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## **CONTRA PROFERENTEM AND THE ROLE OF THE JURY IN CONTRACT INTERPRETATION**

*Ethan J. Leib & Steve Thel\**

### INTRODUCTION

In our age of consumer arbitration—in which many consumer form contracts declare that contractual disputes must take place in arbitral fora—we can lose sight of what the alternative civil process would really look like. In honor of the occasion to celebrate the contracts scholarship of Bill Whitford, we consider how a jury might be instructed in the interpretation of standard form contracts in a civil judicial proceeding. Whitford’s work has independently looked at “the role of the jury (and the fact/law distinction) in the interpretation of written contracts”<sup>1</sup> and standardized terms in consumer contracts.<sup>2</sup> We thought we would pursue the question of how a jury might be involved in the interpretation of consumer form contracts, focusing especially on how the maxim of *contra proferentem* figures into the story of interpretation.<sup>3</sup> *Contra proferentem* usually requires that an interpreter read an ambiguous contract provision against the drafter of that provision. Although *contra proferentem* would seem to have especial application to the world of standard form contracting in the consumer context—serving to help consumers as a general matter—little work exists explaining and exploring how *contra proferentem* actually functions. *Contra*

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\* Ethan J. Leib is Professor of Law at Fordham Law School. Steve Thel is the Wormser Professor of Law at Fordham Law School. Thanks to Fordham Law School for financial support, to Lea Yoon, Sarah Jaramillo, and David Isakov for research support, and to Daniel Schwarcz, Ben Zipursky, David Horton, Bill Whitford, Tom Lee, and Joe Perillo for some nice leads. We are grateful for the invitation from the *Temple Law Review* to write this Essay in honor of Bill Whitford’s lifetime achievements.

1. William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 931 (capitalized in original).

2. See William C. Whitford, *Contract Law and the Control of Standardised Terms in Consumer Contracts: An American Report*, 3 EU. REV. PRIVATE L. 193 (1995).

3. For some recent work on *contra proferentem*, see Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006) [hereinafter Boardman, *Contra Proferentem*]; Michelle Boardman, *Penalty Default Rules in Insurance Law*, 40 FLA. ST. U. L. REV. 305 (2013) [hereinafter Boardman, *Penalty Default Rules*]; David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431 (2009). For older treatments, see John T. Flynn, *The Rule Contra Proferentem in the Government Contract Interpretation Process*, 11 PUB. CONT. L.J. 379, 381 (1980); David S. Miller, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849, 1849–53 (1988); Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 254 (1995).

*proferentem* is a “first principle of insurance law,”<sup>4</sup> but its continuing relevance in more general contract law is presumed rather than carefully examined.

Here are some questions we pursued: Are courts using *contra proferentem* against drafting entities (when the cases aren’t arbitrated)? Are they limiting its application to the standard form contracting context? Do courts use it to avoid bringing juries into interpretation, since, conventionally, *contra proferentem* is only triggered upon a legal finding of ambiguity?<sup>5</sup> Yet, as a matter of black-letter law, aren’t juries supposed to determine the meaning of contracts when terms are ambiguous?<sup>6</sup> Is *contra proferentem* then a rule for guiding the jury’s interpretation, allowing it to decide what an ambiguous contract provision means?<sup>7</sup> Is it only to be used as a tiebreaker<sup>8</sup> or a rule of “last resort”?<sup>9</sup> Before or after other extrinsic evidence is brought to bear to discern the meaning of an

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4. Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 531 (1996); see also *Phillips v. Lincoln Nat’l Life Ins. Co.*, 978 F.2d 302, 312 (7th Cir. 1992) (“[T]he *contra proferentem* rule[] is followed in all fifty states and the District of Columbia, and with good reason. Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters’ expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.” (emphasis omitted) (quoting *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir. 1990))); KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION* 37 (5th ed. 2010). But see Ed E. Duncan, *The Demise of Contra Proferentem as the Primary Rule of Insurance Contract Interpretation in Ohio and Elsewhere*, 41 TORT TRIAL & INS. PRAC. L.J. 1121 (2006).

5. See *FDIC v. Conn. Nat’l Bank*, 916 F.2d 997, 1006 (5th Cir. 1990). For cases using it as a matter of law for the court, see *Kunin*, 910 F.2d at 541; and *Motor Coils Mfg. Co. v. Am. Ins. Co.*, 454 A.2d 1044, 1049–50 (Pa. Super. 1982) (applying the rule after giving the jury a chance to otherwise interpret an ambiguous provision). See also *infra* Section III.

6. See, e.g., *Hewett Grocery Co. v. Biddle Purchasing Co.*, 286 N.W. 221, 236 (Mich. 1939).

7. See, e.g., 1901 Wyoming Ave. Coop. Ass’n v. Lee, 345 A.2d 456, 463 (D.C. 1975) (suggesting it is a rule for the jury to apply); *Klapp v. United Ins. Grp. Agency, Inc.*, 663 N.W.2d 447, 454–55 (Mich. 2003) (same); *Herweyer v. Clark Highway Servs., Inc.*, 564 N.W.2d 857 (Mich. 1997) (same); Steven W. Feldman & James A. DeLanis, *Resolving Contractual Ambiguity in Tennessee: A Systematic Approach*, 68 TENN. L. REV. 73, 91 (2000) (noting that most interpretive disputes will be resolved by the time the court instructs the fact-finder on *contra proferentem*).

8. For one case treating it as a tiebreaker, see, e.g., *Pacifico v. Pacifico*, 920 A.2d 73, 79 (N.J. 2007).

9. See *Residential Mktg. Grp. v. Granite Inv. Grp.*, 933 F.2d 546 (7th Cir. 1991); *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10 n.2 (2d Cir. 1983); *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986) (“[O]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite.”). But see *Chem. Leaman Tank Lines Inc. v. Aetna Cas. & Sur. Co.*, 817 F. Supp. 1136, 1155 (D.N.J. 1993) (“Even assuming that the evidence of the drafter’s intent conclusively shows the desired meaning of the word ‘sudden,’ the doctrine of *contra proferentem*—or ‘against the one who proffers’—precludes this court from considering this evidence.”).

ambiguous word?<sup>10</sup> If it is truly only a “tiebreaker,” are juries given the instruction only after they are otherwise deadlocked?<sup>11</sup>

Are some courts using it as a stronger policy tool rather than a mere tiebreaker for factfinders, as seems to occur within insurance law?<sup>12</sup> Can a drafter draft around *contra proferentem*? Would the answer depend on a jurisdiction’s view of the rule as legal policy rather than as a rule of last resort? On the relative bargaining power of the parties? On whether the contract is a form agreement? We hope to begin to answer these questions here, giving scholars and courts more information about one of the canons of contract interpretation that many have heard of but few actually understand as a matter of law in action. Bill Whitford would want us to know a little better how it works in action.<sup>13</sup>

In the main, we sought answers to our questions by looking at both cases and state pattern jury instructions. Using jury instructions to tell us about the law on the ground isn’t a flawless methodology—they give us no sense of how often matters actually go to the jury and they aren’t really citable legal authority. Still, we have good reasons to think that trial courts and trial lawyers turn to model jury instructions during trials to assess the court/jury divisions of labor and to formulate for juries how to structure their deliberations in cases about contract interpretation. Accordingly, they are a good window into the law on the ground.<sup>14</sup> Below we report what we’ve learned.

Section I explores various policy rationales for the rule of *contra proferentem*, since the mechanics of applying the rule ought to bear some relation to its reason for existence. Section II investigates to which contracts the rule applies, asking whether it is more than an insurance law rule and whether it has special application to standard form contracts. Section III examines whether *contra proferentem* is a rule for the court as a matter of law or whether it is a rule for the jury or factfinder. Section IV refines what kind of rule it is: a “tiebreaker” or something else—and how we might design the rule to accomplish its ends. Finally, Section V asks whether it is a default rule or mandatory rule in the cases to which it applies.

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10. *Klapp*, 663 N.W.2d at 455 (suggesting that *contra proferentem* is applied only after all extrinsic evidence is considered).

11. As we will discuss, this is the approach of California. See JUDICIAL COUNCIL OF CAL. ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS No. 320 (2015) [hereinafter CAL. JURY INSTRUCTIONS].

12. In insurance law, there is often a hair trigger, implicating the question of whether a court really needs to establish ambiguity to apply the rule. See Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 972 (1970).

13. See generally STEWART MACAULAY, JEAN BRAUCHER, JOHN KIDWELL & WILLIAM WHITFORD, *CONTRACTS: LAW IN ACTION* (3d ed. 2010).

14. For examples of scholars looking to model jury instructions to learn about the law on the ground, see, e.g., David A. Hoffman & Alexander S. Radus, *Instructing Juries on Noneconomic Contract Damages*, 81 FORD. L. REV. 1221 (2012); Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587 (2002); Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999 (2007).

I. THE POLICY RATIONALE FOR *CONTRA PROFERENTEM*

Courts and commentators have offered a variety of rationales for *contra proferentem*. Perhaps the dominant explanation is that the rule discourages ambiguity: Drafters will draft clearer contracts if they know that ambiguous language will be construed against them.<sup>15</sup> A related explanation, especially when the doctrine is applied in connection with standard form contracts (such as insurance contracts), is that the doctrine serves to protect the public against institutions that are inclined to draft obscure contracts to entrap consumers.<sup>16</sup>

Recently commentators have challenged these explanations, arguing that *contra proferentem* is not likely to lead to clear contracts and that the conventional explanations rest on incorrect understandings of both actual law and common practice.<sup>17</sup> They have instead emphasized that the creators of widely used contracts value the certainty that a clause will be construed a particular way more than they value any particular construction. This insight leads them to conclude that *drafters* too prefer that provisions be construed against them, because such a construction produces a standard meaning for each clause that they can plan around.<sup>18</sup>

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15. See RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (1981); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1608 (2005) (“The doctrine of *contra proferentem* may still be a sensible tiebreaker, on the ground that the party who drafted the contract was probably in the better position to avoid ambiguities. But this is not always the case.”); Abraham, *supra* note 4, at 533; *cf.* Horton, *supra* note 3, at 433–34 (discussing conventional explanations); Rappaport, *supra* note 3 (same).

16. See RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a; Posner, *supra* note 15, at 1590 (“The second of these tie-breaking rules, *contra proferentem*, is conventionally defended on the ground that the drafting party may be able to pull a fast one on the other party, a defense that fails when the other party is commercially sophisticated.”).

17. See Boardman, *Contra Proferentem*, *supra* note 3, at 1121 (“In short, from power comes responsibility: ‘Convolved or confusing terms are the problem of the insurer . . . not the insured . . .’ Nicely turned out, but not true.”) (alterations in original) (footnote omitted); Yuval Feldman & Doron Teichman, *Are Contractual Obligations Created Equal?*, 100 GEO. L.J. 5, 35–36 (2011) (“Legal scholars have presented competing rationales for this doctrine. . . . Our findings suggest a new explanation for the doctrine that rests on purely ex post grounds. Participants in [our] experiment viewed contractual obligations that were dictated by the opposing party as obligations with a weaker noninstrumental value. . . . These perceptions may be reflected in the doctrine of *contra proferentem* that grants the nondrafting party greater freedom in interpreting the text of the contract.”); Horton, *supra* note 3, at 437 (“The traditional rationale for *contra proferentem* hinges on control: to deter ambiguities, courts interpret them against the party responsible for the faulty language. Academics have offered a second explanation: *contra proferentem* is a ‘penalty default rule’ that facilitates information flow by making the drafter spell out the parties’ rights and duties or suffer dire consequences. . . . [T]wo other potential bases for the rule—that it ameliorates the problems inherent in standard-form contracts and redistributes wealth from firms to consumers—rest on dubious assumptions. Here, I articulate a new justification for strict liability *contra proferentem*. . . . The strict against-the-drafter doctrine deters imprecision but not necessarily to influence the problematic relationship between consumers and the contents of the agreement. Instead, it does so to encourage singularity of meaning in mass-produced contracts.”) (footnotes omitted).

18. Michelle Boardman has elaborated this idea in a number of articles cited *supra* note 3. Horton puts it this way: “[C]ontrary to orthodox understandings of the doctrine, the rule does not [deter ambiguity] primarily to help adherents [in contracts of adhesion]. Instead it does so because

The long-standing text/context debate over contract interpretation,<sup>19</sup> in which Williston and Corbin most famously engaged, might inform the application of *contra proferentem*. This is particularly so with respect to the question of whether the rule is one of last resort. Faced with ambiguity in a written contract, followers of Corbin would look to context and extrinsic evidence to determine the terms of the contract, and might turn to *contra proferentem* only as a last resort. Followers of Williston, on the other hand, might prefer to resolve all ambiguities with rules of construction, such as *contra proferentem*, that will yield predictable outcomes that do not even acknowledge information outside the writing.

We do not undertake to defend or rationalize the doctrine ourselves. But we must observe that the details and mechanics of the rule's application need to be designed with the purpose of the rule in view. Our focus in what follows is on the process by which the rule is applied, and particularly on the role of the jury in its application. Our inquiry into the role of the jury is important for understanding the work the doctrine does—and it is remarkable that no one has studied whether this canon of construction or interpretation (for there is some debate about which it is)<sup>20</sup> is for the judge or jury.<sup>21</sup> The power of the doctrine to produce consistent, judicially controlled readings of standard contractual language, for example, is undermined if the doctrine is applied by juries instead of judges. Similarly, if the doctrine is for juries to apply—and judges have the power and incentives to keep the interpretive issue away from the jury—the rule is not likely to have a systematic effect on the law or any particular standardized clause. Continued confusion about the mechanics of the rule's application impairs the rule's ability to function.

## II. TO WHICH CONTRACTS DOES *CONTRA PROFERENTEM* APPLY?

In light of the various rationales proffered for *contra proferentem*, it isn't obvious that it ought to be applied as a matter of general contract law to every transactional context. Although it is recognized broadly as a rule of insurance

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imprecise standard-form contracts are deleterious both for drafters and social utility." Horton, *supra* note 3, at 473.

19. See generally Ronald J. Gilson, Charles S. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23 (2014).

20. The *Second Restatement of Contracts* restates *contra proferentem* under the topic "Considerations of Fairness and Public Interest," suggesting that the rule is one of construction rather than interpretation. See RESTATEMENT (SECOND) OF CONTRACTS § 206; see also *Joyner v. Adams*, 361 S.E.2d 902, 905 (N.C. App. 1987) ("The rule is essentially one of legal effect, of 'construction' rather than 'interpretation,' since 'it can scarcely be said to be designed to ascertain the meanings attached by the parties.'" (quoting E. ALLAN FARNSWORTH, CONTRACTS, § 7.11, at 500 (1982))). Yet innumerable cases speak about the doctrine as one of interpretation, for the jury to apply. See *infra* Sections III and IV.

21. Horton's article, *supra* note 3, doesn't mention the jury. Neither do Boardman's articles on the doctrine, *supra* note 3.

law (that applies to corporate and individual policyholders alike),<sup>22</sup> we tried to assess whether the general law of contract recognizes the rule.

A. *More than an Insurance Law Rule?*

There are wide ranges of cases outside the canonical area of insurance law throughout the states that employ *contra proferentem*. For example, we found courts applying the rule against an employer in an employment contract;<sup>23</sup> against the drafter of a marriage settlement agreement;<sup>24</sup> against the drafter of stock certificates;<sup>25</sup> against a bank which drafted a money market certificate serving as the relevant agreement;<sup>26</sup> against the drafter of a cooperative apartment association agreement;<sup>27</sup> against the drafting lessors of property lease

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22. See, e.g., *Minnesota Sch. Bds. Ass'n Ins. Trust v. Emp'rs Ins. of Wausau*, 331 F.3d 579, 581–82 (8th Cir. 2003) (similar in Minnesota law); *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 279 (2d Cir. 2000) (“[T]here is no general rule in New York denying sophisticated businesses the benefit of *contra proferentem*.”); *St. Paul Fire & Marine Ins. Co. v. MetPath, Inc.*, 38 F. Supp. 2d 1087, 1091 (D. Minn. 1998) (rejecting argument that *contra proferentem* “should not apply to the Defendants because they are large, sophisticated companies”); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1219 (Ill. 1992) (holding that “any insured, whether large and sophisticated or not, must enter into a contract with the insurer which is written according to the insurer’s pleasure by the insurer. Generally, since little or no negotiation occurs in this process, the insurer has total control of the terms and the drafting of the contract,” so *contra proferentem* should apply) (citations omitted); *CPS Chem. Co. v. Cont’l Ins. Co.*, 536 A.2d 311, 318 (N.J. Super. Ct. App. Div. 1988) (“These principles are no less applicable merely because the insured is itself a corporate giant. The critical fact remains that the ambiguity was caused by language selected by the insurer.”); 2 STEVEN PLITT ET AL., *COUCH ON INSURANCE* § 22:24 (3d ed. 2015) (“Avoidance of the rule . . . is not required merely because an insured party is a business rather than an individual.”). For more nuance on the way sophistication relates to the application of *contra proferentem* in insurance law, see *infra* note 57. However, when the dispute is between two insurance companies fighting about the terms of the policy, the rule generally does *not* apply. See, e.g., *Maryland Cas. Co. v. Alliance Mut. Cas. Co.*, 576 P.2d 625 (Kan. 1978); *United States Fid. & Guar. Co. v. Western Cas. & Sur. Co.*, 408 P.2d 596 (Kan. 1965); see also COMM. ON PATTERN JURY INSTRUCTIONS ASS’N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTION—CIVIL DIVISION § (4)(B)(3) [hereinafter N.Y. JURY INSTRUCTIONS] (“The rule of contract interpretation that ambiguities in insurance policies should be construed against the insurer who drafted the policy, known as the doctrine of *contra proferentem*, does not apply where the party who did not draft the contract was sophisticated and had equal bargaining power, came up with the basic concept and terms for the contract and was instrumental in crafting various parts of the contract, and acted like an insurance company by maintaining a self-insured retention.”).

23. *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1097 (Alaska 2009); *Abrams v. Horizon Corp.*, 669 P.2d 51, 57 (Ariz. 1983); *Int’l Billing Servs., Inc. v. Emigh*, 101 Cal. Rptr. 2d 532, 538 (Cal. Ct. App. 2000).

24. *Hussein-Scott v. Scott*, 298 P.3d 179, 183 (Alaska 2013) (holding that although Alaska law disfavors *contra proferentem* in marriage settlements, this agreement was to be interpreted under Florida law); *McMullin v. McMullin*, 338 S.W.3d 315, 322 (Ky. Ct. App. 2001) (applying the rule to a marriage settlement agreement).

25. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398 (Del. 1996).

26. *Craig v. Hastings State Bank*, 380 N.W.2d 618, 621 (Neb. 1986).

27. *1901 Wyoming Ave. Coop. Ass’n v. Lee*, 345 A.2d 456, 463 (D.C. 1975); see also *Highland Lakes Country Club & Cmty. Ass’n v. Franzino*, 892 A.2d 646, 660 (N.J. 2006) (Wallace, J., dissenting) (suggesting that ambiguities should be construed against drafters of bylaws of a country club).

agreements;<sup>28</sup> against landlords in disputes with tenants;<sup>29</sup> against sellers of real property in a purchase-and-sale form agreement prepared by a real estate firm on behalf of the sellers;<sup>30</sup> against buyers in a real estate transaction when they were the drafting party;<sup>31</sup> and against the drafter of a letter from one lawyer to another that was held to contain actionable promises.<sup>32</sup> These examples reinforce the view that *contra proferentem* is not a doctrine limited to the insurance contract context but has wider application in the general law of contract. At least Arizona,<sup>33</sup> Arkansas,<sup>34</sup> California,<sup>35</sup> Colorado,<sup>36</sup> Delaware,<sup>37</sup> Idaho,<sup>38</sup> Iowa,<sup>39</sup> Massachusetts,<sup>40</sup> Michigan,<sup>41</sup> Mississippi,<sup>42</sup> New Jersey,<sup>43</sup> New

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28. *Kutkowski v. Princeville Prince Golf Course, LLC*, 300 P.3d 1009, 1019 (Haw. 2013); *Owens v. McDermott, Will & Emery*, 736 N.E.2d 145, 154 (Ill. App. Ct. 2000); *Berg v. Hudesman*, 801 P.2d 222, 233–34 (Wash. 1990).

29. *Maryland Arms Ltd. P'ship v. Connell*, 786 N.W.2d 15, 25 (Wis. 2010).

30. *DeWolfe v. Hingham Ctr., Ltd.*, 985 N.E.2d 1187, 1195–96 (Mass. 2013).

31. *Highland Inns Corp. v. American Landmark Corp.*, 650 S.W.2d 667, 674 (Mo. Ct. App. 1983).

32. *Lai Ling Cheng v. Modansky Leasing Co.*, 539 N.E.2d 570, 573 (N.Y. 1989).

33. CIVIL JURY INSTRUCTIONS COMM. OF THE STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) § 27 (5th ed. 2013) [hereinafter ARIZ. JURY INSTRUCTIONS], available at [http://www.azbar.org/media/58793/contracts\\_2013.pdf](http://www.azbar.org/media/58793/contracts_2013.pdf).

34. ARK. SUPREME COURT COMM. ON JURY INSTRUCTIONS—CIVIL, ARKANSAS MODEL JURY INSTRUCTIONS § 2424 (2014) [hereinafter ARK. JURY INSTRUCTIONS], available at [https://govt.westlaw.com/armji/Document/Ib7bda834053f11db9346b0b8bf67faf0?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/armji/Document/Ib7bda834053f11db9346b0b8bf67faf0?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)).

35. CAL. JURY INSTRUCTIONS, *supra* note 11, No. 320.

36. See COLO. SUPREME COURT COMM. ON CIVIL JURY INSTRUCTIONS, COLORADO JURY INSTRUCTIONS FOR CIVIL TRIALS § 30:35 (CLE ed. 2013) [hereinafter COLO. JURY INSTRUCTIONS], available at <http://www.cobar.org/cle/photos/tableofcontents/ZCJICT13B.pdf>.

37. See PATTERN JURY INSTRUCTIONS FOR CIVIL PRACTICE IN THE SUPERIOR COURT OF THE STATE OF DELAWARE § 19.15 (2000) [hereinafter DEL. JURY INSTRUCTIONS], available at [http://courts.delaware.gov/Superior/pattern/patternjury\\_rev\\_81506.pdf](http://courts.delaware.gov/Superior/pattern/patternjury_rev_81506.pdf) (putting the instruction about construction against the drafter first for the jury's consideration—prior to the consideration of extrinsic evidence).

38. See IDAHO SUPREME COURT CIVIL JURY INSTRUCTIONS COMM., IDAHO CIVIL JURY INSTRUCTIONS § 6.08.3 (2009) [hereinafter IDAHO JURY INSTRUCTIONS], available at <https://www.isc.idaho.gov/main/civil-jury-instructions> (last visited Sept. 15, 2015).

39. See IOWA STATE BAR ASSOC. UNIF. COURT INSTRUCTIONS, IOWA CIVIL JURY INSTRUCTIONS § 2400.5 (2004).

40. See JOSEPH D. LIPCHITZ, AMANDA B. CAROZZA, MASS. CONTINUING LEGAL EDUC. INC., 2 MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTRUCTIONS § 14.3.3 (3d ed. 2014) [hereinafter MASS. JURY INSTRUCTIONS].

41. See HON. WILLIAM MURPHY & JOHN VANDENHOMBERGH, MICHIGAN NON-STANDARD JURY INSTRUCTIONS (CIVIL) § 40:4 (2014) [hereinafter MICH. JURY INSTRUCTIONS] (making clear that only after all other evidence fails to provide a determination of intent may a jury construe a contract against the drafter).

42. See MISS. JUDICIAL COLLEGE, MISSISSIPPI MODEL JURY INSTRUCTIONS (CIVIL) § 10:16–17 (2014) [hereinafter MISS. MODEL JURY INSTRUCTIONS]; MISS. JUDICIAL COLLEGE, MISSISSIPPI PLAIN LANGUAGE MODEL JURY INSTRUCTIONS (Civil) § 704 (2014).

43. See MODEL CIVIL JURY CHARGE COMM., NEW JERSEY MODEL CIVIL JURY CHARGES § 4.10H (1998) [hereinafter N.J. JURY INSTRUCTIONS] (“The following instruction is appropriate if the

York,<sup>44</sup> Nevada,<sup>45</sup> North Dakota,<sup>46</sup> Oregon,<sup>47</sup> Virginia,<sup>48</sup> and Wisconsin<sup>49</sup> also have pattern jury instructions that evidence the rule's relevance as a matter of general contract interpretation in a wide array of jurisdictions.

*B. Is the Rule Especially Applicable to Standard Form Contracts? Do Sophisticated Parties Get to Invoke it?*

As the rule's application expanded outward from insurance contracts,<sup>50</sup> widespread debate ensued about just how pervasive the rule ought to be. That is, courts reasonably asked whether there were features of insurance contracts that made them especially susceptible to *contra proferentem*—or whether any contract drafted by one party rather than another provides sufficient reason for triggering the application of the rule. As we have just highlighted above, however, the rule has not ultimately been limited only to contracts that mimic the “adhesive” quality of insurance contracts. But courts do sometimes find that the rule has especial importance in the take-it-or-leave-it context of standard form contracting.<sup>51</sup> It is probably fair to say that a stronger version of the rule

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contract was drafted by just one of the parties. No case has been located which approves this instruction as modified and applied to particular paragraphs when the entire contract has been the product of joint drafting. If you have considered all of the evidence to ascertain the intentions of the parties and you are still unable to decide what the parties originally intended the disputed contract language to mean, then that language as it exists should be interpreted against the party who wrote the contract.”).

44. See N.Y. JURY INSTRUCTIONS, *supra* note 22, § 4:1, VI.A.2 (“In cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it and favorably to a party who had no voice in the selection of its language.”). Note that in New York, “[w]here no extrinsic evidence of the parties’ intent is offered, the construction of an ambiguous contract is a question of law for the court.” *Id.*

45. See STATE BAR OF NEV., NEVADA JURY INSTRUCTIONS—CIVIL § 12CN.18 (2011) (“Ambiguous terms are to be construed against the party that drafted them.”).

46. See STATE BAR ASS’N OF N.D., NORTH DAKOTA JURY INSTRUCTIONS—CIVIL § C-50.24 (2012) (“In cases of uncertainty, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”).

47. See OR. STATE BAR COMM. ON UNIF. CIVIL JURY INSTRUCTIONS, OREGON UNIF. CIVIL JURY INSTRUCTIONS No. 65.17B (2006).

48. See RONALD J. BACIGAL & MARGARET IVEY BACIGAL, VIRGINIA PRAC. JURY INSTRUCTIONS § 55:1 (2014) [hereinafter VA. JURY INSTRUCTIONS].

49. See WISCONSIN JURY INSTRUCTIONS: CIVIL § 3051 (2012).

50. The rule has a much longer history in contract law, told by *Economy Premier Assurance Co. v. Western Nat’l Mut. Ins. Co.*, 839 N.W.2d 749 (Minn. Ct. App. 2013), and Horton, *supra* note 3, at 438–46. But the general story of the doctrine as a core of insurance law which then, in turn, gave courts more comfort with more applications of the doctrine outside insurance law is a conventional story which we accept here without independently testing.

51. See *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 171 (Cal. 1966) (“These principles of interpretation of insurance contracts have found new and vivid restatement in the doctrine of the adhesion contract.”); *Anderson v. Baker*, 641 P.2d 1035, 1039 (Mont. 1982) (same); *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 433–34 (N.C. Ct. App. 2004) (same); *Joyner v. Adams*, 361 S.E.2d 902, 905–06 (N.C. Ct. App. 1987) (highlighting the rule’s central importance in cases of adhesion contracts); *Maryland Arms Ltd. P’ship v. Connell*, 786 N.W.2d 15, 25 n.14 (Wis. 2010) (noting that the rule is particularly applicable in standardized contracts); see also 1 PHILIP L. BRUNER & PATRICK J.



applies in the standard form contracting context; California’s jury instructions, for example, are explicit on this point.<sup>52</sup>

Still, the standard form contract context is not limited to *consumer* form contracts: corporations or big entities that are on the receiving end of form contracts similarly find themselves getting the benefit of the rule, even if not the strongest version of it.<sup>53</sup> This is not, however, to say that courts are indifferent to the bargaining power or the status of the parties.<sup>54</sup> Rather, the core focus of a court’s decision about the application of *contra proferentem* turns on whether there was negotiation between the parties and/or joint drafting. Although some courts wonder aloud whether it makes sense to give sophisticated parties the benefit of the rule at all (implicitly assuming the rule serves the interests of nondrafters, not those of drafters), most acknowledge that the weight of authority does not limit the rule’s application except in cases of joint negotiation and joint drafting.<sup>55</sup>

Some courts also focus on whether parties were represented by counsel.<sup>56</sup> But just having a sophisticated nondrafting party isn’t enough to form a general

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O’CONNOR, JR., BRUNER & O’CONNOR ON CONSTRUCTION LAW § 3:28 (2014) (“[T]he *contra proferentem* rule and adhesion contract analysis have historically been inextricably bound.”) (emphasis added).

52. See CAL. JURY INSTRUCTIONS, *supra* note 11, No. 320 (“This rule is applied more strongly in the case of adhesion contracts.” (citing *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 287–88 (Ct. App. 1998))).

53. See, e.g., *Horton*, *supra* note 3, at 442–43 (“[C]ourts applied strict liability *contra proferentem* to a variety of contracts . . . [and] [t]hey did so without regard to the non-drafting party’s wealth or status.”) (footnotes omitted).

54. See *Joyner*, 361 S.E.2d at 905–06 (considering the strength of a drafting party’s bargaining position when applying the rule); *Highland Lakes Country Club & Cmty. Ass’n v. Franzino*, 892 A.2d 646, 660 (N.J. 2006) (Wallace, J., dissenting) (same); *Bd. of Educ. v. Utica Mut. Ins. Co.*, 798 A.2d 605, 609–10 (N.J. 2002) (same); *Seligson, Morris & Neuburger v. Fairbanks Whitney Corp.*, 257 N.Y.S.2d 706, 713 (App. Div. 1965) (considering it a strike against the application of the rule when “the persons who participated in the making of the written agreement were sophisticated persons with extensive business, and some with legal, training”); *Maryland Arms*, 786 N.W.2d at 25 (suggesting that a “stronger bargaining position” by the drafting party is a reason to favor an interpretation against the drafter); *Horton*, *supra* note 3, at 445 (“[C]ourts declined to apply [*contra proferentem*] to contracts between equals.”).

55. See *Central Tel. Co. of Va. v. Sprint Commc’ns Co. of Va.*, No. 3:09cv720, 2011 WL 6205975, at \*11 n.12 (E.D. Va. Dec. 13, 2011) (applying *contra proferentem* in a contract case between two large enterprises, noting that the contract at issue was not an “arms length transaction”), *aff’d*, 715 F.3d 501 (4th Cir. 2013). *But see Joyner*, 361 S.E.2d at 906 (rejecting the application of the rule “where parties were at arms length and were equally sophisticated”).

56. See *Beanstalk Grp. v. AM Gen. Corp.*, 283 F.3d 856, 858 (7th Cir. 2002) (stating that most courts now agree that the principle that contracts are to be construed against the drafting party does not apply when both parties are sophisticated parties represented by counsel); *Elliott v. Pikeville Nat’l Bank & Trust Co.*, 128 S.W.2d 756, 760 (Ky. Ct. App. 1939) (suggesting that the rule shouldn’t apply because the plaintiff showed the contract to an attorney before he signed it); *Bee Bldg. Co. v. Peters Trust Co.*, 183 N.W. 302, 304 (Neb. 1921) (refusing to apply the rule to represented parties).

exception to the rule.<sup>57</sup> The crux seems to be actual negotiation, deliberation, and dickering over terms.<sup>58</sup>

Here is an example of how the exception is articulated, which tends not to isolate just one triggering feature: “Where both parties to a contract are sophisticated business persons advised by counsel and the contract is a product of negotiations at arm’s length between the parties, we find no reason to automatically construe ambiguities in the contract against the drafter.”<sup>59</sup> Still, our sense of the cases is that the exception is more likely to be applied in cases of negotiations at arm’s length<sup>60</sup>—and the other features associated with the exception tend to be epiphenomenal.<sup>61</sup>

### III. IS THIS A RULE FOR THE COURT OR FOR THE JURY?

In his article *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*,<sup>62</sup> Bill Whitford argued that juries decide more contract cases than most of us appreciate. One of the questions we wanted to address here is the role of the jury in applying the *contra proferentem* doctrine. Beyond the clearly important practical question of who applies the rule, judge or jury, the “who decides” question may have other important implications.<sup>63</sup> For example, if application of the rule is considered part of the jury’s interpretation of the contract as a matter of fact, the application will survive appeal unless clearly erroneous, while if it is a matter of law, the appellate court will have broader power of review. Similarly, if the rule simply leads a jury to adopt an interpretation as a matter of fact, its decision will not be entitled to stare

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57. There is discussion about a trend toward a “sophisticated insured” exception in insurance law, but the sophistication of the insured there too is probably less important standing alone than is joint drafting and negotiating at arm’s length. See 2 PLITT ET AL., *supra* note 22, § 22:24 (noting that the rule might not apply if a sophisticated insured “fully negotiated the insurance contract”); Hazel Glenn Beh, *Reassessing the Sophisticated Insured Exception*, 39 TORT TRIAL & INS. L.J. 85 (2003); Jeffrey W. Stempel, *Reassessing the “Sophisticated” Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 87 (1993).

58. See, e.g., *Cook v. Cook*, 249 P.3d 1070, 1078 (Alaska 2011) (when both parties carefully debate the provisions, *contra proferentem* shouldn’t apply); BRUNER & O’CONNOR, JR., *supra* note 51, § 3:28 (noting that the “rule is used less frequently in private agreements negotiated between parties in roughly equal bargaining positions”).

59. *Western Sling & Cable Co., Inc. v. Hamilton*, 545 So. 2d 29, 32 (Ala. 1989).

60. See *Morgan Stanley v. New England Ins. Co.*, 225 F.3d 270, 280 (2d Cir. 2000) (deciding that the linchpin was that the insured—Morgan Stanley—did not negotiate its terms and therefore it did not matter that Morgan Stanley is obviously a sophisticated party); see also *FabArc Steel Supply, Inc. v. Composite Constr. Sys., Inc.*, 914 So. 2d 344, 359–60 (Ala. 2005) (focusing on the “arm’s length” negotiations as the reason not to apply *contra proferentem*).

61. See *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 521 (3d Cir. 1997) (“[T]he dispositive question is not merely whether the insured is a sophisticated corporate entity, but rather whether the insurance contract is negotiated, jointly drafted or drafted by the insured.”); *Owens-Illinois, Inc. v. United Ins. Co.*, 625 A.2d 1, 16 (N.J. Super. Ct. App. Div. 1993) (focusing on whether the contract was jointly negotiated rather than focusing only on “sophistication”).

62. Whitford, *supra* note 1.

63. See *infra* Section IV for a discussion of the various approaches taken to the question.

decisis.<sup>64</sup> Moreover, David Horton's work on class actions may suggest that if application of the doctrine is for the jury, and especially if the jury cannot apply the doctrine until after it has considered extrinsic evidence, class actions may not be available to challenge ambiguous contracts.<sup>65</sup>

When a written contract is unambiguous, its interpretation is generally for the court.<sup>66</sup> However, "[o]nce it is determined that there is an ambiguity or incompleteness, the question of how to resolve the ambiguity or what terms were intended to supplement the written contract is commonly sent to the jury, because the determination is based in part on contested extrinsic evidence."<sup>67</sup> Inasmuch as ambiguity is a prerequisite for the application of *contra proferentem*, it might seem that the application of the doctrine is necessarily the province of the jury. On the other hand, the rule "can scarcely be said to be designed to ascertain the meanings attached by the parties,"<sup>68</sup> and as a rule of construction as opposed to one of interpretation, it might seem the epitome of a rule of law to be applied by judges.<sup>69</sup> Moreover, the application of the doctrine does not turn on extrinsic evidence (unless there is some dispute about whether the ambiguous contract term was jointly or singly authored), and thus there might not seem to be any particular role for a factfinder in its application.

As noted above, even extended treatments of the *contra proferentem* doctrine typically ignore the question of who applies the rule, or assume that it is a matter of law for the courts. Whitford himself seems to view *contra proferentem* as a "general proposition" whose application yields precedential force so that its application should be viewed as a matter of law.<sup>70</sup> In practice,

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64. See 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 340–42 (3d ed. 2004). Farnsworth does acknowledge the possibility that assignment to judge or jury is not dispositive on the question of the scope of review. *Id.*; cf. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 838–39 (2015) (holding that trial court's resolution of subsidiary factual matters made while construing a patent claim are findings of fact reviewable only for clear error, notwithstanding that construction of the claim is for the court and not the jury).

65. See Horton, *supra* note 3; see also *infra* text accompanying note 95.

66. See *Teva Pharm.*, 135 S. Ct. at 837 ("The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis." (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996))).

67. Whitford, *supra* note 1, at 939; see also RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (1981) ("A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law."). See generally 2 FARNSWORTH, *supra* note 64, at 336–42.

68. 2 FARNSWORTH, *supra* note 64, at 303.

69. See *Connie's Const. Co., Inc. v. Fireman's Fund Ins. Co.*, 227 N.W.2d 207, 210 (Iowa 1975) ("Although we have frequently used the terms 'interpretation' and 'construction' interchangeably, they have a distinct technical significance which in jury cases affects whether a particular contract problem is an issue for the jury or for the court. Interpretation, the meaning of contractual words, is an issue for the court unless it depends on extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence. Construction, the legal effect of a contract, is always a matter of law to be decided by the court. . . . The problem in this case is construction of the exclusion in relation to the undisputed facts. . . . The doctrine of *contra proferentem* applies.") (citations omitted).

70. See Whitford, *supra* note 1, at 935.

appellate courts often apply the doctrine<sup>71</sup> or cite it to reinforce their opinions even when the doctrine has not been applied at trial,<sup>72</sup> suggesting that it is a matter of law for the courts. And of course the jury question does not arise in equity cases.<sup>73</sup>

Ultimately, we found the evidence mixed. At the trial court level, some jurisdictions hold that the rule should be applied by the trial judge,<sup>74</sup> or at least that it is not error to fail to instruct the jury on the question.<sup>75</sup> Others hold that application of the rule is for the jury.<sup>76</sup> Many more jurisdictions—like scholars—seem not to have addressed the question squarely. We suspect that some judges may actually prefer some ambiguity in the doctrine governing the submission of interpretation issues to the jury, which allows them flexibility to keep issues from the jury for any number of reasons. However, as discussed in the previous and next Sections, many jurisdictions' pattern jury instructions address in detail the way in which the jury is to apply the doctrine. These instructions suggest that application of *contra proferentem* doctrine is often assigned to the jury.

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71. See, e.g., *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 852–53 (Del. 1998); *SI Mgmt. L.P. v. Winger*, 707 A.2d 37, 43 (Del. 1998); *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149–50 (Del. 1997).

72. See, e.g., *Harris v. Union Elec. Co.*, 787 F.2d 355, 365 n.7 (8th Cir. 1986); *DeWolfe v. Hingham Ctr., Ltd.*, 985 N.E.2d 1187, 1195 (Mass. 2013); *Costa v. Brait Builders Corp.*, 972 N.E.2d 449, 458 (Mass. 2012); *Maryland Arms Ltd. P'ship v. Connell*, 786 N.W.2d 15, 25 (Wis. 2010).

73. See, e.g., *Shifan v. Morgan Joseph Holdings, Inc.*, 57 A.3d 928, 936 (Del. Ch. 2012).

74. *Craig v. Hastings State Bank*, 380 N.W.2d 618, 621 (Neb. 1986); *Denis v. Woodmen Accident & Life Co.*, 334 N.W.2d 463, 465 (Neb. 1983); see also *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 865–66 (Tex. 2000) (Gonzales, J., concurring in part and dissenting in part) (“Generally, when the objective meaning of a contract term is ambiguous, the parties’ subjective meaning of the term becomes a fact question. In some circumstances, however, courts will construe the contract to favor one party in light of the relationship of the parties or public policy. For example, when an insurance contract is ambiguous, the contract is construed against the insurer.”) (citations omitted) (internal quotation marks omitted).

75. See, e.g., *Motor Coils Mfg. Co. v. Am. Ins. Co.*, 454 A.2d 1044, 1049 (Pa. Super. 1982). Perhaps this case explains why we did not find a model *contra proferentem* jury instruction in Pennsylvania outside the indemnity clause context. See PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS, § 6.270 (4th ed. 2011).

76. See, e.g., *Klapp v. United Ins. Grp. Agency, Inc.*, 663 N.W.2d 447, 455 (Mich. 2003) (“[I]f the language of a contract is ambiguous, and the jury remains unable to determine what the parties intended after considering all relevant extrinsic evidence, the jury should only then find in favor of the nondrafter of the contract pursuant to the rule of *contra proferentem*. In other words, the rule of *contra proferentem* should be viewed essentially as a ‘tie-breaker’ . . . .”; cf. *Dardovitch v. Haltzman*, 190 F.3d 125, 138, n.11 (3d Cir. 1999) (“[F]actors the court considered do fall within the ambit of legal construction of a contract, including the *contra proferentem* principle (that a document should be interpreted against its drafter) . . . . But these factors can also be important in the factual interpretation of a contract.”); RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (1981) (observing that *contra proferentem* “is in strictness a rule of legal effect, sometimes called construction, as well as interpretation”).

## IV. WHAT KIND OF RULE IS IT?

Knowing whether *contra proferentem* is a rule for the jury or the court only clarifies part of how it operates in action. There is also some debate about how to characterize the rule, regardless of whether it is for the court or for the jury. There are essentially three possibilities: it is (1) a “strict liability” rule that is triggered early in the process of interpretation or construction; (2) a “tiebreaker” or rule of “last resort” that is a very secondary consideration in interpretive disputes; or (3) it is one of a list of factors to be considered in interpretive disputes along with other evidence of party intent and other concerns of public policy. The first and second options could be for the judge or jury, while the third option seems like it must be for the ultimate fact-finder. How the rule is characterized by courts or to juries obviously affects how well it will be calibrated to its purposes, whatever those may be.<sup>77</sup>

In some cases—especially ones celebrated by Horton<sup>78</sup>—courts treat the rule as a very strong presumption against the drafter even before the interpretive enterprise about the parties’ intentions gets off the ground; this is certainly part of the insurance law version of the rule in some jurisdictions.<sup>79</sup> At the least, the presumption against the drafter/insurer could be the first rule of thumb a decision maker might be asked to consider.<sup>80</sup> There are many reasons such a strong version of the rule—what Horton calls “strict liability”—might be deployed. If the rule, for example, is really calibrated to incentivize careful drafting by the drafter, it might be most productive to trigger the rule early and strongly in the interpretive process. If the rule is part of a redistributive agenda, too, it ought to be deployed strongly and strictly—perhaps applying it even without the finding of a real ambiguity.<sup>81</sup> If the rule is serving as a way for drafters and courts to be communicating about standard form contract meaning—leaving the consumer mostly out of it—then some strict version of the rule might also make the most sense. For these objectives, using ambiguity as the triggering mechanism could be misguided. Instead, *contra proferentem* might be used as a “clear statement” requirement for drafters quite generally—just as federal courts require congressional statutes to infringe on federalism norms in especially clear terms if they are going to infringe on them at all.<sup>82</sup> It is certainly worth considering that some contexts—like mass-marketed insurance policies

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77. See *supra* Section I for an overview of the policy rationales underlying *contra proferentem*.

78. See Horton, *supra* note 3, at 440–46.

79. See, e.g., J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 550, 552 (Miss. 1998); Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658, 662 (Miss. 1994); Williams v. Life Ins. Co. of Ga., 367 So. 2d 922, 925 (Miss. 1979).

80. In Delaware, the jury instruction in a case of contractual ambiguity lists the *contra proferentem* instruction first. See DEL. JURY INSTRUCTIONS, *supra* note 37, § 19.15.

81. See Keeton, *supra* note 12, at 972 (suggesting that ambiguity may not be a seriously enforced threshold for applying the rule).

82. See Rapanos v. United States, 547 U.S. 715, 738–39 (2006); Gregory v. Ashcroft, 501 U.S. 452, 461–64 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).

and standard form contracts for consumers—might be more amenable to this kind of application of the rule.<sup>83</sup>

Although an examination of pattern jury instructions and reported opinions may not fully capture law as it exists on the ground, these sources do suggest a reasonable consensus. To wit, in most modern contexts, courts tend to treat the rule as “tiebreaker” or a “rule of last resort,” as it has often been characterized.<sup>84</sup> Some call it a “secondary” rule of interpretation.<sup>85</sup> Notwithstanding Richard Posner’s dismissal of the rule’s being “in practice a makeweight rather than a tie breaker,”<sup>86</sup> courts clearly tend to admit extrinsic evidence on ambiguities first before relying on the rule.<sup>87</sup> Many jury instructions confirm the point: Michigan clearly tells the jury to consider all evidence on intent first.<sup>88</sup> New Jersey instructs juries absolutely and clearly that it is a rule of last resort.<sup>89</sup> Arizona tells juries it is a rule of “last resort” and to apply the rule “[i]f, and only if, [they]

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83. As Horton highlights so well, the strong version of the rule also facilitates class action adjudication; certification is made more difficult if the version of the rule is merely a tiebreaker for a factfinder in the merits analysis. Horton, *supra* note 3, at 452–57. Common features may not predominate if the rule applies only after the admission of all relevant extrinsic evidence. *See generally id.* Of course, now that the Supreme Court has made class action arbitration waivers bulletproof, the issue does not much arise. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

84. *See Moore v. Lomas Mortg. USA*, 796 F. Supp. 300, 305 (N.D. Ill. 1992); *Hurd v. Ill. Bell Tel. Co.*, 136 F. Supp. 125, 134 (N.D. Ill. 1955) (“At best it is a secondary rule of interpretation, a ‘last resort’ which may be invoked after all of the ordinary interpretative guides have been exhausted.”), *aff’d*, 234 F.2d 942 (7th Cir. 1956); *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398–99 (Del. 1996); *Petersen v. Magna Corp.*, 773 N.W.2d 564, 570 (Mich. 2009); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 206 Reporter’s Note cmt. a (1981) (“[O]ne 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.’”).

85. *See Duncan*, *supra* note 4, at 1123–24 (citing *Cline v. Rose*, 645 N.E.2d 806, 809 (Ohio Ct. App. 1994); *Malcuit v. Equity Oil & Gas Funds, Inc.*, 610 N.E.2d 1044, 1046–47 (Ohio Ct. App. 1992); *Raphael v. Flage*, No. 89CA004539, 1989 WL 109122 (Ohio Ct. App. Sept. 20, 1989)).

86. *Beanstalk Grp., Inc. v. AM Gen. Corp.*, 283 F.3d 856, 859 (7th Cir. 2002).

87. *See Botkin v. Security State Bank*, 130 P.3d 92, 100 (Kan. 2006) (construing ambiguity against drafter only after considering extrinsic evidence); *State Farm Mut. Auto. Ins. Co. v. Esswein*, 43 S.W.3d 833, 842 (Mo. Ct. App. 2000) (refusing to apply *contra proferentem* because it “should not be applied where the intent of the parties can be ascertained from other sources”); *Stephenson v. Oneok Res. Co.*, 99 P.3d 717, 722 (Okla. Civ. App. 2004) (“If there is an ambiguity in a standard industry form, the trier of fact may look to extrinsic evidence, such as industry custom and usage, to determine the intent of the parties.”); Scott G. Johnson, *Resolving Ambiguities in Insurance Policy Language: The Contra Proferentem Doctrine and the Use of Extrinsic Evidence*, BRIEF, Winter 2004, at 33, 34. Posner, quips aside, is not really to the contrary (though he searches for a “patent” rather than “latent” ambiguity first). *See Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co.*, 165 F.3d 1157 (7th Cir. 1999).

88. *See MICH. JURY INSTRUCTIONS*, *supra* note 41, § 40:4.

89. *See N.J. JURY INSTRUCTIONS*, *supra* note 43, § 4.10H (“The following instruction is appropriate if the contract was drafted by just one of the parties. No case has been located which approves this instruction as modified and applied to particular paragraphs when the entire contract has been the product of joint drafting. If you have considered all of the evidence to ascertain the intentions of the parties and you are still unable to decide what the parties originally intended the disputed contract language to mean, then that language as it exists should be interpreted against the party who wrote the contract.”).

have determined and considered the facts and circumstances surrounding the formation of the contract and still cannot determine which of the possible, reasonable meanings was intended by the parties.”<sup>90</sup> Arkansas clearly instructs its juries that *contra proferentum* is a rule of last resort, to be applied only after all other efforts at interpretation are unavailing.<sup>91</sup> Colorado,<sup>92</sup> Idaho,<sup>93</sup> and Massachusetts<sup>94</sup> are similar. When class actions based on mass-distributed contracts are at the certification stage, the requirement to use extrinsic evidence first before triggering *contra proferentem* as a rule of last resort can make it difficult for courts to certify such actions.<sup>95</sup> This may be a reason not to use this form of the rule in such contexts. But perhaps such a loose application of the rule functions adequately to its task when courts are not construing a mass-distributed standardized form.

Some cases and states are even more serious about treating the rule as one of truly last resort. For example, one appellate court in Colorado suggested that *contra proferentem* will apply only when there is no extrinsic evidence that could be brought to bear on parties’ meaning of an ambiguous term.<sup>96</sup> A federal district court in New York also suggested that “where the relevant extrinsic evidence offered raises a question of credibility or presents a choice among reasonable inferences the [interpretation] of the ambiguous terms of the contract is a question of fact which precludes the application of the *contra proferentem* rule.”<sup>97</sup> The Second Circuit clarified that *contra proferentem* could, however, apply if the extrinsic evidence proffered “does not yield a conclusive answer.”<sup>98</sup>

California’s jury instructions—rooted in the state’s Civil Code<sup>99</sup>—reveal another way to treat the rule as a real last resort: by refusing to instruct the jury on *contra proferentem* unless they deadlock with the rest of the extrinsic evidence. As the “Directions for Use” put it, “This instruction should be given only to a deadlocked jury, so as to avoid giving them this tool to resolve the case before they have truly exhausted the other avenues of approach.”<sup>100</sup> If courts want to be absolutely sure that factfinders don’t use the rule as a makeweight

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90. ARIZ. JURY INSTRUCTIONS, *supra* note 33, § 27.

91. See ARK. JURY INSTRUCTIONS, *supra* note 34, § 2424; *see also id.* (“The instruction should be used as the final instruction pertaining to contract interpretation and should reference the previous instructions in the set pertaining to contract interpretation.”).

92. See COLO. JURY INSTRUCTIONS, *supra* note 36, § 30.35.

93. See IDAHO JURY INSTRUCTIONS, *supra* note 38, § 6.08.3.

94. See MASS. JURY INSTRUCTIONS, *supra* note 40, §§ 14.3.3, 40:4.

95. This is the core of Horton’s discovery in Horton, *supra* note 3.

96. See Fisher v. Community Banks of Colo., Inc., 300 P.3d 565, 569 (Colo. App. 2010).

97. Morgan Stanley Grp., Inc. v. New England Ins. Co., 36 F. Supp. 2d 605, 609 (S.D.N.Y. 1999) (internal quotation marks omitted).

98. Morgan Stanley Grp., Inc. v. New England Ins. Co., 225 F.3d 270, 280 (2d Cir. 2000) (quoting McCostis v. Home Ins. Co of Ind., 31 F.3d 110, 113 (2d Cir.1994)).

99. See CAL. CIV. CODE § 1654 (West 2014) (amended 1982) (“In case of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”).

100. See CAL. JURY INSTRUCTIONS, *supra* note 11, No. 320.

and really only employ it as a last resort, this is one way to ensure it. Of course, this method of instructing factfinders will make the rule irrelevant in the vast majority of cases. And that affects the rule's ability to accomplish any objective imputed to it.

But other states and courts are not as eager to use the rule merely as a rule of construction for when interpretation of party intent runs out. These third applications of the rule essentially treat *contra proferetem* as a thumb-on-the-scales, enabling factfinders in cases of ambiguous terms to weigh the principle of public policy against the weight of whatever evidence is brought to bear about intention. The jury instructions in Mississippi,<sup>101</sup> Virginia,<sup>102</sup> and New York<sup>103</sup> read this way. If one's view about party intention is that it tends to be confabulation or reconstructed with a view toward a factfinder's sense of the equities, it would seem to be appropriate to instruct juries and factfinders in a way that would allow them to weigh the benefits of the *contra proferetem* rule against whatever intent they are able to excavate from the evidence parties provide. This method of instructing factfinders is not only more likely to lead it to be used discretionarily, but also makes it more likely to be used in a way that more neatly enables the doctrine to be a general consideration of public policy to be weighed against how confident the factfinder is about the intent of the parties. If one could choose only one method of application (and not divide the application between consumer form contracting and other types of contracts), this general rule is probably usefully somewhere between "strict liability" and a "last resort" and may be desirable as such. Even if the application of *contra proferetem* is to vary among types of contracts, this method of instructing factfinders seems attractive outside the standardized consumer contracting context, where for the preference for certainty is likely best served by a stronger version of the rule that requires less exhaustion of fact development.

#### V. IS IT A MANDATORY OR DEFAULT RULE?

There has been insufficient attention paid to whether *contra proferentem* can be contracted around (and to the corollary question of whether insurers seek to contract around the rule as a general matter).<sup>104</sup> Scholars surely debate

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101. See MISS. MODEL JURY INSTRUCTIONS, *supra* note 42, §§ 10:16–17; see also ARK. JURY INSTRUCTIONS, *supra* note 34, § 2424 ("This instruction should not be used where disputed extrinsic evidence has been offered to establish the meaning of the ambiguous language.").

102. See VA. JURY INSTRUCTIONS, *supra* note 48, § 55:1.

103. See N.Y. JURY INSTRUCTIONS, *supra* note 22, § 4:1, VI.A.2.

104. One of us litigated cases in a New York law firm on behalf of a reinsured entity; all the reinsurer policies contained a provision purporting to forestall the application of *contra proferentem* against the reinsurers in disputes about coverage. When one of us asked partners and associates whether the firm should pursue the argument that *contra proferentem* is a mandatory rule that ought to be nondisclaimable, the firm lawyers unanimously rejected the idea. This may have been because the reinsurance market is a much more controversial area for the application of *contra proferentem* in the first place—thus, if it is disclaimable anywhere, it is disclaimable there. But no one offered any explanation or case citation and the "waiver" of *contra proferentem* was presumed to be enforceable by the reinsurer. For cases highlighting the split in authority on reinsurance and *contra proferentem*,



whether *contra proferentem* is a “penalty default rule,” wondering whether it is an information-forcing rule that can serve to motivate the party in the best position to accomplish more efficient drafting or more efficient risk allocation within the transaction.<sup>105</sup> And it is obviously a “default” in one sense: the drafter could always draft an unambiguous provision or dicker with a counterparty, and that would displace the application of the rule. But it is still unclear how we are to view a drafter adding a provision that reads, for example, “Nothing in this contract may be construed against the drafter solely because the drafter drafted it.”<sup>106</sup>

From one perspective, it seems strange to imagine that drafters of consumer form contracts particularly could so easily avoid the application of a rule calibrated to make their drafting better. If it is so simple to avoid the rule, every drafter that has adherents who don’t read their agreements or have the power to negotiate them would add such a provision (unless, of course, the rule serves to benefit them, as Boardman and Horton suggest).<sup>107</sup> Such contexts—contracts of adhesion—seem like sound places to enforce a *mandatory* rule. Yet there are many other contexts—such as many we exposed in Section II—where the rule is not being applied against drafters of form contracts but against drafters

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see *Zenith Ins. Co. v. Employers Ins. of Wausau*, 141 F.3d 300 (7th Cir. 1998) (Wisconsin law applies *contra proferentem* to reinsurers); and *Great Am. Ins. Co. v. Fireman’s Fund Ins. Co.*, 481 F.2d 948, 954 (2d Cir. 1973) (“Although ordinarily we would be disposed to interpret the language of an ambiguous notice in favor of the insured and against the insurer, we consider that this general rule should not apply when both insured and insurer are ‘large insurance companies long engaged in far flung activities in that field of economic activity.’”). See also 1A PLITT ET AL., *supra* note 22, § 9:15 (“When interpreting ambiguities in contracts of reinsurance, the general standards of interpretation apply. However, the traditional canon of interpreting ambiguity in the insurance contracts against the insurer is not always appropriate in this context.”); *id.* (citing cases going both ways).

In a recent paper, Logue and Baker report that they “have not been able to find a single example of a standard form insurance policy issued in the US that contains a term seeking to eliminate or otherwise alter the traditional *contra proferentem* rule . . . . There are, however, insurance policies written in other countries, between insurers and very sophisticated commercial policyholders, that include provisions purporting to eliminate or alter *contra proferentem*.” Tom Baker & Kyle D. Logue, *Mandatory Rules and Default Rules in Insurance Contracts*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INSURANCE LAW 390 (Daniel Schwarcz & Peter Siegelman eds., 2015). Logue and Baker are here alluding to what is known as the “Bermuda form.” *Id.*

105. See Ian Ayres, *Default Rules for Incomplete Contracts*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 585, 587 (Peter Newman ed., 1998); Ian Ayers, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589 (2006); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Boardman, *Penalty Default Rules*, *supra* note 3; Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563 (2006).

106. Rappaport assumes the insurance law version of the rule is mandatory. See Rappaport, *supra* note 3, at 186 n.35. Boardman comes up with this formulation: “*contra proferentem* is best thought of as a *mandatory doctrine* that creates a subclass of *default substantive rules*.” Boardman, *Penalty Default Rules*, *supra* note 3, at 321. We’re not wholly sure what this means but it highlights some of the confusion on this issue—and shows how a general answer may not be derivable from the insurance law etiology of the modern incarnations of the rule.

107. See *supra* note 18 and accompanying text.

generally. In such cases, it is less clear that the rule should be treated as a mandatory one.

In the one case discussing this issue we found, *McMullin v. McMullin*,<sup>108</sup> the Kentucky Court of Appeals in 2011 refused to forestall application of *contra proferentem* merely because a drafter of a property settlement agreement in a divorce included the following provision: “no provision [of this agreement] shall be interpreted against any party because that party or their legal representative drafted the provisions thereof.”<sup>109</sup> The court was particularly concerned about parties using such provisions after *intentionally* introducing an ambiguity in the agreement. Yet the court essentially suggested that it *would* enforce the provision between ex-spouses as long as the provision was read to cover only “unintentional ambiguities.”<sup>110</sup>

The American Law Institute, in considering the insurance law version of the doctrine, comes out in support of the mandatory version of the rule in its *Principles of the Law of Liability Insurance*:

*A mandatory rule.* Like the rules of contract interpretation generally, [*contra proferentem* is a] mandatory rule[] that the parties cannot alter by contract. Some judicial opinions appear to enforce contract terms purporting to reject the application of the ordinary *contra proferentem* rule, but close analysis of some of those opinions reveals that the contracts in question were jointly drafted by both parties, such that the *contra proferentem* rule would not have applied in any event, regardless of the presence or absence of a contract term purporting to reject the *contra proferentem* rule. If a term is jointly drafted, there can be no single drafter against whom to interpret any lingering ambiguity. Some cases do suggest that *contra proferentem* can be waived even if the term in question is supplied by one of the parties, provided that the parties to the contract are commercially sophisticated and represented by legal counsel. This Section rejects that idea to preserve the integrity of the courts over the interpretation of insurance contracts. At most, such a term in an insurance policy would be evidence regarding the negotiation and drafting of the insurance policy; it would not be binding on a court. The authority of the court over the rules of insurance policy interpretation promotes the authority of the court over the interpretation of insurance policy terms and, thus, the development of uniform, reasoned meanings of insurance policy terms.<sup>111</sup>

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108. 338 S.W.3d 315 (Ky. Ct. App. 2011).

109. *McMullin*, 338 S.W.3d at 322 (alteration in original) (internal quotation marks omitted).

110. *Id.*

111. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF LIABILITY INSURANCE § 4 cmt. 1 (Tentative Draft No. 1, 2013) The example the ALI is likely alluding to is *I.U. N. Am., Inc. v. A.I.U. Ins. Co.*, 896 A.2d 880, 884–85 (Del. Super. Ct. 2006) (enforcing a jointly drafted “waiver” of *contra proferentem*). For more on the question within insurance law, see Logue & Baker, *supra* note 104. Logue and Baker are the reporters of the Principles of the Law of Liability Insurance. Tom Baker told us that this project may be converted to a Restatement. Stay tuned.

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It would not be surprising to see the insurance law version of the rule track what we would expect to be a sensible approach in consumer form contracting. In other contexts, however, we would expect courts to be more likely to allow the rule to serve merely as a default, as the *McMullin* case indicates in the cases of unintentional rather than strategic ambiguity. Moreover, as long as parties understand the provision “waiving” the *contra proferentem* rule, it is hard to see why such a clause should not be enforceable between negotiating parties—even if other ambiguous provisions were drafted unilaterally by one party. We expect to see more cases as more parties seek to opt out of *contra proferentem*. There may be a reason insurers aren’t trying it en masse as of yet—Logue and Baker hypothesize that fear of regulators may be a big factor<sup>112</sup>—but other drafters with less regulatory oversight may be trying harder to opt out in the coming years. We would expect consumer form contract drafters to be unsuccessful in their efforts but other parties to have more success.

#### CONCLUSION

Revisiting Bill Whitford’s work on the role of the jury in contract interpretation and his work on consumer form contracting inspired us to take a careful look at a doctrine of contract interpretation that is usually thought to help consumers in interpretive battles with those who draft their contracts unilaterally. But we found that *contra proferentem* is more confusing than we expected. What we have done here is lay out some of the complexities of the doctrine, focusing on its broader application outside insurance law, its exceptions and limitations within transactional contexts where bargaining and joint drafting take place, the difficulty of knowing whether it is a rule for the judge or the jury to apply, the various forms the rule can take, and the difficulty of knowing whether it is a default or mandatory rule. We hope laying out these complexities here helps courts and commentators in the future achieve more consistency and nuance in their applications and discussions of this hoary principle of contract interpretation.

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112. See Logue & Baker, *supra* note 104, at 14, 25.

