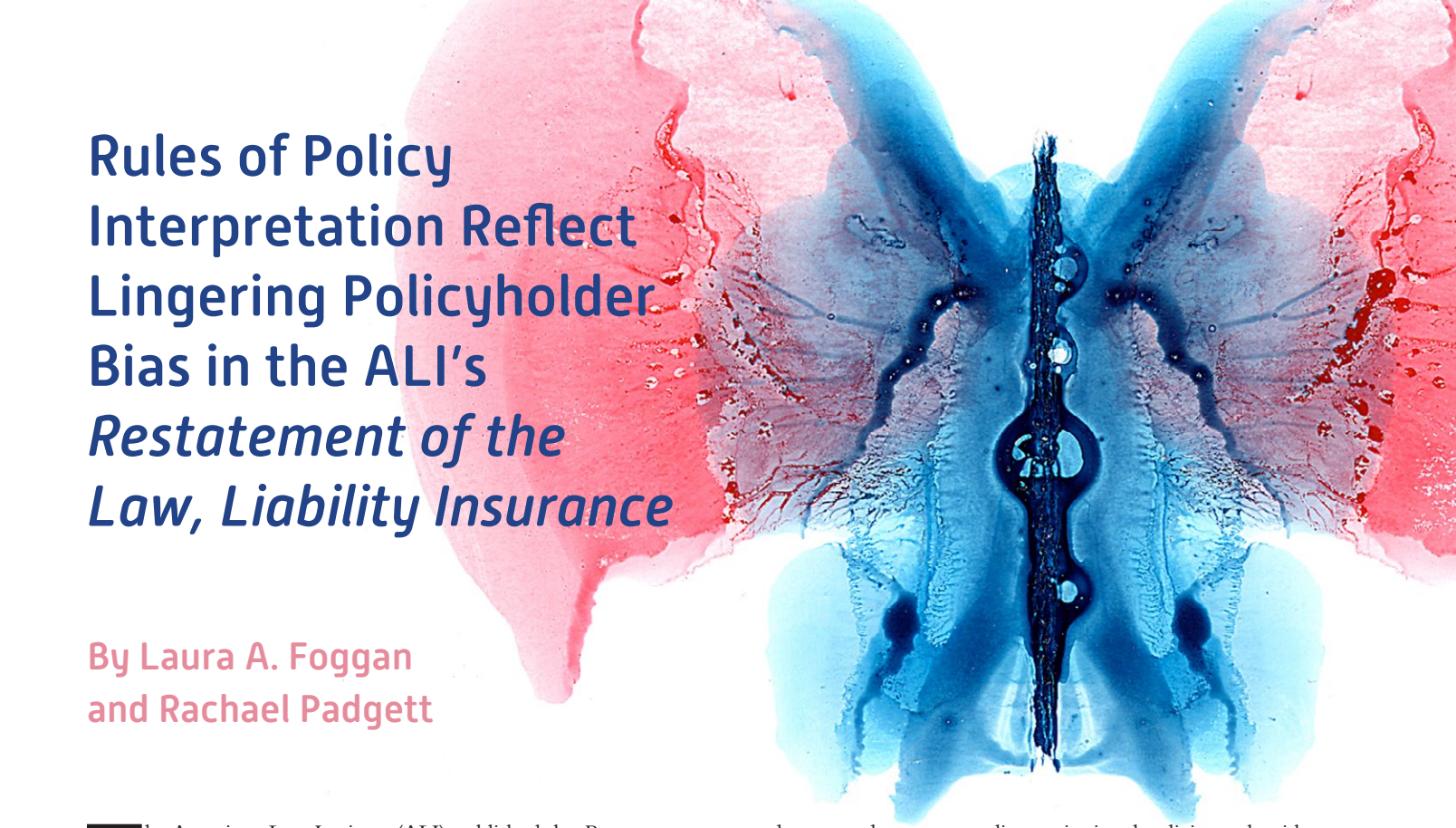
Rules of Policy Interpretation Reflect Lingering Policyholder Bias in the ALI's *Restatement of the Law, Liability Insurance*



By Laura A. Foggan and Rachael Padgett

The American Law Institute (ALI) published the *Restatement of the Law, Liability Insurance* (RLLI) in June 2019, amid substantial controversy.[1] Much of that controversy centered on whether the RLLI's provisions reflect established majority insurance law rules or whether and how often they reflect aspirational proposals to create new rules or alter the law, without appropriate legal support.[2] Concerns that the RLLI proposes innovative rules that seek to change settled insurance law were sharpened by the recognition that courts traditionally look to ALI restatements as a reliable reference reflecting the state of the common law.

The RLLI began in 2010 as a "principles" project, an ALI project that is aspirational in design and intended to recommend policies and guidelines for a developing area of the law.[3] The ALI *Style Manual* describes a principles project as one that may make recommendations to unify a legal field "without regard to whether the formulations conform[] precisely to present law."[4] In late 2014—nearly four years into the drafting process—the ALI leadership made the "unprecedented decision"[5] to change the liability insurance law principles project to a restatement. Restatements "aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court," the ALI *Style Manual* explains.[6] Despite that change, several articles have documented the curiously aspirational tone of this particular restatement project.[7]

While the RLLI has faced much discussion and criticism, a closer look at its tumultuous drafting history paints an even clearer picture of *why* it has come under so much scrutiny: many provisions of the project retain vestiges of its early principles approach. This article provides a review of the RLLI's rules for insurance policy interpretation and reveals that the reporters' early proposals recommending aspirational policies and guidelines for a principles project often had equal or greater influence than the existing common law on the final "rules" in the RLLI.[8]

RLLI Topic 1: Interpretation

The starting point for the RLLI—Topic 1—is liability insurance policy interpretation. Any question about liability insurance coverage must start with the insurance policy, as the insurance contract controls. How to interpret an insurance policy is thus fundamental to almost any liability insurance issue.

As the RLLI states in section 2 comment a, "[i]nterpretation is the first substantive topic of this Restatement because of its importance for insurance coverage." The RLLI explains that "[m]ost of the parties' rights and obligations under an insurance policy are set forth in the policy. Courts primarily determine those rights and obligations by interpreting the terms in that policy."[9] Because courts look to policy interpretation rules in determining the parties' rights and obligations, those rules are critical to the liability insurance system and the RLLI as a whole. If the RLLI unfairly tilts the rules of interpretation—fundamentally, how insurance contracts are to be applied—against insurers, the RLLI is imbued with an anti-insurer bias.

RLLI Topic 1 encompasses sections 2, 3, and 4. This article explores how the policy interpretation rules laid out in those sections evolved from the early principles drafts to the final restatement. It shows what the reporters set out to accomplish, drawing on the recommendations they made when they wrote with the freedom allowed by the principles project—that is, when they wrote "without regard to whether the formulations conformed precisely to present law." And it traces how the RLLI came to adopt rules of insurance policy interpretation that often further pro-policyholder constructions of insurance agreements

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rather than long-standing common-law insurance rules. The article reveals the nuanced ways that the RLLI incorporates the reporters' early desire to permit extrinsic evidence to shape the meaning of a policy, as well as a bias toward interpreting insurance policies from the perspective of the policyholder.

Section 2: Insurance Policy Interpretation

The first section in RLLI Topic 1 is section 2, which provides three general principles for liability insurance policy interpretation:

> (1) Insurance policy interpretation is the process of determining the meaning of the terms of an insurance policy. Whether those terms as so interpreted are enforceable is determined by reference to other legal rules.
> (2) Insurance policy interpretation is a question of law.
> (3) Except as this Restatement or applicable law otherwise provides, the ordinary rules of contract interpretation apply to the interpretation of liability insurance policies.

These black-letter rules remained the same from the earliest drafts of the principles project to the final RLLI. On their face, section 2's black-letter rules are uncontroversial. But the comments and reporters' note for section 2 reflect strong pro-policyholder presumptions that have guided the project from its start.

For instance, RLLI section 2 comment c lists the objectives of liability insurance policy interpretation, beginning with "effecting the dominant protective purpose of insurance."[10] Exactly the same wording appeared in section 2 comment b in *Principles of the Law of Liability Insurance*, Tentative Draft No. 1 (PLLI 2013 Draft).[11] While it is a truism that insurance protects against identified risks that occur or as to which claims are made within a specified period, the objective in interpreting insurance policies is to effectuate the parties' agreement. In other words, courts' responsibility is to determine *whether* the policy protects against a particular risk. The key objective in insurance policy interpretation is not to interpret a liability insurance policy to provide protection (i.e., effecting a dominant protective purpose of insurance); it is to interpret a policy to carry out the agreed division of risks between those covered and those outside the policy terms.[12]

The RLLI erred by stating that the meaning of insurance policy terms should be guided by the goal of effecting a dominant protective purpose—i.e., affording protection to policyholders—rather than by the evenhanded objective of deciding the agreed allocation of risk. Tracing the history of section 2 back through the early drafts of the RLLI suggests that this error derived from the reporters' assumption that all policyholders are at a bargaining disadvantage—and thus in need of a thumb on the scale to achieve a better outcome in insurance disputes.

The comments and reporters' note for section 2 argue that "[i]nsurance policies generally are standard-form contracts sold on a mass-market basis."[13] Reporters' note d claims that "[i]n the contracts literature, consumer and small business insurance policies are the paradigmatic mass-market, standard-form contract of adhesion," an overblown and inaccurate description that the reporters had attached to all insurance policies in earlier project drafts. Section 2 comment d contends that "[e]ven in the commercial insurance market, the vast majority of insurance policies are standard-form contracts. A prospective policyholder generally is able to customize the coverage only by selecting among the forms offered by the insurer." This is also inaccurate and untrue.

Insurance is heavily regulated through a process that provides strong checks on insurer selection of policy language and terms. The National Association of Insurance Commissioners has explained that "[s]tate regulators protect consumers by ensuring that insurance policy provisions comply with state law, are reasonable and fair, and do not contain major gaps in coverage that might be misunderstood by consumers and leave them unprotected."[14] States have[15]—and use[16]—the power to require insurers to submit policy forms for review by the state insurance commissioner and to proscribe policy language and terms. State statutes often set out specific requirements for a policy's content and detailed requirements for terms in particular lines of insurance.[17] The RLLI minimizes the importance of state oversight of insurance policy forms and content in section 2 comment i,[18] but state oversight of standard insurance policy language minimizes the risk of unjust terms and protects policyholders—particularly small businesses and individual consumers—from the dangers presented by unregulated contracts of adhesion.[19]

In the commercial insurance market, many sophisticated policyholders employ their own in-house risk management professionals to oversee and negotiate insurance solutions. The Risk and Insurance Management Society (RIMS) is a professional association of more than 10,000 risk management professionals who manage risk for their organizations through various means, including securing insurance.[20] Policyholders also engage leading brokerage houses in negotiating their policies and customizing coverage options.[21] The 100 largest U.S. insurance brokerage firms have broking revenues that range from tens of millions of dollars to over $6 billion annually.[22] Leading brokers "exemplify creative risk solutions, exceptional customer service and a profound knowledge of the industry."[23] Global broking powerhouses such as Marsh, Aon, and Willis Towers Watson develop their own insurance coverage forms and offer their clients bespoke coverage solutions designed to address the particular risks of importance to their individual policyholders.[24]

The reporters' exaggerated claims that insurance policies are "paradigmatic mass-market, standard-form contract[s] of adhesion" are not well-taken and do not justify painting a pro-policyholder gloss over established insurance policy interpretation rules. Recognizing the protections available to policyholders through regulation and the marketplace, courts should not alter settled law and veer away from the straightforward application of insurance policy terms.

TIP: When faced with an insurance issue that is covered by the RLLI, check your jurisdiction's law first to determine whether it conflicts with the restatement rule.

Section 3: The Plain Meaning Rule

RLLI section 3 addresses what is no doubt the most fundamental and widely accepted rule for interpreting insurance contracts: courts must give insurance policy terms their plain meaning. The overwhelming majority of jurisdictions have adopted the "plain meaning rule" for interpreting insurance agreements and have held that courts must enforce unambiguous insurance policy language without considering extrinsic evidence.[25] Yet the drafting history of the RLLI shows that, from the start of the project, the reporters aspired to dislodge this settled insurance law rule.

The earliest draft of the RLLI, in the form of the PLLI (the aspirational, recommended guidelines that the reporters developed at the start of this project), rejected plain meaning and instead put the policyholder's view at the center of interpretation of insurance policy terms. Section 3 of the PLLI 2013 Draft stated:

> § 3. The Presumption in Favor of the Plain Meaning of Standard-Form Insurance Policy Terms
> (1) An insurance policy term is to be given the meaning that a reasonable policyholder would ascribe to it under the circumstances.
> (2) The plain meaning of an insurance policy term is the single meaning, if any, that a reasonable policyholder would give to the term in relation to the claim at issue, in the context of the insurance policy as a whole, without reference to extrinsic evidence regarding the meaning of the term.
> (3) The plain meaning of the term, if there is one, is to be displaced only if, after considering extrinsic evidence, the court determines that a reasonable person in the policyholder's position would give the term a different meaning, and the language of the term is reasonably susceptible to that different meaning.

This draft of the section 3 plain meaning rule recommended a rule that would elevate a reasonable policyholder's view above the meaning gleaned from the face of the insurance contract itself. It discounted the understanding or intent of the other contracting party: the insurer. The reporters also advocated displacing an insurance policy's plain meaning upon consideration of "extrinsic evidence." This test threw out established insurance law to allow extrinsic evidence to dislodge an insurance policy term's plain meaning and told courts to accept the meaning that a reasonable policyholder (or reasonable person in the policyholder's position) would give to an insurance policy term.

The proposal undervalued the importance of the language of the provision to be construed and overweighted the policyholder's views. It also was unsupported by existing law.[26] The rule proposed in the PLLI 2013 Draft thus met with considerable opposition.

By the time the project was transformed into a restatement, the reporters' proposal for section 3 gave way to a new approach. But the next drafts still carried forward the aspirations that the reporters expressed in the principles draft by sidestepping established insurance law and proposing to substitute an inventive "presumption" for the long-standing plain meaning rule. The next versions of section 3 provided:

> (1) The plain meaning of an insurance policy term is the single meaning, if any, to which the language of the term is reasonably susceptible when applied to the claim at issue, in the context of the insurance policy as a whole without reference to extrinsic evidence regarding the meaning of the term.
> (2) An insurance policy term is interpreted according to its plain meaning, if any, unless extrinsic evidence shows that a reasonable person in the policyholder's position would give the term a different meaning. That different meaning must be more reasonable than the plain meaning in light of the extrinsic evidence, and it must be a meaning to which the language of the term is reasonably susceptible.[27]

Now section 3(1) seemed to abandon the one-sided, policyholder-centric rule that courts should always give a term the meaning that a policyholder ascribes to it. But section 3(2) reintroduced the idea that extrinsic evidence could override the plain meaning of a term, and it reasserted the policyholder's position as paramount in evaluating extrinsic materials. This formulation jettisoned the certainty afforded by the plain meaning rule (by allowing plain meaning to be displaced by extrinsic evidence) and maintained the pro-policyholder bias of earlier drafts.[28]

The reporters explained their new draft of section 3 as creating a "presumption" in favor of plain meaning. The section 3 comments provided that "[e]xtrinsic evidence is always relevant," so policyholders could "dispute the plain meaning of policy language in virtually every case."[29] And in every case, a term's plain meaning gleaned from the face of the insurance contract would give way if extrinsic evidence established that a policyholder—and *only* a policyholder—would give a different meaning to the contract terms. Moreover, the extrinsic evidence would override a term's plain meaning if the evidence showed that *a reasonable person in the policyholder's position* would give the term a different

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meaning. In other words, extrinsic evidence could trump plain meaning even when that evidence revealed nothing about the understanding and intent of the actual policyholder party to the insurance contract. This departed from the existing law because the plain meaning rule forbids extrinsic evidence absent ambiguity; when admissible, such evidence must be of the parties' mutual contracting intent; and courts generally hold one party's unilateral understanding to be inadmissible because it cannot aid the court in determining the parties' mutual intent.[30]

While this proposed formulation of the section 3 black-letter rule deviated from the majority common-law plain meaning rule, the comments and reporters' note obscured the issue by inaccurately suggesting the absence of a majority rule governing insurance policy interpretation because of claimed variations in the case law.[31] As the final draft of the RLLI now admits in section 3 comment a, "a substantial majority of courts in insurance cases have adopted a plain-meaning rule."

Because the plain meaning rule is so widely recognized and well established, the reporters' proposal that section 3 adopt an inventive plain meaning presumption received an influx of objections. Commentators pointed out that section 3 deviated from most states' insurance law rules for policy interpretation.[32] Major concerns were that a plain meaning *presumption*—under which pro-policyholder extrinsic evidence could override the plain meaning—undercut straightforward enforcement of policy terms and would "significantly expand the scope of coverage litigation" and increase litigation costs.[33] Submissions to the ALI noted that the rule "could have a chilling effect on the [insurance] industry" as it would no longer allow insurers "to comfortably rely on being able to enforce plain language of the policy."[34] It would "cause a dilution of policy language, decrease certainty in the interpretation of policy language and drive up the costs of insurance for consumers."[35] At bottom, observers noted that the presumption "propose[d] to give the policyholder a veto over whether the policy term should be given its plain meaning" by using extrinsic evidence to attack that result.[36]

Leading up to the scheduled vote to adopt section 3, the RLLI draft came under fire from regulators, major trade associations, and practitioners, who expressed concerns with the project's departure from well-established insurance rules, as well as the RLLI's possible adverse effects on the insurance system.[37] The reporters' treatment of the plain meaning rule was often at the center of these criticisms. For example, the American Insurance Association (AIA) and the National Association of Mutual Insurance Companies (NAMIC) wrote jointly to decry what they viewed as "a troubling 'reshaping' of fundamental aspects of the insurance law based on aspirations and not existing majority views, and without solid, appropriate justification."[38]

The discussion of RLLI Tentative Draft No. 1 at the 2016 ALI annual meeting also featured these concerns. In support of a motion to amend section 3 to adopt the majority plain meaning rule (i.e., if a term is clear and unambiguous on its face, it will be given its plain meaning without resort to extrinsic evidence), Judge Carolyn Kuhl offered cogent comments. She noted that by defining "plain meaning" as "a meaning to which the language of the term is reasonably susceptible," which may be "determined to exist by considering extrinsic evidence," the RLLI ultimately articulated a rule "in which all extrinsic evidence that might bear on the interpretation of the contract must be admitted and considered in determining whether a contract is ambiguous."[39] This, Kuhl pointed out, would open the door to "admitting evidence about almost any aspect of the negotiation, about the course of dealing, about subjective expectations," creating a costly rule that would increase litigation and transaction costs.[40]

The RLLI drafting history shows that, from the start of the project, the reporters aspired to dislodge the settled insurance law on plain meaning.

Despite these objections to the inventive plain meaning presumption, the reporters refused to budge from their proposal for section 3.[41] The ALI scheduled the final vote to approve the RLLI for May 23, 2017. Yet a torrent of comments and criticisms "urged the ALI to give further consideration" to the project, including the section 3 proposal to alter the plain meaning rule, before voting.[42] As a result, at the last minute and in the face of this extensive criticism, the ALI pushed back the final vote one year, to May 23, 2018, and directed the reporters to reevaluate the proposed draft.[43]

This was another chance to reconsider the proposal to depart from the plain meaning rule. On August 4, 2017, the reporters issued a revised draft (Preliminary Draft No. 4), seemingly trying to assuage the concerns regarding their approach to liability insurance contract interpretation.[44] For the section 3 rule, this draft did not differ significantly from the prior draft as it retained the problematic plain meaning presumption. The reporters again contended in the comments and reporters' note that courts were "sharply divided" on interpretive issues and asserted that their rationale aligned with the "latent ambiguity" approach to policy interpretation, where outside evidence may be considered to interpret ambiguities that do not appear on the face of the contract.[45] But their treatment of the existing law was inaccurate, and critics continued to speak out, noting that the new draft again misstated existing law and failed to correct the issues with the prior draft.[46]

State legislators began to take notice of the problems with the RLLI in the face of conflicting state law. Tennessee enacted a house bill specifically stating that the language of the policy of insurance is to be given its "ordinary meaning."[47] The reporters' treatment of plain meaning was so controversial that at one point in early 2018, the council considered a rule that would have ducked this issue. They proposed to say that state law on contract interpretation would apply to the determination of whether a contract term is ambiguous and whether secondary sources or extrinsic evidence may be considered in making this determination, leaving the decision about whether to consider extrinsic evidence to existing state law.[48]

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Finally, just one month before the May 2018 ALI annual meeting, the reporters replaced their proposed presumption with a black-letter rule that adopted the traditional plain meaning rule.[49] The black-letter rule in section 3—and the final, published RLLI—now provides:

> (1) If an insurance policy term has a plain meaning when applied to the facts of the claim at issue, the term is interpreted according to that meaning.
> (2) The plain meaning of an insurance policy term is the single meaning to which the language of the term is reasonably susceptible when applied to facts of the claim at issue in the context of the entire insurance policy.
> (3) If a term does not have a plain meaning as defined in subsection (2), that term is ambiguous and is interpreted as specified in § 4.

The final section 3 black-letter rule gets it right: courts must give insurance policy terms their plain meaning.

But even with this change, the reporters resisted the straightforward application of insurance policy terms. The comments and reporters' note to section 3 include troubling residual aspects of the prior proposals. Most significantly, in tension with the law and now black-letter RLLI rule on plain meaning, the reporters continue to show their preference for dislodging the plain meaning rule and considering materials outside the contract to determine the meaning of a policy term.[50] While conceding that the approach under which "courts interpret insurance policy terms in light of all the circumstances surrounding the drafting, negotiation, and performance of the insurance policy" is a minority rule, reporters' note a provides a detailed defense of that approach. The reporters' defense advocates exactly what the RLLI rejected by adopting the long-standing plain meaning rule in the black-letter of section 3. And they downplay well-documented advantages to the prevailing insurance law plain meaning rule. It is straightforward and predictable. It provides needed certainty in interpreting insurance policy terms. And it avoids substantial cost and delay associated with bringing external materials into the determination of a term's meaning, rather than giving binding effect to the language of the insurance policy itself.

In section 3 comment b, the reporters attempt to lay the groundwork for courts to look beyond the language of the policy to interpret the meaning of a term. Having lost the battle to inject extrinsic evidence into the determination of a policy's plain meaning, the reporters take pains to define certain evidentiary material outside the insurance contract as what they call "external materials" and not "extrinsic evidence." They contend that "[g]enerally accepted external sources of meaning that courts consult when determining the plain meaning . . . include: dictionaries, court decisions, statutes and regulations, and secondary legal authority such as treatises and law review articles." The reporters also claim that "[s]uch external sources of meaning are not 'extrinsic evidence' under any definition of that term." While courts sometimes cite legal sources such as case law, statutes, and regulations in deciding the plain meaning of a term, consideration of external material and secondary sources is limited to legal authority, not articles offering factual data, assertions, or "information" about matters outside the record.[51]

Comment c advocates another loophole to plain meaning. Drawing from general contract law and other contexts, the reporters claim that "[s]ome courts that follow a plain-meaning rule also consider custom, practice, and usage when determining the plain meaning of insurance policies" where the policy is "between parties who can reasonably be expected to have transacted with knowledge of that custom, practice, or usage." The comments don't discuss the many courts that reject such evidence at the plain meaning stage,[52] and they don't note that use of such evidence is limited even by courts applying the contextual approach and considering all circumstances surrounding the formation of a contract. For instance, usage can add meaning to a contract only when it is not inconsistent with the agreement or manifestations of intent.[53]

The reporters make a final push to weaken the plain meaning rule and to give less importance to the language of the liability insurance policy itself by endorsing the idea that the "purpose" of a term may be used to determine its plain meaning.[54] They suggest that sources of such evidence might include "an affidavit of an expert in the trade or business, who is subject to deposition, but without the need for extensive document requests," together with "[d]iscovery necessary to impeach an opposing

party's evidence," which, comment c contends, "trial judges have the capacity to manage."[55] But courts have rejected that approach.[56] And these external sources—and the evidence necessary to test their trustworthiness—are plainly the same extrinsic evidence that the plain meaning rule forbids. Considering them would lead to contract uncertainty, diminish the availability of summary judgment in liability insurance cases, and reopen the slippery slope of consideration of extrinsic materials, creating a costly rule that would increase litigation and transaction costs—precisely what the RLLI rejected in adopting section 3's black-letter plain meaning rule.

Through the lens of the drafting history of the black-letter proposals for section 3, we see that the reporters aspired to dislodge the well-established plain meaning rule of policy interpretation, repeatedly urging different formulations and at times even misstating the existing common law. A close review of the comments and reporters' note to section 3 reveals that the RLLI still contains remnants of their aspirations, which were to allow extrinsic evidence to override a term's plain meaning, particularly if a policyholder might ascribe a different meaning to an insurance policy term.

Section 4: Ambiguity

The final section in RLLI Topic 1 is section 4. Under RLLI section 3(3), "[i]f a term does *not* have a plain meaning . . . that term is ambiguous and is interpreted as specified in § 4."[57] Section 4 went through a substantial transformation as the RLLI project progressed, from its original form in the principles project draft to its final form.

In the PLLI 2013 Draft, section 4 provided:

> (1) An insurance policy term is ambiguous if it does not have a plain meaning, as defined in § 3, when applied to the underlying liability claim in question.
> (2) An ambiguous insurance policy term is interpreted in light of all the circumstances to determine the meaning that a reasonable person in this policyholder's position would be most likely to ascribe to the term under the circumstances. The meaning must be one to which the language in the term is reasonably susceptible.
> (3) If the court is unable to determine the meaning of an insurance policy term using all permissible sources of meaning, the term is interpreted against the party that drafted or supplied it.
> (4) A standard-form insurance policy term is interpreted as if it were supplied by the insurer, without regard to which party actually supplied the term, unless a large commercial policyholder has agreed in writing to the contrary.

The first three subparts of the black-letter rule in section 4 of the principles draft came close to laying out the steps for resolving ambiguity: determining whether ambiguity exists; finding out if extrinsic evidence of the parties' contracting intent can resolve any ambiguity that may exist; and, if not, applying a contra proferentem rule of construction as a tiebreaker rule. This early formulation was tainted by the reporters' proposal to give force to the meaning that a reasonable person in the policyholder's position would attribute to a term rather than the plain meaning gleaned from the policy language itself,[58] but it otherwise correctly laid out the three-step process for resolving ambiguity. The fourth subpart was a gratuitous addition that likely originated from the faulty premise that all liability insurance policies are standard-form adhesion contracts in which policyholders have no bargaining power.[59] Subpart (3) already provided that an ambiguous term whose meaning could not be resolved by resort to relevant extrinsic evidence should be interpreted against the party that supplied it. There was no need to tip the scales and dictate that even a term supplied by the policyholder could be interpreted as if supplied by the insurer, unless otherwise agreed.

In the final RLLI, section 4 provides:

> (1) An insurance policy term is ambiguous if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy.
> (2) When an insurance policy term is ambiguous as defined in subsection (1), the term is interpreted against the party that supplied the term, unless that party persuades the court that a reasonable person in the policyholder's position would not give the term that interpretation.

This formulation is troubling for many of the same reasons as the original text, and it injects more uncertainty into how the RLLI handles ambiguity. Section 4 would reject the contra proferentem principle that an ambiguous term is construed against the party that supplied it if "a reasonable person in the policyholder's position would not give the term that interpretation." In other words, it skews the contra proferentem rule to afford special advantages to the policyholder. If this approach seems familiar, it should. It reintroduces the aspirational approach that the reporters proposed in the PLLI 2013 Draft for the section 3 plain meaning rule, where they suggested that "[a]n insurance policy term is to be given the meaning that a reasonable policyholder would ascribe to it under the circumstances." While the black-letter rule in RLLI section 3 was corrected, section 4 now essentially affords to an *ambiguous* term the meaning that a reasonable policyholder would ascribe to it under the circumstances. As attempted in earlier sections, this places at the center of insurance policy interpretation the policyholder's viewpoint rather than the parties' mutual intent—here, when a term is found to be ambiguous.

It is true that insurers usually supply policy language, and thus the contra proferentem rule often will mean that courts will give ambiguous terms in a liability insurance policy the meaning that a reasonable policyholder would attribute to them. But the common law does not uniformly support section 4's approach to resolving ambiguity. First, before any tiebreaker rule of construction such as contra proferentem is

applied, courts should attempt to resolve any ambiguity by resort to relevant extrinsic evidence.[60] Doing so allows the court to pursue the fundamental policy interpretation goal of determining the parties' intent. Further, many courts hold that contra proferentem—which means "against the one that proffers a term"[61]—leaves open the possibility that a term will be construed against the policyholder if it is the party that supplied it, and should have no application where an insurance policy is negotiated and not a contract of adhesion.[62] In contrast, section 4 would allow a term to be construed against the policyholder only if the policyholder supplied the term, the term provided by the policyholder is not a "standard-form term,"[63] and a reasonable person in the policyholder's position would not give a different meaning to it.

RLLI section 4 on ambiguous terms skews the contra proferentem rule to afford special advantages to the policyholder.

The comments to section 4 provide a tour de force of argument favoring a consumer- and policyholder-oriented understanding of the insurance mechanism and the insurance market. Ignoring the marketplace and regulatory constraints on insurers, the comments repeatedly treat liability insurance as a one-sided undertaking:

- Comment c adds that "[i]nsurers are presumed to be sophisticated and knowledgeable about matters of insurance, including the drafting history of standard-form terms, even if the particular insurer involved was not itself involved in the drafting of that term," but provides no presumptions against sophisticated commercial policyholders.
- Comment h rejects the sophisticated policyholder exception to the contra proferentem doctrine without citing any authority for doing so. Yet, as the New Jersey Supreme Court recently noted, many policyholders are sophisticated commercial entities whose comparative bargaining strength does not merit the application of a consumer-protective doctrine like contra proferentem.[64]
- Comment *l* provides that a term that the policyholder supplied should *not* be construed against that policyholder if it is a "standard-form term taken from an insurance policy drafted by another insurer."[65] Section 1(13) defines "standard-form term" as "a term that appears in, or is taken from an insurance policy form (including an endorsement) that an insurer [apparently meaning *any* insurer, not *the* insurer] makes available for a non-predetermined number of transactions in the insurance market."

The section 4 comments retain and advance the one-sided policyholder perspective that existed in the earliest versions of the principles project. They show how the RLLI heavily favors the protection of all insureds, even the most powerful and sophisticated policyholders, without giving either appropriate weight to actual policy terms or recognition to the regulatory oversight and commercial market realities of the liability insurance system.

Conclusion

This review of the RLLI's drafting history provides important insight on why the restatement project is controversial and how it incorporates hidden bias in articulating insurance law rules. The rules for insurance policy interpretation are the ground rules for the entire RLLI project. Bias in those rules therefore strikes the heart of the ALI's work on the RLLI, escalating the potential for this restatement to adversely impact insurers and the insurance system. ◄

Notes

1. A common critique of the restatement is that it "fails to accurately 'restate' the law." *See, e.g.*, Michael F. Aylward, *The Plain-Meaning Problem: Should the American Law Institute Restate or Rewrite the Rules for Interpreting Insurance Policies?*, 59 For Def. 22 (Sept. 2017); Hayes Ellett et al., *The "Restatement" of Liability Insurance Law?*, 35 Ala. Def. Law. J. (2019); Glenn G. Lammi, *Restate or Rewrite? Stark Choice Faces ALI Leaders on Liability Insurance Law Project*, Forbes (Jan. 16, 2018); A. Hugh Scott, *ALI's Proposed Insurance Law Restatement: A Trojan Horse?*, Law360 (Feb. 9, 2017), https://www.law360.com/articles/889483.

2. *E.g.*, Lisa A. Rickard, *ALI Shouldn't Inject Opinion into Its Interpretation of Consumer and Insurance Law*, Nat'l L.J. (Jan. 17, 2018), https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/17/ali-shouldnt-inject-opinion-into-its-interpretation-of-consumer-and-insurance-law; *see also* Scott E. Harrington, *Economic Perspectives on the Restatement of the Law on Liability Insurance Project* (Mar. 20, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941892 (noting that RLLI rules "risk significant disruption of current law with uncertain, unintended, and adverse consequences on liability insurance markets in the form of higher prices, less availability of coverage, reductions in policy limits purchased, aggravation of the judgment proof problem, and increased adverse selection and moral hazard").

3. *See* Am. Law Inst., Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work 13, 15 (rev. ed. 2015) [hereinafter ALI Style Manual] ("Principles are generally written as recommendations . . . ."). The ALI council first submitted Principles of the Law of Liability Insurance

(Am. Law Inst., Tentative Draft No. 1, Apr. 9, 2013) (PLLI 2013 Draft) to the members for consideration at the ALI's 90th annual meeting on May 20–22, 2013.

4. ALI Style Manual, *supra* note 3, at 13.

5. Victor E. Schwartz & Christopher E. Appel, *The American Law Institute at a Crossroads: With Power Comes Responsibility*, Nat'l Found. for Jud. Excellence 2, 3 (May 22, 2017), https://sites-shb.vuture.net/40/161/landing-pages/pp-alert-5.25.17---article.asp?sid=blankform.

6. ALI Style Manual, *supra* note 3, at 3–4.

7. *E.g.*, George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 Geo. Mason L. Rev. 635, 636 (2017) ("Although the Reporters have toned down some of their earlier aspirations reflected in the partial Principles draft, again in the proposed Restatement, and yet again in the Restatement Discussion Draft, it remains a strikingly pro-policyholder statement, not generally reflective of the law in the various U.S. jurisdictions." (footnote omitted)).

8. There are numerous examples of how the reporters' early aspirational ideas advocated in the principles project drafts have been retained. Two prominent examples are: (1) PLLI 2013 Draft section 14 sought to impose vicarious liability on an insurer for "a breach of professional obligation by defense counsel and related service providers in relation to a claim"—a controversial proposition that underlies the final RLLI section 12, which now proposes insurer tort liability for negligent selection of counsel; and (2) PLLI 2013 Draft section 21 included the reporters' proposal that an "ordinary breach of the duty to defend" should result in an insurer being estopped from contesting coverage for a claim—a concept unsupported by the common law that the reporters later transferred to RLLI section 50(2) and comment c, where they now propose applying forfeiture as a penalty for bad faith failure to defend despite negligible support and contrary authority.

9. Restatement of the Law, Liability Insurance § 2 cmt. a (Am. Law Inst. 2019).

10. *Id.* § 2 cmt. c (stating that the objectives of policy interpretation include "effecting the dominant protective purpose of insurance; facilitating the resolution of insurance-coverage disputes and the payment of covered claims; encouraging the accurate description of insurance policies by insurers and their agents; and providing clear guidance on the meaning of insurance policy terms in order to promote, among other benefits, fair and efficient insurance pricing, underwriting, and claims management"). The first-listed among these four objectives is symbolic of the bias found in the RLLI's proposed policy interpretation rules.

11. Principles of the Law of Liability Insurance (Am. Law Inst., Tentative Draft No. 1, Apr. 9, 2013).

12. The primary purpose of insurance contract interpretation has long been to effectuate the parties' mutual intention by looking at the contract's written provisions. *E.g.*, McEvoy v. Sec. Fire Ins. Co. of Baltimore, 73 A. 157 (Md. 1909). The object is to grant the policyholder the coverage that it paid for—no more, no less.

13. Restatement of the Law, Liability Insurance § 2 cmt. d (Am. Law Inst. 2019).

14. Nat'l Ass'n of Ins. Comm'rs, State Insurance Regulation: History, Purpose and Structure, https://www.naic.org/documents/consumer_state_reg_brief.pdf (last visited Oct. 12, 2020).

15. For instance, property/casualty policy forms must be submitted for approval under New York insurance law, which states that "no policy form shall be delivered or issued for delivery unless it has been filed with the superintendent and either he has approved it, or thirty days have elapsed and he has not disapproved it as misleading or violative of public policy." N.Y. Ins. Law § 2307(b).

16. For instance, the New York superintendent of insurance used that state's form approval standard to reject the use of terrorism exclusions in property/casualty insurance policies as "misleading and/or against public policy" prior to the enactment of the federal Terrorism Risk Insurance Act of 2002. *See* N.Y. Ins. Dep't, Circular Letter No. 25 (Dec. 23, 2002).

17. *E.g.*, N.Y. Ins. Law § 3420. Proscribed terms are widely set out in statutes governing automobile insurance. *E.g.*, Tex. Ins. Code Ann. §§ 1952.001 *et seq*.

18. Restatement of the Law, Liability Insurance § 2 cmt. i (Am. Law Inst. 2019) (contending that the fact of approval of a policy form "has no bearing on whether a term in the policy has a plain meaning or is ambiguous, or whether the plain meaning, if there is one, is the proper interpretation of the term").

19. *See* Terra Indus., Inc. v. Commonwealth Ins. Co. of Am., 981 F. Supp. 581, 591 (N.D. Iowa 1997) (addressing a policy provision mandated by law, the court noted that "one might say that in such circumstances, the policy is one of 'adhesion' as to *both* the insurer and the insured").

20. *See* RIMS, https://www.rims.org (last visited Oct. 12, 2020).

21. *E.g.*, Autumn Heisler, *Gallagher Power Broker John Chino Builds Programs Based in Trust and Knowledge*, Risk & Ins. (June 19, 2020), https://riskandinsurance.com/gallaghers-john-chino-builds-programs-based-on-trust-and-knowledge (recognizing that brokers "work tirelessly in assisting in creating strategies alongside their clients, using technical skills, actuarial and statistical data, a deep understanding of the market and communication").

22. *BI Top 100*, Bus. Ins. (Jan. 1, 2020), https://www.businessinsurance.com/article/20190103/NEWS06/912325911/Business-Insurance-2018-Data-Rankings-BI-Top-100-brokers-US-business.

23. Autumn Heisler, *84 Insurance Brokers You Haven't Heard the Last Of*, Risk & Ins. (May 15, 2020), https://riskandinsurance.com/84-insurance-brokers-you-havent-heard-the-last-of. *Risk & Insurance* magazine recently named 190 brokers as 2020 Power Broker winners and finalists, 84 of whom were under the age of 40, making them *Risk & Insurance* Rising Stars.

24. *E.g.*, Aon, Insurance for M&A: A Coming of Age and an Exciting Future Ahead 3 (2019), https://aoncomauthoring.blob.core.windows.net/aoncom2017media/aon.com/media/aon-inpoint/transactional-liability.pdf ("Aon has led the way in developing bespoke insurance solutions to meet the M&A industry's needs for the past 20 years."); *Construction*, Marsh, https://www.marsh.com/uk/industries/construction-insurance.html (last visited Oct. 12, 2020) (offering "[b]espoke policy wordings and programme design").

25. *See* Eric J. Dinallo & Keith J. Slattery, ALI's Restatement of the Law Liability Insurance: Regulatory Considerations 4 (Jan. 17, 2017), https://www.namic.org/pdf/insbriefs/ali_whtppr.pdf.

26. As the final RLLI itself acknowledges, "a substantial majority of courts in insurance cases have adopted a plain meaning rule."

Restatement of the Law, Liability Insurance § 3 cmt. a (Am. Law Inst. 2019). Under the plain meaning rule, courts examine the insurance contract on its face, giving the language used its plain meaning. *E.g.*, Dimmit Chevrolet, Inc. v. Se. Fid. Ins. Corp., 636 So. 2d 700, 705 (Fla. 1993).

27. Restatement of the Law, Liability Insurance § 3 (Am. Law Inst., Proposed Final Draft, Mar. 28, 2017).

28. *See* Restatement of the Law, Liability Insurance § 3(2) (Am. Law Inst., Preliminary Draft No. 4, Aug. 4, 2017).

29. Phil Graham & Cody Hagan, *ALI Insurance Restatement Oversteps Its Boundaries*, Law360 (Feb. 21, 2018), https://www.law360.com/articles/1014356/ali-insurance-restatement-oversteps-its-boundaries.

30. *E.g.*, Gendzier v. Bielecki, 97 So. 2d 604, 609 (Fla. 1957). *See generally* 1 Barry R. Ostrager & Thomas R. Newman, Insurance Coverage Disputes § 1.01[b] (15th ed. 2010) ("[I]f a court concludes that the policy language is ambiguous, it must look beyond the language of the policy to discern the intent of the parties at the time the contract was made.").

31. *See* Restatement of the Law, Liability Insurance § 3 cmt. a (Am. Law Inst., Preliminary Draft No. 4, Aug. 4, 2017); *see also* Restatement of the Law, Liability Insurance § 3 cmt. a (Am. Law Inst., Council Draft No. 4, Dec. 4, 2017).

32. *See, e.g.*, Ellett et al., *supra* note 1; Jeff Sistrunk, *5 Controversial Rules in the ALI's Insurance Project*, Law360 (May 18, 2018), https://www.cov.com/-/media/files/corporate/publications/2018/05/5_controversial_rules_in_the_alis_insurance_law_project.pdf.

33. Graham & Hagan, *supra* note 29.

34. *Id.*

35. *Id.*; R. Mark Mifflin & Donald Patrick Eckler, *When "Reasonable" Is Unreasonable: ALI's Proposed Final Draft of the Restatement of Law of Liability Insurance*, 27 IDC Q. (2017), https://cdn.ymaws.com/www.idc.law/resource/resmgr/quarterly_v26-27/27.3.12.pdf (noting that under the presumption, "every policy provision would be subject to extrinsic evidence based upon what a policyholder 'reasonably expected' and then what a court thinks is more reasonable").

36. A. Hugh Scott, *Why Criticism of ALI's Insurance Restatement Is Valid*, Law360 (May 10, 2017), https://www.law360.com/articles/922277/why-criticism-of-ali-s-insurance-restatement-is-valid.

37. *See* Letter from the AIA and NAMIC to the ALI (May 11, 2017). Those concerns were echoed in a letter from the Property Casualty Insurers Association of America (PCI), which cautioned that "several Restatement sections continue to set forth aspirational statements of the law as opposed to the most sound existing state common law rules on a topic." *See* Letter from the PCI to the ALI (May 1, 2017); *see also* Letter from the NYIA to the ALI (May 15, 2017); Letter from John E. Cuttino, President, DRI, to the ALI (May 5, 2017); Letter from Louis C. Long, President, Pa. Def. Inst., to the ALI (May 24, 2017); Letter from R. Mark Mifflin, President, Ill. Ass'n of Def. Trial Couns., to the ALI (May 12, 2017).

38. Letter from the AIA and NAMIC to the ALI, *supra* note 37.

39. 2016 A.L.I. Proc. 62–65.

40. *Id.*

41. *See* Restatement of the Law, Liability Insurance § 3 (Am. Law Inst., Proposed Final Draft, Mar. 28, 2017) ("The Presumption in Favor of the Plain Meaning of Standard-Form Insurance Policy Terms").

42. Aylward, *supra* note 1.

43. *See* Michael F. Aylward, The American Law Institute's New Liability Insurance Restatement (2018), https://www.morrisonmahoney.com/writable/files/maylward-ali_restatement_summary_2018.pdf.

44. *Id.*

45. Aylward, *supra* note 1.

46. *See* Letter from Peter Y. Solmssen to ALI Council Members (Jan. 4, 2018).

47. Tenn. H.B. 1977, 110th Gen. Assemb. (2018) ("Tennessee Code Annotated, Section 56-7-102, is amended by . . . adding the following as new subsections: (b) A policy of insurance is a contract and the rules of construction used to interpret a policy of insurance are the same as any contract. (c) A policy of insurance must be interpreted fairly and reasonably, giving the language of the policy of insurance its ordinary meaning."). Other state legislatures also have rejected the RLLI. *E.g.*, Ark. Code Ann. § 23-60-112; Mich. Comp. Laws § 500.3032; N.D. Cent. Code § 26.1-02-34; Ohio Rev. Code Ann. § 3901.82; Tex. Civ. Prac. & Rem. Code Ann. § 5.001; *see also* Ind. H.R. Con. Res. 62, 2019 Gen. Assemb. (2019); Ky. H.R. Res. 222, 2018 Gen. Assemb. (2018); La. S. Res. 149, 2019 Leg. (2019).

48. *See* Letter from Carolyn Kuhl, Judge, to ALI Reporters (Jan. 16, 2018) ("A few members of the Council have had an email discussion about whether Section 3 should or should not take a position with respect to plain meaning vs. latent ambiguity vs. extrinsic evidence admission. I have come to the conclusion that it is best to leave this issue to state contract law, given that every state has its own contract interpretation guidelines with respect to whether and when extrinsic evidence should be admissible on the issue of whether a contract term is ambiguous.").

49. Victor E. Schwartz & Christopher E. Appel, *Restating or Reshaping the Law?: A Critical Analysis of the Restatement of the Law, Liability Insurance*, 22 U. Pa. J. Bus. L. 718, 731 (2020).

50. *See* Cyrus W. Haralson & Christina A. Culver, *Texas Law and the Restatement of the Law of Liability Insurance: An Initial Comparison of Blackletter Principles*, 17 J. Tex. Ins. L. 3, 15 (Spring 2019) (noting that "[w]hile Texas blackletter law and Restatement blackletter provisions largely match, the Restatement Comments on interpretation suggest conflicting views of the goal of interpretation"). Haralson and Culver point out that section 2 comment c "identifies several other 'objectives of liability-insurance-policy interpretation,'" contrary to Texas law, which has "the primary concern . . . to ascertain the intentions of the parties as expressed by the plain meaning of the policy's terms." *Id.*

51. *See generally* Amy R. Paulus & Henry T.M. LeFevre-Snee, *Restatement of Law of Liability Insurance: The Plain-Meaning Rule*, Clausen Miller (Sept. 19, 2018), https://www.clausen.com/restatement-of-law-of-liability-insurance-the-plain-meaning-rule.

52. *E.g.*, Haney v. USAA Cas. Ins. Co., 331 F. App'x 223, 229 (4th Cir. 2009) ("With no ambiguity, evidence of historical practice or custom is not admissible to create a contractual obligation . . . ."); Farmland Indus. Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,

359 F. Supp. 2d 1144, 1152 (D. Kan. 2005) ("Only when an ambiguity exists, however, may a court resort to extrinsic evidence, such as industry custom, to show intent."); Int'l Multifoods, Inc. v. Commercial Union Ins. Co., 98 F. Supp. 2d 498, 503 (S.D.N.Y. 2000) (finding that allowing custom and usage to create ambiguity where none exists in the plain language denigrates the contract and unsettles the law); Larson v. Composting Concepts, Inc., No. A07-976, 2008 WL 2020489, at *3 (Minn. Ct. App. May 13, 2008) (noting that "extrinsic evidence may be considered only if the terms to be interpreted are ambiguous"; rejecting arguments based on, among other things, more specific ISO exclusion that could have been used); U.S. Fid. & Guar. Co. v. St. Elizabeth Med. Ctr., 716 N.E.2d 1201, 1208–09 (Ohio Ct. App. 1998) (improperly considering extrinsic evidence regarding party's intent, prior policies, and course of conduct).

53. *E.g.*, Atl. Richfield Co. v. Good Hope Refineries, Inc., 604 F.2d 865, 875 (5th Cir. 1979); Heiden v. Gen. Motors Corp., 567 S.W.2d 401, 405 (Mo. Ct. App. 1978); State *ex rel.* H. K. Porter Co. v. Nangle, 405 S.W.2d 501, 504 (Mo. Ct. App. 1966).

54. Restatement of the Law, Liability Insurance § 3 cmt. e (Am. Law Inst. 2019).

55. *Id.* § 3 cmts. b, c & e.

56. Cincinnati Ins. Co. v. Becker Warehouse, Inc., 635 N.W.2d 112, 119–20 (Neb. 2001) (rejecting case that relied on supposed history and purpose of exclusion to overcome plain meaning, finding it "unnecessary and inappropriate to look beyond the 'bare words of the exclusion'"); Sellie v. N.D. Ins. Guar. Ass'n, 494 N.W.2d 151, 157, 158 n.3 (N.D. 1992) (erring by relying on expert opinion regarding insurance industry understanding of term rather than plain meaning).

57. Restatement of the Law, Liability Insurance § 3(3) (Am. Law Inst. 2019) (emphasis added).

58. *See* Letter from Frank E. Borowsky Jr. to ALI Reporters (Aug. 3, 2017).

59. *See, e.g.*, Baxter Int'l, Inc. v. Am. Guar. & Liab. Ins. Co., 861 N.E.2d 263 (Ill. App. Ct. 2006) (noting that sophisticated insured had substantial bargaining power); Newport Assocs. Phase I Developers Ltd. P'ship v. Travelers Cas. & Sur. Co., No. A-5543-11T1, 2015 N.J. Super. Unpub. LEXIS 103, at *31–32 (App. Div. Jan. 16, 2015) (noting that the policies at issue "covered commercial risks procured through a broker, and thus involved parties on both sides of the bargaining table who were sophisticated with regard to insurance").

60. *E.g.*, Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983) ("[*C*]*ontra preferentem* is used only as a matter of last resort, after all aids to construction have been employed but have failed to resolve the ambiguities . . . . To conclude otherwise would require every ambiguously drafted policy to be automatically construed against the insurer . . . ."); E. Air Lines, Inc. v. Ins. Co. of Pa., No. 96 CIV. 7113 (MGC), 2001 WL 1111514, at *5 (S.D.N.Y. Sept. 21, 2001) (noting that "each party has submitted extrinsic evidence to support its interpretation of the Insurance Contract, creating an issue of fact that precludes application of contra proferentem at the summary judgment stage").

61. The words literally mean "against the offeror." U.S. Fire Ins. Co. v. Gen. Reinsurance Corp., 949 F.2d 569, 573–74 (2d Cir. 1991). When the doctrine is applied, ambiguous provisions are to be construed against the drafter of a contract. *Id.*

62. *E.g.*, Newport Assocs. Dev. Co. v. Travelers Indem. Co. of Ill., 162 F.3d 789 (3d Cir. 1998) (ruling that where the insurance contract is negotiated, jointly drafted, or drafted by the insured, the doctrine of contra proferentem should not be invoked); E. Associated Coal Corp. v. Aetna Cas. & Sur. Co., 632 F.2d 1068 (3d Cir. 1980) (finding contra proferentem not applicable where sophisticated insured negotiated policy terms); Vought Aircraft Indus., Inc. v. Falvey Cargo Underwriting, Ltd., 729 F. Supp. 2d 814, 824 (N.D. Tex. 2010) (finding that where capable insured contributes to drafting the agreement, the policy is not construed against the insurer); Am. Home Assurance Co. v. Merck & Co., 386 F. Supp. 2d 501, 512 (S.D.N.Y. 2005) (finding that contra proferentem "does not apply where, as here, 'large corporations, advised by counsel and having equal bargaining power, are the parties to a negotiated policy,' and where Merck itself may have supplied some of the critical language in the [p]olicy" (citation omitted)); RTC Mortg. Trust 1994 N-1 v. Fid. Nat'l Title Ins. Co., 58 F. Supp. 2d 503, 531 (D.N.J. 1999) (finding that where the policy "was the product of negotiation, *i.e.*, where the evidence establishes that the insurance policy was not a contract of adhesion, the court should not apply the rule of strict construction against the insurer" (quoting Stewart Title Guar. Co. v. Greenlands Realty Co., 58 F. Supp. 2d 370, 381 (D.N.J. 1990)).

63. Under RLLI section 1(13), a "standard-form term" is still broadly defined as "a term that appears in, or is taken from an insurance policy form (including an endorsement) that an insurer [apparently meaning *any* insurer, not *the* insurer] makes available for a non-predetermined number of transactions in the insurance market." This definition would encompass virtually all terms in traditional policy form contracts. While this definition might appear neutral on its face, section 4 comment *l* endorses the principle that a term supplied by a policyholder may nevertheless *not* be construed against that policyholder if it is a "standard-form term taken from an insurance policy drafted by another insurer." This idea has been rejected by a number of courts. *See, e.g.*, Dare Invs., LLC v. Chi. Title Ins. Co., No. 10-6088 (DRD), 2011 U.S. Dist. LEXIS 130288, at *20 (D.N.J. Nov. 10, 2011).

64. Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co., 160 A.3d 1263, 1270–71 (N.J. 2017).

65. *See supra* note 64. Many courts disagree with the reporters' approach. Indeed, even where the insured did not select or negotiate a specific policy term, courts have declined to apply contra proferentem to polices that are the product of the parties' negotiation. *E.g.*, *Dare Invs.*, 2011 U.S. Dist. LEXIS 130288, at *20–21 ("Indeed, a sophisticated insured with bargaining power may strategically choose to negotiate or draft certain policy provisions but not others. Thus, limiting the inquiry to whether the insured negotiated or participated in drafting a particular policy provision, rather than the policy as a whole, would create a perverse incentive in the negotiating process for sophisticated insureds to deliberately refrain from negotiating or drafting particular terms—despite fully understanding their implications—only so that they can take advantage of the doctrine of reasonable expectations and ensure that those terms are construed against the insurer.").