

# THE UNPREDICTABILITY OF INSURANCE INTERPRETATION

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## I

### INTRODUCTION

Courts engaged in the interpretation of insurance contracts often make implicit reference to the effect the interpretation will have on a multitude of other policyholders and insurers. Judges may be unusually aware of this future effect in the insurance context because they see the same policy language in contracts offered to millions of policyholders by diverse insurers. This Article examines the unpredictable, downstream effects of one of the most-used interpretive tools in insurance—*contra proferentem*—under which ambiguities are interpreted against the drafter.<sup>1</sup>

The doctrine is partially forward-looking; it assumes that judges will use their power to induce a rewrite of unsatisfactory contract terms *in future contracts* with policyholders *not before the court*.<sup>2</sup> This broad reach of a single judicial opinion may be evaluated as form of the “butterfly effect,” to borrow a concept from chaos theory. “Just as a butterfly flapping its wings in Tokyo can change the weather in London, so too can a judicial decision interpreting contract boilerplate change the meaning of the language in thousands of other contracts governed by the same law.”<sup>3</sup> The concept of a small, discrete action (a court ruling) having a vast effect on countless unrelated parties (as controlling or persuasive legal authority) is a useful concept by itself. But the concept within chaos theory offers more.

When scientist Edward Lorenz asked the question—“Does the flap of a butterfly’s wings in Brazil set off a tornado in Texas?”—the purpose of the

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1. Because in most circumstances the drafter is the insurer, “[t]he rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured.” *Mut. Life Ins. Co. of N.Y. v. Hurni Packing Co.*, 263 U.S. 167, 174 (1923). It is “the most familiar expression in the reports of insurance cases.” 2 GEORGE J. COUCH, RONALD A. ANDERSON & MARK S. RHODES, COUCH: CYCLOPEDIA OF INSURANCE LAW § 15:74 (2d ed., rev. vol. 1984).

2. “The cost of a failure to clarify is imposed on the drafting party, to encourage that party to clarify its language in the future.” *Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 952 (S.D.N.Y. 1996).

3. John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791, 1855 n.17 (2019) (referring to chaos theory in JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* 8 (1987)).

question was not simply whether a small act can cause a big effect.<sup>4</sup> The purpose, according to Lorenz, “was to illustrate the idea that some complex dynamical systems exhibit *unpredictable* behaviors such that small variances in the initial conditions could have profound and widely *divergent* effects on the system’s outcomes.”<sup>5</sup> In other words, the unpredictability of the outcome is central to the effect. This Article explores both the specifics of the butterfly effect in insurance contract interpretation and the unpredictability of the effect.

In many forms of insurance, courts seem well aware of the downstream ramifications of their decisions, both as to expected insurer behavior and as to interpretive precedent. But there is reason to think this awareness is incomplete. Courts cannot accurately predict if insurers will decide to redraft a term or how it will be redrafted. Nor can they predict whether an increase in coverage, made in response to *contra proferentem*, is genuinely desired by most consumers.

Of what are courts aware? First, courts understand the collective drafting of contract language that takes place in many parts of the insurance industry; many insurers use the same or similar language.<sup>6</sup> And, of course, courts know that each insurer enters into substantially the same contract with hundreds of thousands of consumers. A consumer policy term can come to resemble a statutory term in its wide, common application that is not specific to any given party.<sup>7</sup> The same is true for the widely-used Commercial General Liability policy.

Second, courts are aware that interpreting a disputed insurance term against the drafter—here, the insurer—in favor of coverage provides an incentive for the insurer to redraft.<sup>8</sup> Indeed, one of the two main functions of *contra proferentem*

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4. Edward N. Lorenz, Professor of Meteorology, Address at the Am. Assoc. for the Advancement of Sci. (Dec. 29, 1972), [http://eaps4.mit.edu/research/Lorenz/Butterfly\\_1972.pdf](http://eaps4.mit.edu/research/Lorenz/Butterfly_1972.pdf) [<https://perma.cc/J5S3-W59D>] (capitalization adjusted).

5. Jamie L. Vernon, *Understanding the Butterfly Effect*, AM. SCIENTIST, May–June 2017, at 130. (emphasis added).

6. See Daniel Schwarcz, *Coverage Information in Insurance Law*, 101 MINN. L. REV. 1457, 1477 (2017).

Judicial information regarding contracting parties’ obligations is unusually robust in insurance. This is because insurance policies that are issued by any single company often contain similar language and structure as insurance policies issued by other companies. Property/casualty insurance policies, for instance, incorporate a substantial amount of content that is derived from the collective drafting efforts of competing insurers.

*Id.* For a discussion of the history of the standardization process, see Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263 (2011). Note that Schwarcz’s article also “empirically debunks the common claim that homeowners insurance policies do not vary across different insurance carriers. In fact, carriers’ homeowners policies differ radically with respect to numerous important coverage provisions.” *Id.* at 1263.

7. See Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203, 213 (2010) (comparing the Insurance Services Office, referred to as the “ISO,” to a private legislature that issues statutory products).

8. “Strictly construing ambiguous terms presents [drafters] with a clear alternative: draft plans that reasonable people can understand or pay for ambiguity.” *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1255 (10th Cir. 2007). *Contra proferentem* “pushes the drafters toward improving contractual forms.” *P.R. Burke Corp. v. United States*, 47 Fed. Cl. 340, 351 (2000) (quoting *Sturm v. United States*, 421 F.2d 723, 727 (Ct. Cl. 1970)) (non-insurance case), *aff’d*, 277 F.3d 1346 (Fed. Cir. 2002).

is to encourage insurers to make a change that will have *no effect* in the litigation at hand but a *widespread effect* in future contracts with other parties.<sup>9</sup> In short, courts realize that (1) they are interpreting a term for countless other parties not before the court and (2) a contra-insurer interpretation could lead to a change in countless current and future contracts.

Of what downsides do courts seem unaware? This Article considers three possibilities. First, contra proferentem may enshrine a term rather than banish it. Next, insurers may make redrafts that are harmful to policyholders. Finally, useful redrafting may be impossible.

First, as I have argued elsewhere, contra proferentem can backfire. It can make an unclear term *more* valuable to the insurer, not less, which makes redrafting it *less* likely, not more. Sometimes it is more valuable for a term to have a known judicial meaning than for it to have a preferred meaning.

Second, successfully getting an insurer to redraft a term, or reinterpret an unreformed term, is not a clear win for policyholders as a group. The policyholder in court who wins under contra proferentem enjoys the gentle flutter of the wings of coverage. But future policyholders may then be bound by the redraft or reinterpretation to purchase coverage they do not want or may lose coverage they do want. (Note that this analysis applies when insurers are mostly behaving themselves and not denying payment for a loss that really should be covered.<sup>10</sup>)

The third downside of the unpredictability of contra proferentem occurs because courts do not, perhaps cannot, know when a successful redraft is possible. The court orders: “Redraft! Make your meaning known or have the term construed against thee for all eternity.” The insurer answers: “Impossible! This combination of coverage cannot be made knowable to the average consumer.”

Having couched these three problems in terms of judicial awareness, it is worth considering whether some judges *are aware* of these unintended consequences but find themselves ill-equipped to avoid them under existing interpretation doctrine. Judges cannot order insurers to adopt particular language or to agree to sell a particular product in the future.<sup>11</sup> They have neither the data nor the expertise to decide if consumers at large wish to pay for a

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9. The other main function is fairness to the policyholder in the face of ambiguous contract language over which the policyholder had no control.

10. If insurers give policyholders a bad turn much of the time, courts need tools to address breach or fraud, not interpretation. If most insurers give policyholders a fair turn most of the time, then in most coverage disputes courts need tools to address interpretation or construction. While I believe we are in the second universe, the contribution of this Article does not turn on it being so; the unintended consequences to consumers of contra proferentem still exist, if less commonly, in a universe where insurers behave badly.

11. “[The] court cannot rewrite the contract for the parties, nor is it empowered to alter the terms of the same.” Morgan, Lewis & Bockius LLP v. Hanover Ins. Co., 929 F. Supp. 764, 774 (D.N.J. 1996).

particular risk to be covered. Finally, judges could ask for data on whether a term is in fact ambiguous and whether it could be made less so, but they do not.<sup>12</sup>

Whether from lack of understanding or doctrinal constraint, how big is the butterfly effect in insurance? On the one hand, the effect is vast because the language being interpreted is common to contracts owned by millions of people; a single interpretation of a common term creates binding precedent in that state and an example to be considered by courts in other states—all because the term appears in up to millions of other contracts. Because the crux of the issue is ambiguity, having contrary rulings across states carries unusual weight for the next state court.<sup>13</sup> On the other hand, the effect will be relatively weak if a court's interpretation does not change the legal landscape. If a court interprets a term as the players always assumed it would be interpreted, and as other state courts presumably will do, the ruling adds some certainty but the ripple effect is small. But when “a court adopts an *idiosyncratic* interpretation of a piece of contract boilerplate[, then] this decision is keenly felt by a range of third parties not involved in the litigation.”<sup>14</sup> And, in insurance, when a term is legally ambiguous and could be interpreted in at least two ways, a ruling that chooses one sends the butterfly on its flight path.

## II

### CONTRA PROFERENTEM BACKFIRES: NO REDRAFT

In theory, and perhaps in many cases, two things happen when a court interprets an ambiguity against the drafter under *contra proferentem*. First, the drafter is usually the insurer, and the contrary interpretation usually results in payment for the policyholder, potentially operating as a penalty default rule.<sup>15</sup> In short, in a coverage dispute, a finding of ambiguity leads to coverage for the

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12. See generally Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts Via Surveys and Experiments*, 92 N.Y.U. L. REV. 1753 (2017). Ben-Shahar and Strahilevitz support using survey evidence, of the type courts currently rely on in trademark disputes about consumer confusion, to help courts identify how consumers interpret a contract clause, whether the clause is ambiguous to consumers, and whether a better drafted clause could be made less so.

13. Decades ago, more courts were open to the idea that conflicting opinions were proof enough of ambiguity. See, e.g., *Alvis v. Mut. Benefit Health & Accident Assn.*, 297 S.W.2d 643, 645–46 (Tenn. 1956) (“If Judges learned in the law can reach so diametrically conflicting conclusions as to what the language of the policy means, it is hard to see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it.”). Most courts today take judicial conflict, at most, as one piece of evidence in the ambiguity puzzle. See *Beretta U.S.A. Corp. v. Fed. Ins. Co.*, 17 F. App'x 250, 255 (4th Cir. 2001) (“[Insured] Beretta maintains that the conflicting decisions from other jurisdictions concerning the scope of the Exclusion also constitute evidence of ambiguity. In Maryland, however, a mere conflict in judicial interpretation is not dispositive on the issue of ambiguity, but is only a factor to be considered.”) (internal citations omitted).

14. Coyle, *supra* note 3, at 1797 (emphasis added).

15. See generally Michelle E. Boardman, *Penalty Default Rules in Insurance Law*, 40 FLA. ST. U. L. REV. 305 (2013) (analyzing whether insurance *contra proferentem* operates as a penalty default rule). A few courts explicitly read *contra proferentem* to result in construing not just against the insurer but in favor of coverage for the policyholder.

policyholder. Over this outcome, the court has direct control.<sup>16</sup> Second, in theory, the insurer redrafts the ambiguous language to avoid similar losses in the future, policyholders better understand their contracts, and the volume of litigation decreases. Over this outcome, the court has no direct control. Courts occasionally note this with irritation when insurers choose not to redraft despite repeated “orders” to do so.<sup>17</sup>

Contra proferentem takes different forms.<sup>18</sup> A few jurisdictions have a “sophisticated policyholder” exception to contra proferentem.<sup>19</sup> Other jurisdictions apply it at different times in the interpretive process.<sup>20</sup> But in all cases, once the court decides to apply it, contra proferentem relieves a court from the burden of identifying a shared ex ante intent. Indeed, it is not required that the interpretation chosen reflect the original intent of *either* party. When an insurer and policyholder are in court, a common posture is of a coverage-seeking policyholder versus a coverage-denying insurer. The policyholder may assert that the pro-coverage interpretation reflects his contractual intent but he need not prove it. The court may also be convinced by context, risk-spreading principles, and other evidence that the insurer did *not* intend coverage. Nonetheless, if the provision is open to two meanings, one of which provides coverage, the insurer loses.

This is where the predictability ends. After the insurer loses, the natural prediction is that the insurer will redraft the language to clarify its meaning, so as to avoid losing in the future. But this prediction is often wrong—insurers may resist redrafting for unusually long periods of time or may commit to not redrafting at all.

One perplexing example is how long it took insurers to address liability for damage to electronically-stored data. Commercial General Liability policies have long provided coverage for liability arising from “physical injury to tangible property.”<sup>21</sup> As early as 1983, commercial policyholders were seeking coverage

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16. The parties may settle after a lower court ruling to avoid appeal, of course, but the court has complete control over the ruling it issues on interpretation.

17. A district court asked “why?” when it noted that “[i]nsurance companies continue to employ the term ‘invasion of the right of private occupancy’ in their policies, despite twenty years of legal decisions finding that this term is ambiguous.” *New Castle Cty., Del. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA.*, 84 F. Supp. 2d 550, 555 (D. Del. 2000). The Third Circuit on appeal added, “We also find it instructive to ask ‘why?’—because we cannot conceive of an answer.” *New Castle Cty., Del. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA.*, 243 F.3d 744, 755 (3d Cir. 2001). Neither court came to a satisfactory explanation.

18. See generally Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531 (1996) (explaining how different jurisdictions interpret and apply contra proferentem).

19. See, e.g., *E. Associated Coal Corp. v. Aetna Cas. & Sur. Co.*, 632 F.2d 1068, 1075 (3d Cir. 1980) (“[T]he principle that ambiguities in policies should be strictly construed against the insurer does not control the situation where large corporations, advised by counsel and having equal bargaining power, are the parties to a negotiated policy.”). See also, Jeffrey W. Stempel, *Reassessing the “Sophisticated” Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 807, 808 (1993).

20. See Boardman, *supra* note 15, at 324–27.

21. The policyholder is covered for “property damage,” defined as “physical injury to tangible property . . . or [l]oss of use of tangible property that is not physically injured.” *Ins. Servs. Office, Inc.*,

for liability from lost or compromised data.<sup>22</sup> Was that data tangible property? If it were lost without any physical injury to the computer on which the data was stored, was there “physical injury” to the property?

Courts were unpredictable and inconsistent in their answers and remained so for decades.<sup>23</sup> While some courts decided in each direction without resorting to *contra proferentem*, others used the doctrine and concluded that, “[a]t best, the policy’s requirement that only tangible property is covered is ambiguous” as to computer data.<sup>24</sup> Not until 2001 did the Insurance Service Office (ISO) issue a Commercial General Liability policy with a clear statement: “For the purposes of this insurance, electronic data is not tangible property.”<sup>25</sup> Courts have found this redraft unambiguous as applied to most scenarios.<sup>26</sup>

Why might an insurer choose not to redraft losing language the first time, or first several times, a court sends the “redraft or lose again” signal? The insurer may disagree that the language is ambiguous and hope to convince an appellate court or future lower courts. The language may also have worked well in most cases, and the insurer thinks the particular factual case in which it lost is rare; language is ambiguous in context, as applied to the facts at hand—unusual facts, uncommon dispute.

Redrafting, after all, is not costless. One cost is the possibility of creating new misunderstandings with new language.<sup>27</sup> In addition, if the existing language has been used for some time, it may be tied to actuarial data about how often policyholder losses raise the term. Changing the term can weaken the predictive value of the existing actuarial data. If the term is part of a “standard” policy, such as a collectively drafted Homeowners Policy or Commercial General Liability Policy, large industry players will need to first convince others that the term

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Form No. CG 00 01 04 13, Commercial General Liability Coverage Form, Definitions (2012), <https://www.northstarmutual.com/UserFiles/Documents/forms/policyforms/Current/CG%2000%2001%2004%2013.pdf> [https://perma.cc/6XQG-5Z8C].

22. See *Centennial Ins. Co. v. Applied Health Care Sys., Inc.*, 710 F.2d 1288 (7th Cir. 1983).

23. Compare *Comput. Corner Inc. v. Fireman’s Fund Ins. Co.*, 46 P.3d 1264, 1266 (N.M. Ct. App. 2002) (referring to the district court’s ruling that computer data is tangible property, which was not challenged on appeal), with *Am. Online, Inc. v. St. Paul Mercury Ins. Co.*, 207 F. Supp. 2d 459, 462 (E.D. Va. 2002) (holding that electronically stored data is not “tangible property”). Other courts have focused on the question of whether there is physical injury or physical damage in data loss cases. See *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789, at \*2 (D. Ariz. 2000) (holding that loss of computer data was physical damage for purposes of a business interruption insurance policy).

24. *Retail Sys., Inc. v. CNA Ins. Cos.*, 469 N.W.2d 735, 737 (Minn. Ct. App. 1991).

25. *Ins. Servs. Office, Inc.*, Form No. CG 00 01 10 01, Commercial General Liability Coverage Form, Definitions (2000), <http://www.certifiedriskmanagers.com/CG%2000%2001%2010%2001.pdf> [https://perma.cc/WC5R-MUZ9]. Coverage for liability stemming from damage to electronic data can now be purchased separately.

26. See, e.g., *RSVT Holdings, LLC v. Main St. Am. Assur. Co.*, 136 A.D.3d 1196, 1198 (N.Y. App. Div. 2016) (“In light of this unambiguous language, we agree with defendant that [the policyholder’s] claim for damages arising out of [their] negligent handling of electronic data is not a claim for ‘property damage’ under the policy and is excluded from coverage.”).

27. Another cost of decades of piecemeal redrafting in “the shadow of this interpretative risk” is the “(sometimes futile) effort to reduce this risk . . . [by] writing longer and longer documents, further divorcing legal and lay meanings.” Ben-Shahar & Strahilevitz, *supra* note 12, at 1757.

should be changed. Smaller players will need either to wait for the larger players to move or strike out on their own with a redraft.

The bigger puzzle is when an insurer, or the industry as a whole, chooses not to redraft despite repeated, widespread litigation over the meaning of a term. Note that in the prior, less puzzling case described above, the insurer has decided not to redraft the language, at least for a time, and not to accept the court's contrary reading. In other words, the insurer maintains that the policy does not provide the coverage the court has found under *contra proferentem*. The insurer plans to deny claims for coverage under the term and may be willing to go to court again and again to defend it. No change in language, no change in meaning.

In the second, more puzzling case, the insurer still decides not to redraft the language but *does decide* to *affirmatively adopt* the court's interpretation. No change in language, change in meaning—to the meaning the court gave the language under *contra proferentem*. For example in the previous electronically stored data damage example, insurers eventually varied in whether they adopted coverage for electronic data or not under the original language.

This unpredictable, counterintuitive result can be attractive to insurers for several reasons. A fundamental reason, of which courts seem unaware, is that, in “punishing” the insurer with a contrary interpretation, the insurer has actually been given something of great value—a clear understanding of how courts in that jurisdiction will interpret a term. Policyholders may remain in the dark about the meaning of the term, but the court, and thus the insurer, now has a known, shared understanding of its legally enforceable meaning.

If the court's reading is actuarially viable and the insurer can raise premiums to cover the newly expanded coverage, the insurer may be fine with accepting the new reading. In particular, in circumstances where the interpreted language is shared among many insurers, each insurer can take solace in the fact that the court's interpretation applies to all. If one insurer needs to raise premiums to fund the new coverage, it is likely its competitors will need to do so as well. If, on the other hand, many insurers object to the expanded coverage interpretation, the industry can get together to redraft, and each individual insurer can await that outcome; there is no need on competitive grounds to get out ahead of others in redrafting as everyone is in the same boat.

Thus, an insurer can often live with newly expanded coverage brought about by a court's interpretation under *contra proferentem* as long as the interpretation applies to all who use the same language, as it does. In these cases, it may be a relief to the insurer to cease costly litigation in an attempt to convince courts to adopt the insurer's original view of the language. Nor does the backfiring strategy incur the costs or risks of redrafting. If you can't beat 'em, join 'em.

In short, insurers may choose not to redraft when (a) the courts' *contra* interpretation is actuarially viable, (b) the cost can be passed on to future policyholders, (c) the interpretation will apply to each insurers' competitors, and (d) insurers have reason to believe courts will remain hostile to future attempts

to write the coverage out.<sup>28</sup> This last element is not necessarily required for insurers to keep a difficult clause.

There are, however, several serious downsides when insurers cling to disputed language under a *contra proferentem* backfire. First, if the interpreted clause is truly ambiguous, it will continue to confuse policyholders in its un-redrafted form, some of whom will read it to not provide coverage.<sup>29</sup> These policyholders may therefore be paying for coverage they do not realize they have. More importantly, unaware that they have the coverage, the policyholders will not seek compensation by claim or in court.<sup>30</sup> Commercial policyholders might be counted on to seek legal counsel after a loss, but the average homeowner may not if the claim is worth less than litigation costs or the policyholder assumes there is no coverage from their own reading.

Second, if insurers originally resisted the courts' interpretation because the insurers believed policyholders did not value the coverage at cost—and the insurers are right—policyholders are now paying for coverage they do not wish to purchase. Recall that, in a *contra proferentem* backfire, the insurer has decided *not* to redraft the language *but has decided* to adopt the court's pro-coverage interpretation of the language. Thus, according to the insurer and the court, the ambiguous language now provides coverage in the right context, which the insurer is unlikely to give away for free. This will be explored in more depth in Part III.

Third, the decision to not redraft, but provide coverage, creates an opportunity for an unscrupulous insurer to deny claims to any policyholder who does not come knocking with a lawyer's hand. Litigation should decrease sharply because the courts and the insurer now share the same understanding of the language—an insurer who knows it will lose in court should not end up in court for resisting a claim. But an unscrupulous insurer may decide to test the policyholder's resolve, paying the claim if and only when the insurer concludes the policyholder will pursue the claim legally.

These unfortunate effects from a *contra proferentem* backfire cannot be predicted by the court at the time of interpretation. Nor can they be resolved by the court after the backfire takes place; the court has used its most powerful weapon against the insurer and has no arrows left in its quiver. State legislatures

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28. Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1124 (2006).

29. If policyholders ever read their insurance policies, the most likely time it will be read is after a loss has taken place. Given that most consumer insurance contracts are issued after purchase—with the possibility, rarely exercised, of return—the most direct effect a consumers' (mis)understanding of the language has is in deciding whether to bring a claim and whether to fight a denied claim.

30. Jens Dammann refers to “boilerplate provision[s] that may lead the consumer to underestimate the rights that he enjoys under the contract” as “scarecrows.” Jens Dammann, *Flytraps, Scarecrows, and the Transparency Paradox: The Case for Redesigning the Law on Vague Boilerplate Contracts*, 2018 U. ILL. L. REV. 185, 188 (2018). He argues that the law should be more interested in scarecrows than in falsely enticing terms (flytraps) because consumers are more likely to be frightened away from demanding their due by a scarecrow than to be enticed into a contract through language unread at the time. *Id.*

and state insurance commissioners, however, could consider rules requiring insurers to redraft language within a set number of years following an adverse contra proferentem ruling. This would have costs of its own, not to be explored here. Less drastically, insurers could be required to place an asterisk or notation next to any term that has been found ambiguous by a court and not yet redrafted. This would, at a minimum, make it more difficult for an unscrupulous insurer to continue denying coverage to its least sophisticated policyholders.

### III

#### UNFORTUNATE REDRAFTS

The last Part considered what happens when contra proferentem backfires—the intended incentive to redraft unclear language becomes the incentive to retain instead. But what happens when the use of contra proferentem *succeeds* in convincing an insurer or group of insurers to change a term? The classic view is that the court’s objection is to ambiguous language and that the fix is to clarify the language. If insurers suspect, however, that the judicial objection is not to the language of a term but to the content, a more prudent “fix” may be to rewrite the term to provide coverage or to exclude a yet larger area of coverage.

A court can disingenuously describe language as ambiguous when the court’s true objection stems from a consumer protection instinct as to content.<sup>31</sup> A court may believe, for example, that a homeowners policy should cover certain losses and that it is unfair and surprising to the policyholder to deny coverage, even if the contract language does so directly. Courts rarely use unconscionability in these cases, in part because the procedural aspect of unconscionability will rarely be satisfied. In some jurisdictions, however, courts can apply the reasonable expectations doctrine.<sup>32</sup>

Note the two layers of unpredictability here. First, it is difficult to predict whether an insurer will choose to clarify its meaning in a redraft or choose to change coverage altogether. If coverage is changed, whether it will be expanded or contracted is also unpredictable. Second, it is hard to predict whether changed coverage will be better for consumers or policyholders.

Nor is successfully persuading an insurer to redraft a term to *increase* coverage an automatic win for policyholders as a group. Judges tend to see the future string of policyholders as shadows of the suing policyholder at hand.<sup>33</sup> This

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31. For an argument that courts should adopt consumer protection explicitly on the products liability model in the construction of insurance contracts, see generally Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007).

32. See generally Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981) (analyzing the reasonable expectations principle descriptively and prescriptively). For the origins of the acknowledged reasonable expectations doctrine, see generally Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

33. There are excellent exceptions to this general rule. See *Am. Commerce Ins. Brokers v. Minn. Mut. Fire & Cas. Co.*, 551 N.W.2d 224, 229–30 (Minn. 1996) (rejecting a proposed interpretation about the number of occurrences that had taken place because it would have helped the policyholder at hand

policyholder asserts, without evidence, that she did not understand the language, and this policyholder, now that a loss has occurred, would rather be covered for the loss than not. Instead of gathering facts about whether most policyholders would care to pay for a particular point of coverage, courts often assume that all policyholders share the preference of the policyholder who has already paid her premium and taken her loss.

Who knows most what policyholders desire to cover at cost—insurers or courts? The answer could be insurers, whose business it is to determine what consumers want *and for which they are willing to pay*. Surely insurers are imperfect at this, but the question is who has the comparative advantage between the insurer and the judge. Courts have access to skewed information about the universe of these contracts, a non-representative subset. By design, judges only see the disputes between insurer and consumer and do not see all the times the insurer pays without dispute. (Of course, nor do judges see the policyholders who are wronged but either do not sue or settle out of court.) The chorus of policyholders the judge hears has been denied coverage over and over. The consumers who do not want to pay for additional coverage are absent from the courtroom.

There are at least two other possibilities. First, perhaps judges are well aware that they are expanding coverage beyond what insurers believe consumers want. But the judge believes consumers are mistaken about what they want. Consumers ill-advisedly choose a cheaper policy at the front end but would make a different choice if given sufficient time, information, and support.<sup>34</sup> The judge may believe insurers compete on price but do not compete well on coverage. For judges or jurisdictions in which this is the case, contract interpretation is again being used for the explicit purpose of the downstream effects, although the final effects may surprise the judge.

Second, what if insurers are crooks? Assume for a moment that insurers are not trying to craft a product people desire at a desired price. Each crooked insurer's goal is to capture as much of the relevant market as possible, consistent with maximizing premiums and minimizing payouts. The insurer is still constrained somewhat by the market—an insurer who charges too much and pays out too rarely will go out of business—but the reputational constraint is somehow too weak to keep insurers from often denying coverage that the contract actually provides. Many policyholders will not sue.

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and hurt future policyholders in difference circumstances); *Carlson Mktg. Grp., Inc. v. Royal Indem. Co.*, 517 F. Supp. 2d 1089, 1100–03 (D. Minn. 2007) (questioning the use of *contra proferentem* across multiple cases involving the determination of the number of occurrences, where “the possibility of such variance conflicts with the general principle that the same contractual language should be interpreted consistently across cases”).

34. See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013) (exploring the effect of boilerplate language on consumer consent); Michelle E. Boardman, *Consent and Sensibility*, 127 HARV. L. REV. 1967 (2014) (reviewing Radin's work in *BOILERPLATE*).

One puzzle about this crooked insurer model is that it makes more sense for the insurer to write a policy that clearly excludes the types of losses the insurer thinks it can get away with not covering.<sup>35</sup> On the widespread assumption that policyholders do not read the bulk of their policies, pretending to cover a risk by ambiguous language is unlikely to draw in customers for the simple reason that the customer will not read the language before choosing to buy. And it will lead to more litigation on the backend when the consumer, or her attorney, *does* read the language after a loss. *Contra proferentem* then makes it likely that the insurer will have to pay for the loss it was trying to exclude.

A smart crooked insurer, therefore, would lure consumers in by relying on their general expectations about what a homeowners policy will cover, for example. The product is made attractive by the consumers' background assumptions, not by long, confusing policy language. A clear exclusion of coverage would protect the insurer from many suits and from the application of *contra proferentem* in court. In short, ambiguity as an intentional strategy would be foolish: Hoodwinking consumers through ambiguous policy language will not succeed but will cost the insurer in court.<sup>36</sup>

Why does the fact or form of crookedness matter? Misdiagnosing the problem leads to the wrong medicine. There are two moving parts—what insurers are doing and why, and what courts are doing and why. Recall, the options under consideration are:

- Insurers often attempt to short consumers after a loss and use ambiguous policy as part of the ruse.
- Insurers are either unwilling or unable to disabuse consumers of consumer preconceptions about what insurance will cover, and insurers are likewise unwilling to expand policy coverage to match what consumers assume will be covered. Ambiguous policy language is a bane, not a benefit, to insurers here.
- Insurers do not provide coverage in the policy, based on their view of what policyholders are willing to purchase. Ambiguous language is not part of a ruse but will occur on occasion anyway.

Of the crooked-insurer options, punishing insurers for ambiguous language is the right medicine in the first case every time. In the second case, if the language is genuinely and meaningfully ambiguous, *and if its meaning could be made clearer to the layperson*, *contra proferentem* may also be the right medicine.<sup>37</sup> This

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35. See Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 222–24 (1995) (explaining that the costs to an insurer of an ambiguous term may outweigh any benefit).

36. Simply using background consumer expectations as the lure, and then using clear policy language to avoid liability for those expectations, is not a perfect strategy for the crooked insurer either. In a few jurisdictions, the court could use the reasonable expectations doctrine to provide coverage despite relatively unambiguous language but most jurisdictions do not follow the doctrine. To see the landscape of the doctrine as it stands across jurisdictions today, see Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 111–18 (2007).

37. The question of greater clarity is addressed in Part IV.

treatment stems not from an assumption of crookedness but from the usual underlying *contra proferentem* goal of encouraging clean drafting.

If the court suspects that the insurer's reluctance to provide coverage in the third case is "wrong" on some level, it can, at the margin, use a weak finding of ambiguity to award coverage in the present case and encourage redrafting of coverage for future cases. This medicine is desirable only if the court is correct that consumers value the coverage. In a sense, the motive of the insurer then no longer matters. If consumers truly value a form of coverage—meaning they value it enough to pay for it at cost—then whether the insurer is mistaken about consumer demand or crooked is irrelevant.

Of course, if the court is incorrect about consumer demand, we return to the problem of using the blunt instrument of *contra proferentem* to enlarge coverage, and therefore consumer cost, to the detriment of consumers. Courts are unlikely to convince an insurer that the court knows best about what its consumers want. But a court could easily convince insurers that repeatedly redrafting to clarify a term in the face of skeptical courts is too costly. Whether the court suspects a crooked insurer or simply thinks consumers reasonably expect a certain form of coverage, the looseness of the ambiguity inquiry grants courts the power to reject all but the content of the term itself.

#### IV

##### IMPOSSIBLE REDRAFTS

The third downside of the unpredictability of *contra proferentem* occurs because courts do not, perhaps cannot, know when a successful redraft is possible. The court orders: "Redraft! Make your meaning known or have the term construed against thee for all eternity." The insurer answers: "Impossible! This combination of coverage cannot be made knowable to the average consumer." Or, the insurer *could* give this reply but does not because it raises awkward questions about the role the policy plays in the insurance product. It could offend policyholders, and, perhaps most importantly, it does not fit into a recognizable legal defense. "The language is not ambiguous," is a defense. "The language is not ambiguous to you, Your Honor, though the policyholder will never understand the point," is not.

There are two aspects of unpredictability here. First, a court may not be able to predict when meaningful redrafting is possible. Again, courts do not gather, and parties do not submit, evidence on the lay comprehensibility of the policy language, let alone evidence on the comprehensibility of substitute language. Often, a court will be able identify a term that could be more clearly drawn to fit the precise facts before it, but a term or combination of terms in insurance needs to be able to apply to hundreds of similar, but not identical, factual scenarios. A term that could fit the precise case better is easy to write in hindsight but not necessarily useful going forward.

Second, a court cannot predict how an insurer will respond to the application of *contra proferentem*. Even when the court is accurately confident the term can

be reasonably redrafted, the prior Parts reveal how responses differ. Here, assume a term that cannot be fruitfully redone, or perhaps simply assume an insurer who *believes* the term cannot be fruitfully redone. The insurer has three primary options.

First, as already explored, the insurer can leave the language alone but adopt the court's contrary reading. Courts might misleadingly experience this as a good outcome because the court stops seeing litigation over the term, not realizing the language still confuses policyholders. Second, the insurer can change the term altogether, accepting that the content of the term cannot be more clearly stated. Third, the insurer can redraft the language in the hopes of convincing *the court* that the new language is clearer; the insurer might retain its belief that policyholders cannot be made to understand but no evidence will be required to show that the language is clearer to policyholders.

Note that, under the second option, the insurer is changing coverage based on what can be made understandable, not based on what the insurer or court thinks consumers want. While consumers may want any given insurance term to be more comprehensible (although this is debatable),<sup>38</sup> it is not immediately clear that consumers value readability of the contract over an insurance product that covers the right things and no more.

This final unpredictable outcome stems from the fact that there is no clear doctrine in insurance interpretation to address well-drafted but complex language. *Contra proferentem* is meant to apply when there are two or more plausible interpretations of a term or terms, one of which supports an outcome desirable to the non-drafter. But there are many clauses that have a clear meaning to insurers and judges but no meaning to most policyholders, including moderately sophisticated commercial policyholders. Where the insurers, lawyers, and judges see a known quantity, policyholders see a blank in the contract.<sup>39</sup>

These blank holes may be created by nature or nurture; courts struggle to interpret either. Natural blank holes are created when a clause that represents a sound actuarial decision cannot be written simply enough to be comprehensible to the layman. Nurtured blank holes are created by clauses that have gone through too many revisions in response to changes in fact and judicial opinion.<sup>40</sup>

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38. See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 14–32, 59–79 (2016) (exploring the lack of interest, and lack of skill, that consumers have in reading the fine print of consumer contracts).

39. A blank, or blank hole, which has meaning to one party alone, differs from the Choi, Gulati, and Scott conception of a black hole, which has no meaning to either party. See Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 *DUKE L.J.* 1, 5 (2017). “At the limit, a boilerplate term that is reused for decades and without reflection merely because it is part of a standard-form package of terms, can be emptied of *any* recoverable meaning: this creates a contractual black hole.” *Id.* at 3.

40. One nurtured blank hole may be the pollution exclusion, which has had a long history of important litigation, tangled up with *contra proferentem*, punctuated by two major redrafts by ISO over several decades. Insurers had a strong incentive to clean up the exclusion, given that “no single exclusion has had more prominence in insurance litigation than the pollution exclusion,” but the effort has sometimes lagged and never been great success. ROGER C. HENDERSON & ROBERT H. JERRY, II,

Experts, including judges, can see in these layered clauses a world of subtle meaning—an insurance haiku where one turn of phrase references past clauses and cases. To the policyholder, the clause is incomprehensible—a blank spot in the contract where a term should be.

On one conception of contra proferentem as “a rule of legal effect,” rather than a rule of interpretation, it *could* apply to terms that read as “clear legal meaning”/“no lay meaning,” just as it currently applies to terms that result in plausible meaning A/plausible meaning B.<sup>41</sup> But even when courts employ contra proferentem as a rule of legal effect, the trigger for its application remains a finding of ambiguity.

Courts do tend to treat both types of blank holes as though they are ambiguous, unleashing all the insurance law tools that spring from ambiguity.<sup>42</sup> For example, one court declared a term “to be ambiguous. Indeed, because [the term] was carelessly drafted, it is literally meaningless.”<sup>43</sup> But blank clauses do not have two or more meanings so much as one clear meaning to the drafter (and the court) and no meaning to the purchaser. It may be that the outcome in these cases should resemble the outcome in ambiguity cases, but the question is worth considering.

This reveals one difficulty with blank holes, which is that on one level insurance policies are not *permitted* to have holes as to coverage questions. The court backfills holes by asking: “What is the policyholder’s preferred *ex post* position?” This is related to contra proferentem but more expansive. Leaving aside all the other contractual issues that can arise in insurance—the insurer’s defense obligations; the policyholder’s notice and proof obligations; and questions about numbers of occurrences and policy limits per occurrence, among others—the basic agreement of most all-risk policies is that an outcome-risk is covered unless it is excluded. Once a court has construed the contract’s grant of coverage and exclusions of coverage, there is an answer—not a hole.

The policyholder is covered or she is not. The policyholder bears the burden of first proving coverage, and the insurer bears the burden of proving that an exclusion applies. Then, there may be a notorious “exception to the exclusion”

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INSURANCE LAW: CASES AND MATERIALS 631 (3d ed. 2001). See also Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 613 (1990) (analyzing the pollution exclusion “to derive a common sense, workable interpretation of the exclusion”).

41. Klapp v. United Ins. Grp. Agency, Inc., 663 N.W.2d 447, 457 (Mich. 2003). The Michigan Supreme Court in this case cited favorably to Corbin’s view that we should see contra proferentem as a “rule of policy, generally favoring the underdog,” and “not actually one of interpretation.” *Id.* at 456, referring to 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.27, at 306 (Joseph M. Perillo ed., rev. ed. 1998).

42. Kenneth Abraham has recently argued that in certain circumstances courts seem to recognize “[a]mbiguity by [n]ecessity,” and choose not to apply contra proferentem. “Instead, the courts substitute a rule for what would otherwise be an unduly complex policy provision.” Kenneth S. Abraham, *Plain Meaning, Extrinsic Evidence, and Ambiguity: Myth and Reality in Insurance Policy Interpretation*, 25 CONN. INS. L.J. 329, 363 (2019).

43. Carlson Mktg. Grp., Inc. v. Royal Indem. Co., 517 F. Supp. 2d 1089, 1100 (D. Minn. 2007).

to consider. If any of these are ambiguous, *contra proferentem* will dictate coverage. As a gross oversimplification, then, we can say that an insurance blank hole is plugged with coverage.

We can divide courts dealing with inherently complex coverage into two camps. The first is relatively uninteresting—judges that woodenly apply *contra proferentem* whenever the policyholder claims confusion without first requiring that the policyholder’s interpretation be one the language can support. With more thought, these judges would recognize that they are applying the unofficial *contra confusion* doctrine: **Whenever a policyholder is confused by language that excludes coverage, provide coverage.** Perhaps this *should* be a doctrine in insurance interpretation, but there are reasons for skepticism, and a full discussion is outside the scope of this Article.

The second camp is more interesting. These judges realize that the idea the contract language is meant to convey may be un-conveyable to most policyholders. That is, these judges *realize* that the “redraft to achieve comprehension” instruction is nonsensical. The insurer chooses to provide some coverage, and exclude some—in keeping with actuarial principles and some conception of what policyholders want—but the mixture is impossible to convey to a policyholder. (Again, if one assumes insurers are mostly crooks, the analysis will differ.) Yet, using *contra proferentem*, the “redraft” signal is sent still, with unpredictable results.

An example is in order, returning to the two sources of incomprehensibility, both stemming from the same clause. First, there are structural or architectural blank holes. Courts do not commonly refer to “structural ambiguity,” but they do recognize that the organization of an insurance policy by itself can cause confusion, ambiguity, or a complete lack of comprehension.<sup>44</sup> The structural problems with policies appear to stem both from the evolution of policies over time and from the difficulty of writing a coherent order of statements meant to apply to thousands of perils and outcomes.

A second source of incomprehensibility may be the actual concept underlying the contours of coverage. Consider the inherent problem of multiple causes of a loss. One cause is covered, say, damage from wind. Another cause is not covered, say, damage from flood waters. What happens when the causes occur serially—wind damage, then flooding or flood destruction, then wind damage? What happens if the wind and flood waters come concurrently, or if there is no evidence to solidly determine the order? The massive, widespread losses from Hurricane Katrina raised these questions, although not for the first time.<sup>45</sup>

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44. It is sometimes called “ambiguity of organization.” ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* §25A[a], at 145 n.316, 146 (4th ed. 2007) (adding “ambiguity of organization” to the Farnsworthian categories of imprecise language).

45. A famous and infamous decision in the Eastern District of Louisiana held that a man-made flood was a covered, ensuing loss. *In re Katrina Canal Breaches Consol. Litig.*, 466 F. Supp. 2d 729, 761 (E.D. La. 2006). The Fifth Circuit reversed, which is the correct outcome if one aims to interpret the language as opposed to ruling on public policy grounds. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 208–21 (5th Cir. 2007).

Two clauses that attempt to address concurrent or chain causation have led to much litigation and a fair amount of redrafting. At times, the redrafting is in response to contra proferentem and at times in response to courts creating a default rule of coverage—which court-rejected redrafting eventually reveals to be a mandatory rule.

First, a version of the “anti-concurrent cause clause” in homeowners policies reads: “We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.”<sup>46</sup> “There is no question among courts and academics that concurrent causation insurance cases across jurisdictions, and even within jurisdictions, produce wildly unpredictable results and are jurisprudentially inconsistent.”<sup>47</sup> Despite the expense of the persistent litigation and the redrafting, insurers are reluctant to let the underlying concept go—if a loss is excluded by one cause, the introduction of another, otherwise covered cause, will not necessarily result in coverage.

But it might, thanks to the “ensuing loss” provision common to homeowners policies. A deceptively brief explanation is that, if an excluded peril occurs, resulting in excluded property damage, which results in a covered peril, the ensuing loss from the covered peril is covered. Thus, if a mudslide (excluded peril) causes damage to a wall and gas line (excluded damage) that result in a fire (covered peril), then the resulting fire damage is covered. Note that the ensuing loss provision grants coverage *back* to policyholders from what might otherwise have been an excluded loss. In other words, when it operates, it oftentimes operates to the benefit of policyholders.

But ensuing loss provisions are notoriously confusing to policyholders, to the point of being meaningless. Part of the problem is structural. The central clause attempts to reference covered and uncovered perils mentioned elsewhere in the policy, to terrible effect.<sup>48</sup> The interaction between the ensuing loss provisions and the anti-concurrent cause clauses makes it worse.<sup>49</sup> Even apart from structural confusion, however, the concept of ensuing loss has turned out to be difficult for both policyholders and courts to grasp.

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46. Ins. Servs. Office, Inc., Form No. HO 00 03 05 11, Homeowners 3 – Special Form, Exclusion A (2010), <https://www.propertyinsurancecoveragelaw.com/files/2018/09/HO-00-03-05-11-1.pdf> [<https://perma.cc/F34Q-UQFF>].

47. Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 979 (2010). “For example, the California Supreme Court has shifted to three perceptibly different doctrinal approaches to concurrent causation from 1973 to 2005.” *Id.*

48. For example, a sample ensuing loss provision from the ISO reads: “[u]nder 2.b. and c. above, any ensuing loss to property described in Coverages A and B not precluded by any other provision in this policy is covered.” Ins. Servs. Office, Inc., Form No. HO 00 03 05 11, Homeowners 3 – Special Form, Exception to c.(6) (2010), <https://www.propertyinsurancecoveragelaw.com/files/2018/09/HO-00-03-05-11-1.pdf> [<https://perma.cc/S6UX-MHCW>]. It might have been possible to create this cross-referencing thicket without a well-worn process of adding and inserting terms in lieu of drafting new sections, but it seems unlikely.

49. Indeed, it takes an entire article to explore the interaction of the two. See Christopher C. French, *The “Ensuing Loss” Clause in Insurance Policies: The Forgotten and Misunderstood Antidote to Anti-Concurrent Causation Exclusions*, 13 NEV. L.J. 215, 216 (2012).

Note that ensuing loss provisions do not readily lend themselves to two interpretations—the choice is between understanding their application after careful study or having no clue.<sup>50</sup> While the current ensuing loss provisions include unforced errors if one is attempting to communicate with consumers, it seems likely that ensuing loss is a natural blank hole—one that courts should preserve for the benefit of both insurers and policyholders. The more costly courts make the provision for insurers by (a) construing it to add back excluded losses and (b) entertaining lengthy litigation when a summary judgment is due, the more likely insurers are to drop the exception altogether. There is some evidence that unpredictable court outcomes can lead insurers to draft harsher terms excluding even concurrent causation under which policyholders should reasonably expect coverage.<sup>51</sup>

Perhaps *contra proferentem* is a brilliant solution to complex language. But given the promiscuous application of *contra proferentem* to terms that are not ambiguous but are instead incomprehensible, there is “a heightened risk that courts may be persuaded to adopt an interpretation of the term at issue that is antithetical to the functioning of a market that relies on the standard contract to regulate the rights and duties of the participating parties.”<sup>52</sup> Complex language that has been extensively litigated, and redrafted—but *not* redrafted to expand coverage—is rebuttable evidence of language that insurers retain because the market does not support the coverage.

If courts were willing to accept the “survey interpretation method” advocated by Ben-Shahar and Strahilevitz, parties could use it to *empirically* identify if there exist “alternative formulations of language that achieve the drafter’s intended meaning with less ambiguity.”<sup>53</sup> If yes, they argue, the role of doctrines such as *contra proferentem* would be stronger. But Ben-Shahar and Strahilevitz also caution against expecting a high degree of clarity for any language, including seemingly plain language. Using one example with unambiguous language and clear, short facts, their survey method resulted in only sixty-five percent of respondents finding no coverage (the correct outcome), with twenty-two percent finding coverage and thirteen percent “completely uncertain” as to coverage.<sup>54</sup>

If courts fully acknowledge the existence of inherently complex language as a separate category, it may free them to reconsider using *contra proferentem* as a penalty. While ambiguous language may be a trap for the unwary, incomprehensible language puts the policyholder on notice that he does not

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50. Some courts recognize this. “The ensuing loss clause may be confusing, but it is not ambiguous. Reasonably interpreted, the ensuing loss clause says that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered.” *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1004 (Wash. 1992) (en banc).

51. See Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 389–91 (1984) (describing California insurers attempting to draft out of coverage for all concurrent causation after the 1983 Coalinga earthquake).

52. See Choi et al., *supra* note 39, at 3.

53. Ben-Shahar & Strahilevitz, *supra* note 12, at 1780.

54. *Id.* at 1792–95.

understand. Blank holes cannot be used to lure policyholders in at the moment of contracting; if the policyholder notices the blank, it will register as a negative. This supports a different interpretive approach, particularly if the language cannot be reasonably perfected without changing its meaning. Treating a blank as an ambiguity, and therefore construing the clause contra the insurer's intent, may take away a clause that policyholders value even though they cannot readily be made to understand it. If the clause cannot be made more simple, repeated encouragement to redraft it may result in removal.

## V

## CONCLUSION

Courts' use of contra proferentem can be unpredictable. Ambiguity may be in the eye of the beholder or in the eye of a judge with an aim to change content rather than language. Ambiguity may be found when inherently complex language is clear to one side and blank to the other.

This Article considers the unpredictable responses of insurers to the "redraft" signal sent by contra proferentem: (1) choosing to not redraft as backfire; (2) choosing to not redraft while adopting the court's contra-interpretation of the language; (3) redrafting so as to expand or contract coverage, whether good for consumers or not; or (4) redrafting to convince the court the language is clearer even though the concept can never be made plain to layman, which redraft may constrict desired coverage just to avoid further dispute. Some lack of predictability in insurer response is inevitable. This level of unpredictability suggests that we should reconsider how and when contra proferentem should be applied.