commissions when plaintiff discussed how to calculate the commission due under his contract because defendant knew plaintiff was acting under an erroneous assumption, defendant owed plaintiff a duty to disclose the correct calculations, and defendant was responsible for plaintiff's misinformation. Gishen v. Dura Corporation, 362 Mass. 177, 285 N.E.2d 117, 120.

**Mass.**1972. Section 232 of Tentative Draft 5 which is now Section 206 of the Official Draft cit. in sup. A credit card issuer sought to recover for merchandise sold to a customer who presented defendant's lost or stolen credit card. Defendant was an attorney. The court held that all doubts as to the interpretation of the credit card application and as to the meaning of the card itself were to be resolved in favor of the applicant for the card, and concluded that the issuer of a credit card must use due care to ascertain that the person using the card is its proper holder or one authorized to use it. Lechmere Tire and Sales Company v. Burwick, 360 Mass. 718, 277 N.E.2d 503, 506.

**Mass.App.**

**Mass.App.**1987. Cit. in ftn. A lessee and a sublessee of a computer system sued for declaratory relief against the lessor. The trial court dismissed all of the lessor's counterclaims, and the plaintiffs waived their complaint for declaratory relief. Affirming, this court held, inter alia, that the sublessee's misrepresentations to the lessor were insufficient to estop the sublessee from requesting that the lessee terminate the lease. The court stated that, given the circumstances, the lessor failed to show that it reasonably relied on the sublessee's misrepresentation. One significant circumstance was the obscure lease provision, presumably drafted by the lessor, which allowed termination of the lease with respect to equipment that had become inadequate to serve the lessee's needs. Zayre Corp. v. Computer Systems of America, 24 Mass.App.Ct. 559, 511 N.E.2d 23, 30.

**Mich.**

**Mich.**2009. Cit. in ftn. Company and its workers' compensation insurance carrier appealed the Workers' Compensation Appellate Commission's decision affirming a magistrate's award to worker's counsel of an attorney's fee of 30% of worker's medical bills unpaid by insurer. On remand, the court of appeals affirmed. Affirming, this court held, inter alia, that the state statute governing such fees was ambiguous because it failed to identify the entity against which the fees could be assessed, and noted as a glaring error in a prior case the statement that a finding of "ambiguity [was] a finding of last resort," whereas the cited principle should instead have been that the rule of contra proferentem was a rule of last resort. Petersen v. Magna Corp., 484 Mich. 300, 313, 773 N.W.2d 564, 570.

**Mich.**2003. Quot. in sup., com. (a) and Rptr's Note quot. generally in sup. Insurance agent sued insurance company, alleging that defendant breached the parties' written contract by refusing to pay plaintiff retirement renewal commissions on insurance policies that plaintiff sold on behalf of defendant while plaintiff was working for defendant. The trial court entered judgment on a jury verdict for plaintiff; the court of appeals reversed. Reversing and remanding, this court held, inter alia, that, although the trial court erred in failing to inform the jury that it should only construe ambiguities in the contract against the drafter if it could not discern the parties' intent from the relevant extrinsic evidence, this error was harmless. Klapp v. United Ins. Group Agency, Inc., 468 Mich. 459, 472-474, 663 N.W.2d 447, 455, 456.

**Mich.**2001. Quot. in diss. op. Car lessor and its insurer sued lessee to recover collision damages pursuant to contractual provision that assigned "all responsibility for damages" to defendant while she rented a vehicle. The trial court granted summary disposition for defendant, and the circuit court affirmed. The court of appeals reversed and remanded. Affirming, this court


 

presumed that the parties intended to enter a valid, enforceable agreement, and interpreted the ambiguous contract to shift liability only for damages that could legally be reallocated. The dissent argued that the contract should be construed against lessor, its drafter, and strongly disagreed with the majority's decision to construct a decision favorable to plaintiffs. Universal Underwriters Ins. Co. v. Kneeland, 464 Mich. 491, 509, 628 N.W.2d 491, 500.

**Minn.**

**Minn.**1986. Cit. in diss. op. A teacher of the visually handicapped was placed on an unrequested leave of absence. She petitioned the trial court to order her reinstatement, claiming that since she was licensed in elementary education, and had elementary education experience from teaching the handicapped, seniority should have allowed her to bump a more recently hired elementary teacher. The trial court ordered the plaintiff's reinstatement on the grounds that the school district's seniority list was nonbinding as it failed to mention either the plaintiff's elementary license or her experience. This court reversed, holding that the plaintiff should have objected to the omissions from the seniority list within 20 days of its being posted. The dissent argued that the school district, as drafter of the seniority list, should have been held responsible for the list's ambiguities. Blank v. Independent School Dist. No. 16, 393 N.W.2d 648, 654.

**Minn.**1986. Cit. in disc. A trucker was injured in the course of his employment when his vehicle was involved in an accident. Conflicting provisions of his employer's insurance policy created ambiguity about the limits of the policy's coverage. The plaintiff trucker sued the defendant insurer on the theory that the defendant's liability under the policy was the greater of the two figures calculable in accordance with the policy's terms. The trial court held that the plaintiff was entitled to the lesser amount, on the theory that the only reasonable interpretation of the policy's contradictory provisions limited coverage to the lesser amount. The intermediate appellate court affirmed. This court reversed, holding that ambiguous language in an insurance policy is to be construed in favor of the insured, provided that such a construction is not beyond the reasonable expectations of the insured. The court reasoned that an ambiguous contract, especially an adhesion contract, will be construed against the drafter. Rusthoven v. Commercial Standard Ins. Co., 387 N.W.2d 642, 645.

**Minn.App.**

**Minn.App.**2013. Com. (a) cit. in disc. After 18-year-old motorist who was insured under his mother's policy caused an accident with another driver while he was driving a pickup truck that he had borrowed from his father, father's insurer paid damages to the injured driver and sued mother's insurer, seeking a declaratory judgment for reimbursement stating that defendant, not plaintiff, was responsible for primary coverage of the accident. The trial court granted summary judgment for defendant. Affirming, this court held that mother's policy provided only excess liability coverage and not primary coverage under the circumstances. The court rejected plaintiff's argument that mother's policy contained an ambiguous provision that had to be construed against defendant, as the drafter, under the doctrine of contra proferentem, reasoning that there was no reason to conclude that Minnesota law was committed to construing ambiguous policy terms against a drafting insurer in order to favor a different insurer who was a stranger to the policy. Economy Premier Assur. Co. v. Western Nat. Mut. Ins. Co., 839 N.W.2d 749, 754, 755.

**Miss.**

**Miss.**1998. Cit. in disc. An insured closely held corporation's shareholder sued to recover underinsured motorist benefits on behalf of her mother, who died in a car accident. Trial court entered judgment on the pleadings for insurer. This court reversed and remanded, holding, inter alia, that fact issues existed as to whether the mother was an insured under the corporation's policy. J & W Foods Corp. v. State Farm Mutual Automobile Insurance Co., 723 So.2d 550, 552.

**Mo.App.**


 

**Mo.App.**1983. Cit. in disc. The plaintiff seller brought this action to retain a money deposit made by the defendant purchaser under a contract for sale of real estate. The contract required the defendant to obtain a mortgage within a set period and to pay a deposit to an escrow agent. This deposit was to act as liquidated damages for failure to fulfill contractual obligations. The defendant was not able to obtain financing and the plaintiff brought this action to recover the deposit. The trial court gave judgment for the plaintiff, the defendant appealed, and this court affirmed. Construing the sales contract, this court determined that the performances of both parties under the contract were excused by the failure of the defendant to fulfill the condition of obtaining a mortgage within the stated period. However, this court implied an obligation on the part of the defendant to make the condition occur. Because this independent implied covenant to make the condition occur was unfulfilled, this court found the plaintiff entitled to the escrowed deposit. Highland Inns Corp. v. American Landmark Corp., 650 S.W.2d 667, 674.

**Mo.App.**1977. Section 232 of Tentative Drafts 1 through 7, Revised and Edited, which is now Section 206 of the Official Draft cit. in disc. but dist. and Com. a quot. in part. (Erron. cit. as Comment 1.) This is an appeal from a judgment in favor of a manufacturer on his counterclaim for a sum due for merchandise delivered pursuant to a contract with the buyer, a supplier of the manufacturer's dishwashers to the mobile home industry. The buyer had claimed that in refusing to accept return of the merchandise, the manufacturer had breached the contract. The court affirmed on appeal. Looking to the terms of the agreement which provided that the buyer had the right, after inspection by the manufacturer, to return inventory which, in the manufacturer's sole judgment was "salable" and did not entail any additional costs to the manufacturer, the court rejected the buyer's argument that the term "salable", as used in the contract, meant "undamaged". Rather, the court found that the term as used in the contract, meant "marketable", and that where the manufacturer's discretion was exercised in good faith he had not breached his contractual obligations in refusing to accept return of the merchandise. Intertherm, Inc. v. Coronet Imperial Corp., 558 S.W.2d 344, 349.

**Mont.**

**Mont.**2007. Quot. but dist., com. (a) quot. in disc. Landowners brought breach-of-contract claim against holder of an easement for an oil pipeline and fiber-optic cable that crossed their land, asserting, among other things, that the granting language of the easement concerning allowable use of the cable should have been interpreted in the light most favorable to them as the nondrafting party. The trial court granted summary judgment for defendant. Affirming, this court held, inter alia, that, because landowners contended that the granting language was unambiguous, the construction-against-drafter principle did not apply, and the trial court properly applied the language as written. Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives, Inc., 2007 MT 159, 338 Mont. 41, 164 P.3d 851, 860.

**Neb.**

**Neb.**1986. Com. (a) quot. in sup. A mother was the sole contributor to the purchase of a bank certificate made payable to herself and her two sons. Based on a clause in the preprinted form, the bank later asserted that it had the right to use the certificate to pay off a promissory note owed by one of the sons. The trial court found for the mother against the bank in an action for unlawful conversion. Affirming, this court held that the bank had neither a statutory nor a contractual right of setoff. The court reasoned that the plaintiff had not agreed to a right of setoff because the clause in dispute, which was drafted by the bank, was ambiguous and therefore should be construed against the drafting party. Craig v. Hastings State Bank, 221 Neb. 746, 380 N.W.2d 618, 621.

**N.J.**

**N.J.**2006. Quot. in ftn. in diss. op. Homeowners' association sought to compel current homeowner to pay unpaid membership fees, as well as arrears attributable to prior property owners. The trial court granted summary judgment for association. The appellate court reversed, and entered summary judgment for homeowner. Reversing, this court held, inter alia, that homeowner acquired the obligation to pay his predecessors' debt when he acquired the property; the master deed and bylaw provisions were sufficient to put homeowner on notice that he had an obligation to inquire about amounts owing on his property. The dissenting opinion argued that the language in the bylaws suggesting that a purchaser could rely on notice provided through a recorded


 

lien search on the property rendered the bylaws ambiguous, and this ambiguity was to be strictly construed against association as the drafter. Highland Lakes Country Club & Community Ass'n v. Franzino, 186 N.J. 99, 122, 892 A.2d 646, 660.

**N.M.**

**N.M.**1983. Cit. but dist. An insurance company brought suit for an injunction and damages against a former employee for engaging in post-employment competition with the company in violation of an employment contract. The trial court entered an order enjoining the employee from competing with the company and awarding to the company the commissions received by the employee from business conducted with the company's customers. This court affirmed and found that the ambiguities and uncertainties in the contract required consideration of the parties' intentions as evidenced by their conduct, language, and objectives, and by the surrounding circumstances. From a review of the contract in light of the surrounding circumstances, this court concluded that the parties intended that the employee be restricted from competing by not soliciting or accepting business from the company's customers. Manuel Lujan Ins., Inc. v. Jordan, 100 N.M. 573, 673 P.2d 1306, 1309.

**N.M.App.**

**N.M.App.**1995. Cit. in headnote, cit. in disc. Carnival operator sued city for allegedly repudiating its contractual obligations to him and thereby committing an anticipatory breach of contract when it entered into an agreement with a local arts council for the development of a cultural center on land that overlapped part of the area under lease to plaintiff. Reversing the trial court's entry of judgment on a jury verdict for plaintiff and remanding, this court held, inter alia, that defendant did not repudiate its obligations under its three-year lease with plaintiff, since defendant's agreement with the local arts council to hold the land and not dispose of or alienate it for three years did not interfere with the existing term of the lease, which plaintiff did not have a unilateral right to renew. The court said that plaintiff failed to establish an ambiguity in the lease terms that would make the issue of repudiation a jury question. Hoggard v. City of Carlsbad, 121 N.M. 166, 909 P.2d 726, 727, 731.

**N.Y.**

**N.Y.**1997. Cit. in disc. An executor brought suit to determine the validity of a claim for maintenance payments asserted by the decedent's former wife against the decedent's estate. The parties' separation agreement provided for maintenance payments until the wife's death or remarriage, but was silent as to eventuality and consequence of his predeceasing her. Considering the agreement as a whole to ascertain the decedent's intent, the trial court granted the executor's summary judgment motion. The intermediate appellate court reversed, holding that the trial court erred in looking to the separation agreement as a whole. This court affirmed as modified, holding, inter alia, that summary judgment was inappropriate, because the database surrounding and affecting the separation agreement in relation to the intent bearing on the contested provision was inconclusive or incomplete. The court determined that the governing principles of contract interpretation supported a more discerning search for the parties' intent, derived from the whole document and set of their particularized circumstances. It noted that the controversy arose in part because the claimant's lawyer drafted the separation agreement and the decedent had no lawyer of his own. Matter of Riconda, 90 N.Y.2d 733, 739, 665 N.Y.S.2d 392, 397, 688 N.E.2d 248, 253.

**N.Y.**1989. Cit. in disc. An attorney working on a personal injury case was discharged by his client, who hired another attorney to proceed with the case. The second attorney wrote a letter requesting the first attorney to send him the case file and promising that each attorney's fee would be settled at the end of litigation. The case was settled, and the first attorney sued the second for his fee, arguing that, in the letter, he had been promised a share of the recovery. The trial court agreed with the plaintiff. The intermediate appellate court reversed, stating that, since the plaintiff was not an attorney of record, per New York law, he was not entitled to a contingency fee. Reversing, this court held that the plaintiff's claim was based not on the statute, but on the defendant's promise. The court pointed out that any ambiguity in the letter should be resolved against its writer and that, if the plaintiff's fee was not to have been based on recovery, there would have been no point in waiting until the end of litigation. Lai


 

Ling Cheng v. Modansky Leasing Co., 73 N.Y.2d 454, 541 N.Y.S.2d 742, 745, 539 N.E.2d 570, 573, on remand 153 A.D.2d 839, 545 N.Y.S.2d 359 (1989).

**N.Y.Sup.Ct.App.Div.**

**N.Y.Sup.Ct.App.Div.**2009. Com. (a) cit. in sup. Unmarried man who had a 20-year relationship with unmarried woman sued woman in connection with a prior settlement agreement providing that the expenses from the sale of certain real property would be deducted from his half of the proceeds, alleging, among other things, that the term "expenses" did not include taxes or upkeep. After a nonjury trial, the trial court interpreted the agreement against plaintiff as its drafter and construed the term "expenses" to include "all costs attendant to the property through its sale." This court, relying on extrinsic and parol evidence, modified the judgment so that the term "expenses" included "expenses of the sale" only. The court pointed out that defendant was the one to supply the term "expenses," that she contributed to the selection of the language used in the settlement, and that the axiom "contra proferentem" was a rule of construction that should be employed only as a last resort. Fernandez v. Price, 63 A.D.3d 672, 880 N.Y.S.2d 169, 173.

**N.Y.Sup.Ct.App.Div.**1982. Cit. in sup. In a proceeding to permanently stay arbitration, appeals were taken from two judgments of the trial court which granted the application. This court stated that the contractual requirement of notice contained in the insurance policy was satisfactorily met by the insured's written communications with the insurer detailing the claim, as there was no statutory requirement that a specific form of notice be used. This court held that where a party who draws a contract wishes specific forms to be submitted as a condition precedent to his performance, he should explicitly make such a requirement in the contract, and upon his failure to do so, any ambiguities in the contract will be construed against him as the drawer of the document. Metropolitan Property and Liability Ins. Co. v. Torcivia, 90 A.D.2d 811, 455 N.Y.S.2d 666, 667.

**N.Y.City Civ.Ct.**

**N.Y.City Civ.Ct.**1976. Section 232 of Tentative Drafts 1 through 7, Revised and Edited, which is now Section 206 of the Official Draft cit. in sup. Plaintiff brought this action on an insurance policy to recover for theft of his car and its contents. The theft occurred while plaintiff was in the course of packing his car in preparation for a vacation. The sole issue at trial was whether or not plaintiff's loss was covered under the policy. The defendant argued that the policy covered plaintiff's possessions only while "in transit" and sought to have the term defined as meaning after movement in a vehicle has commenced. Plaintiff contended that the term should be interpreted so that the insured was "in transit" from the moment he placed any of his property in the car. The court found that as the defendant had failed to define this material term in the policy, the term was inherently ambiguous. The court, applying the doctrine that any ambiguity in the construction of an insurance policy would be resolved against the insurer, gave the term a liberal interpretation so as to include plaintiff's loss. Citron v. Hartford Accident and Indemnity Co., 86 Misc.2d 26, 381 N.Y.S.2d 650, 651, affirmed, 88 Misc.2d 902, 390 N.Y.S.2d 506 (1976), affirmed, 394 N.Y.S.2d 576 (1977).

**N.C.**

**N.C.**2004. Quot. in disc. After passenger injured in automobile accident sued driver, she moved to compel arbitration pursuant to underinsured-motorist provision. Trial court held that motion was time-barred. The court of appeals reversed and remanded, with instructions to compel arbitration. Affirming, this court held that, using the reasonable construction of the language of the arbitration provision, and resolving all doubts about intended meaning in favor of insured, the demand for arbitration was timely. Register v. White, 358 N.C. 691, 599 S.E.2d 549, 556.

**N.C.App.**

**N.C.App.**2004. Com. (a) quot. in sup. Credit-card company sued cardholder to collect outstanding balance and then moved to dismiss or stay cardholder's counterclaim pending arbitration pursuant to arbitration provision that was included in written notice


 

of changes to cardholder agreement. Trial court denied company's motion to compel arbitration. This court affirmed, holding that company waived right to compel arbitration and that no enforceable arbitration agreement existed. The court held that unilateral addition of arbitration clause to company's cardholder agreement was not within reasonable expectation of cardholders and not in compliance with requirement of good faith. Sears Roebuck and Co. v. Avery, 163 N.C.App. 207, 593 S.E.2d 424, 433.

**N.C.App.**1987. Cit. in disc., com. (a) cit. in disc. A landlord sued a lessee to recover rent allegedly due under a rent escalation clause in the lease. The trial court held that the contract was ambiguous as to what would trigger the rent increase and, because the defendant had drafted the lease, found in the plaintiff's favor. Affirming in part and reversing in part, this court held that, although the trial court did not err in finding that there was no meeting of the minds concerning the clause, it did err in awarding judgment to the plaintiff, since it was unclear who had drafted the clause. The case was remanded to determine whether either party had reason to know the other's different interpretation of the clause. Joyner v. Adams, 87 N.C.App. 570, 361 S.E.2d 902, 905.

**Pa.**

**Pa.**1986. Cit. in sup. Property owners executed a lease with a mining company, which provided for the payment of minimum advance royalties for at least three years should the mining company choose not to actively engage in the extraction of coal from the demised property. After three years had passed and mining had not begun, the owners refused to accept further royalty checks and sought a declaratory judgment that the lease had terminated. The trial court held that the lease was valid as long as royalties were paid; the intermediate appellate court reversed. Affirming, this court held that the lease was ambiguous and interpreted it to mean that, unless mining commenced within three years, the lease would terminate. Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385, 390.

**Pa.**1978. Cit. in disc. in diss. op. (Cit. section 232 of the Tentative Drafts, which is now section 206 of the Official Draft.) Plaintiff's husband had applied for and had paid initial premium on a life insurance policy issued by defendant. Before the application had been acted upon, and before the applicant had received a medical examination required by the policy, applicant was accidentally killed. Plaintiff brought this action to recover benefits, contending that a temporary contract created by payment of the initial premium was in force at the time of applicant's death. Defendant argued that no contract existed because the condition regarding the medical examination had not been fulfilled. The trial court ruled that the condition recedent had not been fulfilled and granted summary judgment for defendant. The Superior Court affirmed on appeal. This court vacated the Superior Court's order and reversed and remanded with instructions to the trial court to enter an order in favor of appellant. Where insurer accepted payment of the first premium at the time it took the application, it was up to the insurer to establish by clear and convincing evidence that the consumer had no reasonable basis for believing immediate insurance coverage had been purchased; otherwise, acceptance of the insured's money at the time of the application would expose the insurer to liability during the interim between the taking of the application and approval (or between the application and successful completion of a required medical examination). Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 606, 388 A.2d 1346, 1360, certiorari denied 439 U.S. 1089, 99 S.Ct. 871, 59 L.Ed.2d 55 (1979).

**Pa.**1977. Section 232 of Tentative Draft 5 which is now Section 206 of the Official Draft cit. and fol. The income beneficiaries of five trusts appealed from a decision awarding a bank, as trustee, interim commissions from principal, claiming that the fee agreements between the bank and the settlor barred such commissions. The court held that, as to one of the trusts, interim commissions were barred by a letter which memoralized a special fee agreement between the settlor and the trustee providing for a 1% payment from principal at termination of the trust, since the letter was clear and unambiguous on its face and to be given effect as a contract between the parties. As to other trusts, the court held that where there was no agreement on the part of the trustee to abandon interim commissions from principal which were authorized by statute, and the trustee met its burden of showing that it had not been fully compensated, the trial court did not abuse its discretion in awarding interim commissions from principal. In re Estate of Breyer, 475 Pa. 108, 379 A.2d 1305, 1310.


 

**Pa.Super.**

**Pa.Super.**1987. Com. (a) cit. in disc. After wind blew in the doors of a laundromat, freezing some pipes that subsequently burst, the insurer replaced the doors but refused to pay for the internal damage. The owner sued the insurer for breach of contract. The trial court entered a summary judgment for the defendant. Reversing, this court held that, since there was ambiguity in the terms of the windstorm coverage, the policy must be construed against the drafter and in favor of coverage for the plaintiff. There being no facts in dispute, the case was remanded for a partial summary judgment for the plaintiff. Di Fabio v. Centaur Ins. Co., 366 Pa.Super. 590, 531 A.2d 1141, 1143.

**Pa.Super.**1983. Com. (a) quot. in sup. in diss. op. A seller brought suit for breach of contract against a buyer. The buyer had terminated the contract based on language at the bottom of a purchase order reading, "Please note the above release schedule to be reviewed quarterly." A jury returned a verdict for the buyer. This court reversed and ordered a new trial, holding that the parties never came to a mutual understanding as to the meaning of the disputed phrase. Also, the evidence of usage of trade did not support the contention that the phrase empowered the defendant with the option to terminate the contract. The dissent agreed with the court's conclusions, but found that because the purchase order was drafted by the defendant and was ambiguous, it should be construed against the defendant. Leslie v. Pennco, Inc., 323 Pa.Super. 23, 470 A.2d 110, 114, 115.

**Pa.Super.**1982. Coms. (a) and (b) quot. in part in ftn. A manufacturing company brought suit against two insurers to recover the proceeds of liability policies which covered damages done to property of the company's customers while in transit on vehicles owned or operated by the company. After the jury failed to reach a decision, the trial court entered judgment on the whole record in favor of the company, and the insurers appealed. On appeal, the court rejected the insurers' contention that the court below had erred in deciding an issue that was properly reserved to the jury. The court noted that the one question of material fact apparently unresolved was the meaning of the word "operate" in the insurance contract. Finding that the word was ambiguously used in that contract, that it had no one generally prevailing meaning, and that properly admitted extrinsic evidence had not clarified its meaning as used, the court held that the lower court had properly construed the word against the drafting insurers. Having ruled that the meaning of the word "operate" was therefore properly determined as a matter of law in the earlier proceeding, the court affirmed lower court's the judgment. Motor Coils Mfg. Co. v. American Ins. Co., 308 Pa.Super. 568, 454 A.2d 1044, 1049-1050.

**Pa.Super.**1980. Cit. in disc. (Cit. section 232 of the Tentative Drafts, which is now section 206 of the Official Draft.) The plaintiff trucking company brought an action against an excavating company to enforce an agreement between the parties by which the trucking company was to remove dirt from the construction site. The lower court entered a judgment in favor of the plaintiff. Subsequently, a dispute arose regarding the amount of dirt to be removed and the defendant counterclaimed for damages resulting from the plaintiff's refusal to complete the job and for additional costs incurred as a result. On appeal, this court stated that even though an ambiguous contract is usually interpreted against the party that drafted it, the plaintiff herein had presented more evidence to support its interpretation. This court was unwilling to disturb the lower court's decision on this issue because the lower court was in a better position to judge the credibility of the witnesses. However, this court reversed and remanded because, inter alia, the plaintiff had failed to complete the job. Johnston Truck Rental Co. v. Fowler-McKee, 281 Pa.Super. 271, 422 A.2d 164, 167.

**Pa.Super.**1976. Section 232 of Tentative Drafts 1 through 7, Revised and Edited, which is now Section 206 of the Official Draft quot. in diss. op. in sup. The plaintiff contractor brought an action against the buyer of an above-ground swimming pool to recover the price of the pool installed in the defendant buyer's front yard. A local ordinance prohibited the construction of swimming pools in front yards, and the pool had to be dismantled. The defendant buyer asserted, inter alia, that the plaintiff could not recover, in that, the contract was illegal due to the local ordinance and because the plaintiff had unreasonably refused to mitigate his damages. The plaintiff contractor admitted that the pool had been erected in violation of the local ordinance, but asserted, nevertheless, that it could still recover since it was the defendant's responsibility under the contract to get the building permit (the contract stated "Customer supplies permit"). The trial court gave judgment for the contractor, and the defendant buyer appealed. The appellate court held, inter alia, that the contract was not illegal. The violation of a local ordinance may sometimes render a contract illegal, but this is true only where either the formation or the performance of the contract is forbidden; neither


 

of which is the case here. On the other hand, the plaintiff contractor had failed to make reasonable inquiry of the defendant buyer concerning whether or not the defendant had obtained a building permit, as was the defendant's obligation under the contract. In fact, substantially all of the plaintiff's damages in this case were foreseeable and avoidable. Accordingly the plaintiff would be allowed to recover, at most, the cost of transporting the materials and the work crew to the site. The dissent argued that the contractual provision ("Customer supplies permit") which the plaintiff asserts required the defendant to get the building permit was actually ambiguous. The defendant's assertion that the provision required the defendant to pay for the permit only and not to procure it was, in the dissent's view, reasonable and should prevail. The language of a contract must be construed strictly against the party responsible for it, and that party in this case is the plaintiff. Therefore, according to the dissent's view, it was the plaintiff contractor's duty to procure the permit, and, therefore, it was the plaintiff contractor who breached the contract. It is also possible to take the view, the dissent stated, that the non-existence of a proscription against front yard swimming pools was a condition precedent to the formation of a binding contract. The failure of this condition would have the effect of discharging the duties of performance of the parties. Contractor Industries v. Zerr, 24 Pa.Super. 92, 359 A.2d 803, 811.

**Pa.Cmwlth.**

**Pa.Cmwlth.**1998. Cit. in headnote, cit. in disc. An operator of gasoline service stations at turnpike service plazas filed a petition to vacate an arbitration award that determined that, as assignee of the lease agreement, it was obligated to operate and maintain on-site sewage treatment plants and obtain water pollution discharge permits. Confirming the arbitration award, the court held, inter alia, that the arbitration panel did not commit an error of law in considering extrinsic evidence for the purpose of ascertaining the intention of the parties to the lease and clarifying the ambiguity existing in the lease as to the responsibilities for operating and maintaining the sewage treatment plants. The court stated that it was only when an inquiry into the circumstances surrounding the execution of the document failed to clarify the ambiguity that the rules of construction should be used to conclude the matter against the party responsible for the ambiguity, the drafter of the document. Sun Co., Inc. (R & M) v. Pennsylvania Turnpike Com'n, 708 A.2d 875, 876, 879.

**Pa.Cmwlth.**1991. Quot. in ftn. A public building authority and a construction contractor entered into a contract involving excavation and landscaping work undertaken to prepare a building site. After work began, the authority issued a stop work order and rejected the landscaping preparation performed by the contractor's subcontractors, who removed the rejected topsoil and redid the job. Upon the submission of a site preparation claim by the contractor, the authority's executive director rendered a decision in favor of the authority. On appeal, the board of arbitration found for the contractor, awarding it damages for the total cost incurred in redoing the site preparation work. This court affirmed the board's decision on the claim, construing a latent ambiguity in the state government contract against the state so as to find that the contractor met the time limitation for filing its appeal to the board. Public School Bldg. Auth. v. Quandel, 137 Pa.Cmwlth. 252, 585 A.2d 1136, 1144.

**Pa.Cmwlth.**1981. Quot. in disc. (Cit. section 232 of the Tentative Drafts, which is now section 206 of the Official Draft.) Recipient of general assistance benefits petitioned for review of a decision of the Department of Public Welfare upholding the action of the county assistance office in requiring reimbursement from the recipient for general assistance benefits paid during the entire period rather than the period for which federal supplemental security income benefits were ultimately awarded. The court held that the reimbursement agreement executed by the recipient on the preprinted form provided by the Department of Public Welfare and authorizing the Department to deduct, from the recipient's first payment of supplemental security income benefits, "the amount of State Assistance paid to me in the interim," authorized the Department to withhold reimbursement for the interim between the onset of eligibility for supplemental security income benefits and termination of such eligibility. Accordingly, the court found that the State may withhold only that amount which it paid to an individual during eligibility for supplemental benefits, and vacated the decision of the Department of Public Welfare and remanded the case. The court noted that the law recognizes the principle that ambiguous language in a contract must be construed against the party responsible for it. Newton v. Com. Dept. of Public Welfare, 58 Pa.Cmwlth. 417, 427 A.2d 792, 794.

**Tenn.App.**

**Tenn.App.**2009. Cit. in sup. Sub-investor sued investment firm, alleging breach of an agreement in which sub-investor was to post a letter of credit in order to obtain an interest in firm's potential profits and liabilities under its guaranty of minimum ticket sales for a prize fight. The trial court granted summary judgment for firm, finding that there was no binding agreement because sub-investor never posted the letter of credit. Reversing and remanding, this court held that firm breached an implied or constructive condition of the agreement requiring it to furnish sub-investor with the information necessary for sub-investor to post the letter of credit. The court noted that doubtful language had to be construed against firm, as the party that drafted the contract, especially where, as here, the drafting party sought to use the language to defeat the operation of the contract. German v. Ford, 300 S.W.3d 692, 704, 708.

**Tex.**

**Tex.**2000. Com. (a) cit. in conc. and diss. op. Clients sued attorneys for, inter alia, breach of contract in connection with attorneys' collection of an additional 5% in fees following settlement in clients' wrongful-death suit against third party. The trial court entered summary judgment for attorneys, but the intermediate appellate court reversed. Reversing, this court held, in part, that attorneys were entitled to the additional fees provided for in the fee agreement when the wrongful-death judgment was "appealed to a higher court," or, in other words, when defendant in that action filed a cash deposit with the appellate court. Concurring and dissenting opinion believed that the contingent-fee agreement should be construed against attorneys/drafters, and that the term "appealed to a higher court," as used therein, was ambiguous and could reasonably be interpreted to mean something more than the initial step taken by defendant to preserve its appellate rights. Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 866.

**Utah**

**Utah,** 2005. Cit. in disc. Corporate officer appealed from a trial-court decision holding that he was personally liable under a contract he had signed on behalf of corporation in his official capacity. Vacating, this court held, inter alia, that the contract's guaranty provision was not triggered by corporation's involuntary administrative dissolution. The court reasoned that, although the contract was ambiguous as to whether the guaranty applied only upon the sale of the corporation, or also upon the corporation's discontinuation of business, and any ambiguity was to be construed against the drafter, involuntary dissolution was not, in any event, equivalent to the discontinuation of business. Express Recovery Services, Inc. v. Rice, 2005 UT App. 495, 125 P.3d 108, 109.

**Utah,** 1996. Cit. in headnote, quot. in sup. Law firm sued former client to recover $43,000 in fees owed for firm's work on client's divorce. After concluding that no fee cap had been established, the trial court determined that $43,000 was a reasonable amount for the services provided, denied firm's request for collection costs and attorneys' fees incurred in prosecuting its action, and entered judgment accordingly. Affirming as amended, this court held, in part, that client was not collaterally estopped from relitigating the issue of the reasonableness of the $43,000 fee; that firm's oral expression to client that she "should count on" paying, at most, $18,000 for its services would be construed against firm; and that the oral expression was a binding statement that required the court to reduce the total fee owed to $18,000. Jones, Waldo, Holbrook, etc. v. Dawson, 923 P.2d 1366, 1367, 1372.

**Wash.**

**Wash.**1996. Quot. in part in sup. Sellers of property sued buyers to enforce the promissory note that buyers gave as part of the purchase price. Buyers had intended to develop the land into a business park but were prevented from doing so after it was rezoned; they argued that their default on the note was excused and their obligations discharged under the doctrine of supervening frustration. The trial court granted sellers' motion for summary judgment and the intermediate appellate court affirmed. Affirming, this court held that the doctrine of supervening frustration was inapplicable because, among other things, buyers failed to show that construction of the business park was a basis of the land sale contract as sellers understood it.


 

Moreover, if buyers had wanted the construction to be a condition of the deal, they could have drafted the agreement accordingly. Felt v. McCarthy, 130 Wash.2d 203, 922 P.2d 90, 93.

**Wash.**1990. Cit. in disc. A ground lease, which was executed in 1959 for a term of 99 years, included a rent payment clause. The landlord sued in 1987, contending that for several years the tenant incorrectly calculated the rent due under the lease. The trial court granted partial summary judgment for the landlord, holding that the rent provisions were clear and unambiguous. Reversing in part and remanding, the intermediate appellate court attempted to provide definitions to the terms of the rent provision pertaining to gross rentals based on what it believed to be the intent of the drafter of the lease. Reversing the trial court's decision and remanding, this court held, inter alia, that there were certain ambiguities appearing on the face of the lease instrument and extrinsic evidence of the circumstances of the making of the contract was admissible. The court noted that since the lease was drafted by the landlord's attorney, it may be proper for the trial court, on remand, to construe ambiguous language against the drafter's client. Berg v. Hudesman, 115 Wash.2d 657, 801 P.2d 222, 233-234.

**Wash.App.**

**Wash.App.**2013. Subsec. (a) cit. in ftn. Former employee of a fitness facility sued facility and its owners, seeking, among other things, a temporary restraining order to prohibit enforcement of a noncompete clause contained in an employment agreement that he had entered into with defendants after being an at-will employee at the facility for approximately five years. The trial court denied employee's motion for summary judgment. Reversing and remanding, this court held that the noncompete clause was unenforceable as a matter of law, because it expressly stated that defendants did not give plaintiff any consideration other than continuing at-will employment in exchange for his agreement not to compete. The court rejected defendants' arguments that it gave plaintiff additional consideration for the noncompete clause in separate oral agreements not included in the employment agreement and that it had included an integration clause in the agreement by mistake; it was undisputed that defendants drafted the employment agreement and presented it to plaintiff to sign, and defendants could not now escape the agreement's clear provisions by claiming ambiguity in its favor. McKasson v. Johnson, 315 P.3d 1138, 1142.

**Wash.App.**1997. Cit. in headnote and ftn. A New Jersey corporation contracted to provide a Washington corporation with a magnetic tape containing names, telephone numbers, and other personal information about consumers regarding the consumers' smoking habits. The Washington corporation conducted interviews with these consumers and compiled the information into a database. Washington corporation sued New Jersey corporation in Washington state court, claiming that it was owed $150,000 for its work. Trial court granted defendant's motion to dismiss, holding that the forum selection clause that required the parties to bring all suits on the contract in Nevada was valid and enforceable. This court affirmed, holding, inter alia, that plaintiff had failed to meet its burden of proving that the parties would be so seriously inconvenienced by litigation in Nevada that the clause must be found unreasonable or that the clause was obtained through unfair dealing. The place of contract performance was not dispositive, and even if the forum selection clause was included by mistake by the plaintiff, the mistake must be interpreted against the party making it. Voicelink Data Services v. Datapulse, 86 Wash.App. 613, 937 P.2d 1158, 1159, 1162.

**Wis.**

**Wis.**2010. Quot. in sup., com. (a) quot. in ftn. Landlord sued tenant and tenant's guarantor, alleging that tenant was liable, under the terms of the residential lease, for fire damage to her apartment. The trial court granted summary judgment for plaintiff; the court of appeals reversed and remanded. Affirming, this court held that the terms of the lease did not unambiguously provide that tenant was liable for the fire damage caused in part by her acts of bringing a hair dryer into the apartment and plugging it into an electrical outlet. The court noted that the principle that ambiguities were construed against the drafter was a deeply rooted doctrine of contract interpretation; this rule was often invoked in cases of standardized contracts and in cases where the drafting party had the stronger bargaining position. Maryland Arms Ltd. Partnership v. Connell, 2010 WI 64, 326 Wis.2d 300, 786 N.W.2d 15, 25.


 

**Wis.**2005. Quot. in disc., com. (a) cit. in disc. Commercial landlord sued assignee tenant, seeking tenant's eviction for its failure to timely cure various parts of its default under the lease. The trial court entered judgment for landlord, and the court of appeals affirmed. This court affirmed, holding that, because of inconsistencies between the default notice and the lease in regard to when and how service of notice was to be effected, tenant had the right to rely on the more lenient terms in the default notice; nonetheless, tenant did not comply with the default notice's terms, and, accordingly, landlord lawfully evicted tenant. The court applied the general rule that ambiguity was construed against the drafter, noting that landlord drafted both the lease and the default notice. Walters v. National Properties, LLC, 2005 WI 87, 282 Wis.2d 176, 699 N.W.2d 71, 75-76.

**Wis.**2004. Com. (a) cit. and quot. in diss. op. Gynecologist who was suspended sued health network, seeking a declaration that another gynecologist, who was licensed to practice law in another state, could represent him at a peer-review hearing. Trial court denied plaintiff's declaratory-judgment motion. Answering certified questions, this court affirmed, holding, inter alia, that, based on hospital's bylaws, which formed a contract between the parties, if plaintiff chose to have legal counsel present at peer-review hearing, he had to choose an attorney who was licensed to practice law in Wisconsin. Dissent argued that, assuming that contract was ambiguous, and applying pertinent bylaws, the bylaws should be interpreted against the hospital and plaintiff should be allowed to appear at hearing with an attorney licensed in another state. Seitzinger v. Community Health Network, 270 Wis.2d 1, 676 N.W.2d 426, 442.

**Wis.**1979. Com. (a) quot. in sup. (Cit. section 232 of the Tentative Drafts, which is now section 206 of the Official Draft.) A capital risk lender sued a borrower corporation and its shareholders for specific performance of certain provisions of a financing agreement on grounds that the corporation had breached several provisions of the contract by refusing to elect two of the lender's designees to its Board of Directors. The appellate court held that the financing agreement, when read in its entirety, was ambiguous because it was susceptible to more than one meaning with regard to the termination of a contract provision which required the election of two lender designees to the corporation's Board of Directors. The court then had to construe the contract in order to determine the intentions of the parties. One rule of construction required that the ambiguity be construed against the drafting party, in this case the lender. Therefore the lender's right to representation on the Board ended when the lender's financial interests were fully protected and there were no longer any mortgage notes or stock purchase warrants outstanding. Capital Inv., Inc. v. Whitehall Packing Co., 91 Wis.2d 178, 280 N.W.2d 254, 259.

**N.Y.Sup.Ct.App.Term.**

**N.Y.Sup.Ct.App.Term.**2020. Quot. in sup. Taxpayer who hired consultant for assistance in settling a debt that he owed to the Internal Revenue Service (IRS) sued consultant after consultant terminated his representation of plaintiff, alleging that defendant never contacted the IRS and failed to refund plaintiff's money. After a nonjury trial, the trial court found that defendant's letter of engagement was vague and misleading, in that it did not clearly state whether it was a flat fee that was nonrefundable or an hourly retainer that was refundable in excess of hours billed, and that defendant failed to submit credible evidence of any time spent on plaintiff's case. Affirming, this court held that the trial court did not err in construing the letter of engagement as an hourly retainer in favor of plaintiff. The court reasoned that, under Restatement Second of Contracts § 206, in cases of ambiguity, a contract had to be construed most strongly against the party that prepared it, and favorably to a party that had no voice in the selection of its language. Thomas v. Jordan, 116 N.Y.S.3d 486, 487.



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