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INTERPRETATION OF INSURANCE CONTRACTS IN TEXAS

By David Plaut, Hanna & Plaut, L.L.P.

General Rules of Construction

Interpretation of insurance policies is governed by the same rules that govern interpretation of other contracts. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). The court primarily seeks to give effect to the written expression of the parties' intent. *Id.* It must read all parts of the contract together and "must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract." *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995) (citing *Forbau*, 876 S.W.2d at 133-34). The plain language of an insurance policy will be given effect -- even with respect to exclusionary language -- "when the parties' intent may be discerned from that language." *Glover v. National Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977); *see also Hofland v. Firemans Fund Ins. Co.*, 907 S.W.2d 597, 599 (Tex. App.—Corpus Christi 1995, no writ) (holding that an exclusion should be accorded its plain, grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated).

If a written contract is worded so that it can be given a definite or certain legal meaning, it is not ambiguous. *National Union Fire Ins. Co. v. CBI Industries, Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). Whether a contract is ambiguous is a question of law for the court to decide. *CBI Industries*, 907 S.W.2d at 520; *Coker*, 650 S.W.2d at 394; *see also Temple-Inland Forest Products Corp. v. U.S.*, 988 F.2d 1428, 1421 (5th Cir. 1993) (under Texas law, interpreting an unambiguous contract presents a question of law). Mere disagreement by the parties as to the meaning of a provision of an agreement does not create an

ambiguity. *Beaston*, 907 S.W.2d at 433 (“Both the insured and the insurer are likely to take conflicting views of coverage, but neither conflicting expectations nor disputation is sufficient to create an ambiguity”); *see also Matlock v. Nat’l Union Fire Ins. Co.*, 925 F. Supp. 468, 472 (E.D. Tex. 1996).

If no ambiguity exists, the court will enforce the policy in accordance with its plain meaning. *National Union Fire Ins. Co. v. Kasler Corp.*, 906 F.2d 196, 198 (5th Cir. 1990) (emphasizing that “special rules favoring the insured are only applicable where there is an ambiguity in the policy; if the term in question is susceptible to only one reasonable construction, then these rules do not apply”); *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 918 (Tex. App.–Fort Worth 1988, writ denied) (citing *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984)). Only where a contract is first determined to be ambiguous may the courts consider extraneous evidence. *CBI Indus.*, 907 S.W.2d at 520; *Mustang Tractor & Equip. Co. v. Liberty Mutual Ins. Co.*, 76 F.3d 89, 91 (5th Cir. 1996) (parol evidence of intent is admitted to explain an ambiguity in an agreement, but never to create the ambiguity). An insurance policy term is “ambiguous” when it is reasonably susceptible to more than one construction.

“Judicial Tiebreakers” for Assessing Contract Meaning

Despite an apparent preference for the contra-insurer rule discussed below, courts often resort to “judicial tiebreakers,” many of which are venerable Latin maxims which give judges a chance to pretend they took Latin in high school (and probably makes the law clerks wish they had). All too often these maxims provide an occasion for using rhetoric rather than analysis.

1. Specific terms control over general terms.

Specific provisions usually take precedence over general language. In this vein, handwritten terms generally get deference, followed by typewritten terms, which take precedence over preprinted forms. *Melvin Green, Inc. v. Questor Drilling Corp.*, 946 S.W.2d 907, 909 (Tex.App.–Amarillo 1997, no writ); *O’Connor v. O’Connor*, 694 S.W.2d 152, 155 (Tex.App.–San Antonio 1985, writ ref’d n.r.e.); *Bright v. New York Life Ins. Co.*, 546 S.W.2d 145,146 (Tex.Civ.App.–Corpus Christi 1977, writ ref’d n.r.e.). This rule of interpretation follows from the idea that where the parties have focused on a given portion of text, this portion should have greater weight than conflicting language largely overlooked by the parties.

2. *Expressio Unius Est Exclusio Alterius*

The maxim *expressio unius est exclusio alterius* (“the expression of one thing is the exclusion of another”) means more or less what a literal translation suggests. *Southern County Mut. Ins. Co. v. Smith*, 529 S.W.2d 618, 620 (Tex. Civ. App.–Tyler 1975, no writ); *Boger & Boger v. Continental Fire & Cas. Ins. Corp.*, 234 S.W.2d 133 (Tex. Civ. App.–Dallas 1950, writ refused n.r.e.) (maxim defined to mean “the expression in a contract of one or more things of a class implies exclusion of all things not expressed, even though all would have been implied had none been expressed”). If, for example, an insurance policy contains a specific discussion of a formula for assessing the cost of

repairing a dwelling, one could reasonably apply *exclusio alterius* to decide that the term “amount of loss” as used in the policy meant the cost of repair rather than replacement cost or market value. Stempel, Interpretation of Insurance Contracts § 3.4.

3. *Ejusdem Generis*

The maxim *ejusdem generis* (“of the same kind”) is used where a contract contains a grouping of items. *Decorative Center v. Employers Cas.*, 833 S.W.2d 257, 260 (Tex. App.–Corpus Christi, 1992, writ denied) (*ejusdem generis* principles draw on the sensible notion that words such as “or other invasion of the right of private occupancy” are intended to encompass actions of the same general type as, though not specifically embraced within, “wrongful entry or eviction”); *Jones v. St. Paul Ins. Co.*, 725 S.W.2d 291, 294 (Tex. App.–Corpus Christi 1986, no writ) (because the general words of the exclusion (earth movement) preceded and did not follow the specific words (earthquake, landslide, mudflow) the doctrine of *ejusdem generis* did not apply). For example, a homeowner’s insurance policy could provide coverage of all personal property but exclude antiques, heirlooms, and art. If the policyholder lost his collection of original letters from Sam Houston to William Barrett Travis instructing Travis to destroy the Alamo, the insurer could argue, probably with success, that the valuable historical documents were like antiques or heirlooms in that they possessed a value beyond ordinary household personal property and that the insurer did not assume this risk.

4. *Noscitur a Sociis*

Courts occasionally use the maxim *noscitur a sociis* (“it is known from its associates”) for the same or similar constructive purpose: deciding whether the term in question is similar or dissimilar to the items unquestionably within the contract. *Maddox v. Flato*, 423 S.W.2d 371, 377 (Tex. Civ. App.–Corpus Christi 1967, writ ref’d n.r.e.) (the rule or maxim of *noscitur a sociis* -- it is known from its associates -- permits the interpretation of a word by reference to the meaning of words that are associated with or related to it).

5. *Ut Res Magis Valeat Quam Pereat*

Another Latin phrase with some clout is *ut res magis valeat quam pereat* (“that the thing may rather have effect than perish”), which in our vernacular means that courts should try to construe contracts so that they will be legal and enforceable in some manner so long as such interpretation does not unduly strain the text. Stempel, Interpretation of Insurance Contracts §3.4.

***Contra Proferentem*: The Contra-Insurer Principle**

The most important Latin phrase in the interpretation of insurance contracts, is *contra proferentem* (“against the author”). *Contra proferentem* or the contra-insurer principle provides that ambiguous contract language is construed against the party that drafted the language, on the theory that the drafter was the person in the best position to avoid the ambiguity. *Contra proferentem* has become a first tier interpretive vehicle in insurance contract litigation. One

commentator has characterized the approach as “a tool of substantive policy that is intended systematically to favor the weaker party,” which is almost always the policyholder. Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* §1.03[B][1] (1988). Once an insurance policy term is labeled “ambiguous,” invocation of the doctrine becomes a nearly automatic finding in favor of the insured. *See* Jeffrey W. Stempel, *Interpretation of Insurance Contracts* § 5.1 (1994). *But see GTE Mobilnet of South Texas Ltd. Partnership v. Telecell Cellular, Inc.*, 955 S.W.2d 286 (Tex. App.–Hous. [1 Dist.]1997, writ denied) (*contra proferentem* is to be applied as interpretive aid “only as a last resort”).

Strictly speaking, however, insurance companies in Texas do not “draft” the standardized policies issued, but provide insurance on forms specifically adopted and approved by the Texas Department of Insurance (“TDI”). Despite the fact that insurance companies have no authority to vary insurance forms approved for use by the TDI, courts have repeatedly applied the contra-insurer principle in the highly regulated insurance context. *See, e.g., Balandran*. The contra-insurer principle probably reflects an implicit recognition of the adhesive nature of insurance contracting and the practical strength of the insurer in the typical transaction. Contra-insurer principles also facilitate risk distribution and probably mask what is really a naked invocation of “public policy,” normally the last resort in matters of contract interpretation.