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What is the Meaning of "Plain Meaning"

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I. INTRODUCTION: PLAIN MEANING: TRADITIONAL, DOMINANT, UBIQUITOUS— BUT STILL INSUFFICIENTLY EXPLAINED AND UNDER-THEORIZED

The term "plain meaning," as well as its cousins "ordinary" meaning, "clear" text, "unambiguous language," and the like have been with us for decades, perhaps even centuries. But both legal decisions and commentators nonetheless continue to lack a uniformly clear ("plain," if you will) understanding of the concept. Notwithstanding this lack of uniformity, the plain meaning approach not only persists but has recently attracted increased attention in the wake of the American Law Institute's Restatement of the Law of Liability Insurance ("RLLI"), which both endorses a

"plain-meaning" approach to the interpretation of insurance policies and bravely seeks to define it.[1]

Section 3 of the RLLI is largely a victory for textualists, but not as resounding a victory as some sought. Critics regard the RLLI definition as insufficiently faithful to the concept of plain meaning and have argued for a more strictly textualist approach to policy construction, rather than what they regard as a sub silentio contextualist approach unduly receptive to extrinsic evidence.[2]

However, even if the contextualists had prevailed in the RLLI, this would hardly have diminished the force of the plain meaning concept in existing and continuing caselaw. For example, LEXIS contains more than 2,700 decisions using plain meaning nomenclature issued during the first half of 2021 alone.[3] Many of these are statutory interpretation opinions but, even if statutory and contractual interpretation could be neatly separated (my thesis is that they should not be), it is clear that plain meaning textualism is indeed the dominant approach to construction of contracts. As reflected in Appendix A, a significant number of states have statutes mandating a plain meaning approach. Although precise classification of the states according to their embrace of plain meaning textualism is impossible due to variance in cases, court composition, and inconsistency in the invocation of the concept, there seems little doubt that most states follow a plain meaning concept or "rule."

But identifying the supremacy of the plain meaning rule does not answer the question of what exactly it means to take a plain meaning approach to the language of contract documents, nor does it explain the methodology used by courts in discerning plain meaning or its absence (in which case, even textualists agree that extrinsic and contextual evidence is relevant in resolving unclear text). Perhaps the term has become merely a buzzword or a veneer placed upon an already decided result. A deeper analysis is required to determine what exactly is meant by the term "plain meaning" other than what a judge in a particular case thinks it means. As discussed below, Courts are often depressingly tautological in applying the plain meaning rule/doctrine/approach: the meaning of insurance policies (and other documents, including statutes and regulations) is plain when the

1. *See* RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 3 (AM. L. INST. 2019) (including Comments and Reporters' Note) [hereinafter RLLI].

2. The debate over Section 3 as far from the only controversy involved in the development of the RLLI, which featured vigorous debate between insurer and policyholder advocates. *See* Jeffrey W. Stempel, *Hard Battles over Soft Law*, 69 CLEVE. ST. L. REV. 605 (2021).

3. A search date limited to 2021 with the single search term of "plain meaning," conducted July 24, 2021, produced 2,754 responsive citations, 276 of which were decided in July, leaving a total of 2,478 for the first half of the year. If "ordinary meaning" and "clear meaning" are included in the search, the number of cases jumps to nearly 4,000.

court says it is. And meaning is plain when a court is confident that its understanding of a term's meaning is the only reasonable one.

As a review of caselaw reflects, courts generally do not "unpack" their reasoning in reaching conclusions as to the plain meaning of text. Although judicial determinations are almost certainly influenced by sub silentio contextual factors such as the document in question (e.g., statute, contract, letter), the judge's own background (linguistic and otherwise), experience, jurisprudence, ideology, and circumstances surrounding an insurance or other dispute, these factors almost never are expressly discussed by courts applying a plain meaning rationale to decide a case.

The inability to adequately describe how to determine "plain meaning" may result not from intellectual failure or lack of effort, but because the task itself admits of no satisfactory answer. Rather than accepting this reality as an inherent drawback of an otherwise efficacious doctrine, bench and bar would be better off endorsing a broader contextual approach akin to that applied by the Second Contracts Restatement and California courts, which is relatively receptive to non-textual indicators of meaning. As discussed below, courts already lean away from or even dodge plain meaning textualism to avoid problematic or absurd outcomes, but typically do so without expressly acknowledging their case-by-case rejection of the plain meaning approach. In addition to providing greater transparency, express acknowledgment and appreciation of extra-textual interpretative factors would be, contrary to the arguments made by textualists, at least as effective as the textualist approach in restraining application of a judge's personal preferences.

II. PLAIN MEANING SYNTHESIZED—SORT OF

A. *Deciphering Secondary Sources and Separating Plain Meaning Textualism from Kindred Concepts*

Courts divide over their approach to contract interpretation and the role of extra-textual evidence of contract meaning. Even determining the prevailing rule in a particular jurisdiction can be difficult. For example, in Nevada one can find precedent that seems consistent with the contextual approach[4]

4. *See, e.g.*, Galardi v. Naples Polaris, LLL, 301 P.3d 364 (Nev. 2013) (even though contract text found to be unambiguous, trial court did not err by considering trade usage and industry custom in construing provision); Powell v. Liberty Mut. Fire Ins. Co., 252 P.3d 668 (Nev. 2011) (refusing to give broad or literal reading to earth movement exclusion in homeowner's policy and finding term ambiguous in light of context); Hilton Hotels Corp. v. Butch Lewis Prods., 808 P.2d 919, 922 (Nev. 1991) (approving jury instruction permitting consideration of "all of the circumstances leading to the contract, such as negotiations and statements to the parties"); Moore v. Prindle, 391 P.2d 352, 354 (Nev. 1964) (endorsing practical construction of contracts where the interpretation of the parties reflected by their conduct is "always persuasive, if not conclusive") (citation omitted).

of the ALI's Second Contracts Restatement[5] as well as precedent that takes a more decidedly textualist approach resistant to consideration of information outside the four corners of the contract documents.[6]

Many commentators have summarized the plain meaning approach in ways that are essentially unified on the core concept but become increasingly less helpful when applied to particular cases in light of judicial variance (among jurisdictions) and inconsistency (within jurisdictions) regarding application of the concept. The search for the meaning of plain meaning—in both secondary sources and in caselaw—is also complicated by a tendency to co-mingle the concepts of ambiguity, context, extrinsic evidence, the parol evidence rule, along with the acceptable hierarchy and boundaries of the tools used for supplementing textual analysis.

For example, one leading treatise (my personal favorite despite its age and one that I assign in first-year Contracts) is informative but, to a degree, it mashes its discussion of plain meaning into its discussion of the parole evidence rule.[7] While not necessarily "wrong," neither is this combination and categorization required. What constitutes acceptable material for consideration of contact meaning in the parol evidence rule context is different than consideration of information other than document text when determining the meaning and legal consequences of the text.

5. Restatement (Second) Contracts (Am. L. Inst. 1981) [hereinafter R2K].

6. *See, e.g.*, William v. United Parcel Servs., 302 P.3d 1144, 1147 (Nev. 2013) ("When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words") (quoting Cromer v. Wilson, 225 P.3d 788, 790 (Nev. 2010) ("In the absence of an ambiguity, we do not resort to other sources, such as legislative history.")); Kaldi v. Farmers Ins. Exch., 21 P.3d 16, 21 (Nev. 2001) (noting that where "a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning") (quoting Geo. B. Smith Chem. v. Simon, 555 P.2d 216, 216 (Nev. 1976)); Siggelkow v. Phoenix Ins. Co., 846 P.2d 303, 304 (Nev. 1993) (contract terms should be "viewed in their plain, ordinary and popular sense"); Reno Club v. Young Inv. Co., 182 P.2d 1001, 1015–16 (Nev. 1947) (in the absence of clear evidence of a different intention, words must be presumed to have been used in their ordinary sense, and given the meaning usually and ordinarily attributed to them; finding option agreement to be "in ordinary and plain language" with a "meaning [that] seems clear"); *see also* Nevada State Democratic Party v. Nevada Republican Party, 256 P.3d 1, 4 (Nev. 2011) ("[W]hen a statute is facially clear, a court should not go beyond its language in determining its meaning."); Lowe Enters. Residential Ptnrs., L.P. v. District Court, 40 P.3d 405, 412 (Nev. 2002) (noting that where statute's language is "plain and unambiguous" and "its meaning clear and unmistakable," there "is no room for construction" or consideration of material beyond the statutory language itself. But where a statute is ambiguous, the plain meaning rule has no application); Nev. Mining Ass'n v. Erdoes, 26 P.3d 753, 758 (Nev. 2001) (using "clear statement of [legislative] intent" to resolve "any ambiguity inherent" in statutory language at issue regarding meaning of "120 calendar days" following commencement of legislative session for determining deadline for conclusion of session; adjusting for daylight savings time to conclude that two bills were enacted before expiration of session).

7. E. Allan Farnsworth, Contracts §§ 7.6–7.13 (4th ed. 2004); *see also* RLLI, *supra* note 1, § 3, cmt. I (distinguishing parol evidence analysis from plain meaning interpretation by noting that "[a]lthough the plain-meaning rule applied in insurance-law cases and the parol-evidence rule have underlying conceptual similarities, the two rules are not identical").

Courts (and lawyers generally) tend to erroneously equate the terms "parol evidence," "extrinsic evidence," and "context" or "contextual evidence" or "information." Parol evidence, properly understood, refers only to evidence of pre-contract discussions proffered to vary the written terms of the contract documents ultimately accepted ("agreed" to) by the parties. The idea behind the parol evidence rule is that a party dissatisfied with some aspect of the memorialized contract should not be able to contradict the written terms of the deal by arguing that they are inaccurate based on conversations that took place prior to finalization of the memorialization.

Unless the policyholder can avoid the parol evidence rule through one of its recognized exceptions (e.g., promissory or equitable estoppel, evidence negating an integration clause, concessions of non-integration by the opposing party), pre-memorialization discussion is not admissible unless the contractual language is sufficiently ambiguous on its face. In that circumstance, courts view such additional information as not contradicting the written instrument but rather clarifying an unclear term. So understood, parol evidence is a relatively narrow doctrine as well as one rather easily avoided, perhaps because—despite its venerability—it is frequently criticized and its rationale (that a silver-tongued liar or fabulist poses great danger of misleading lay jurors than hearing additional information about the transaction) is increasingly seen as flawed.

The relative effectiveness of contract and commercial law in Europe and in international transactions in spite of the absence of a parole evidence rule in continental law as well as in the Convention on the International Sale of Goods ("CISG") and in the UNIDROIT Principles of International Commercial Contracts ("PICC") also undermines the purported necessity of the parol evidence rule. An American may prefer Anglo-American contract law to these other bodies of law, but even the most ardent exceptionalist/chauvinist would have difficulty maintaining (at least with a straight face) that these other bodies of law produce terrible results stemming from tribunals beguiled by false testimony contradicting contract documents.

Of course, outside the United States, lay juries are seldom involved in deciding contract disputes. Even in the jury-friendly United States, lay-person opinion has limited impact on contract construction because this is regarded as a matter of law for the judge rather than a matter of fact for the jury. In addition, U.S. law has, for roughly the past 30 years, increasingly empowered judges to decide disputes without input from juries through doctrinal developments making summary judgment and motions to dismiss easier to obtain.[8]

8. *See, e.g.*, Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp, 475 U.S. 574 (1986) (summary judgment available where court majority deems plaintiff's economic theory unpersuasive); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (heightened burden of proof

One might therefore, limit the term "parol evidence" to use of pre-memorialization discussions or communications of the parties that contradicts the written contract terms. "Extrinsic evidence" would then describe evidence beyond the actual terms of the contract bearing on its meaning or interpretation. This could include post-memorialization communications or conduct, including course or performance or course of dealing regarding the transaction as well as "context." Context, in turn, can be understood either as its own category or a subset of extrinsic evidence providing background orientation that is helpful to understanding the purpose of a transaction, the objectives sought by the parties, the intent of the parties, and other factors that might reasonably bear upon interpretation. For example: What is the custom and practice of the industry/activity/field in question? Was the transaction made during peacetime or wartime? During a period of high inflation or deflation? During booms times or a recession? At a time of scarcity or market glut?

Considering the many permutations of non-textual evidence should be helpful but perhaps provides too much data to be reliably, consistently and expeditiously processed by courts. Undoubtedly, this explains some of the attraction of a more textually oriented interpretative approach that limits the amount of information that may be considered.

B. *Treatise Treatment of Plain Meaning*

A perhaps overly obvious avenue for discerning what is meant by plain meaning is to review scholarly commentary, particularly that of treatises or similar sources that have the mission of synthesizing legal concepts and judicial opinions. While not a dead end, neither is this avenue much of a thoroughfare.

1. Farnsworth

The Farnsworth treatise, despite perhaps overly co-mingling the parol evidence and extrinsic evidence concepts, provides useful summary of the concept of plain meaning and opposing views of the concept.

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association with defamation action imposes greater burden on plaintiff opposing summary judgment); Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (affidavits not required for successful summary judgment motion); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (allegations of complaint must be "plausible" to avoid Rule 12(b)(6) dismissal); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (plausibility can be assessed via judicial experience and "common sense" precluding jury consideration of disputed facts); *see also* Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987) (Court's 1986 summary judgment trilogy made its pre-trial disposition more likely); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982 (2003) (writing prior to *Twombly* and *Iqbal*, treatise author concludes that trilogy and other civil procedure developments have resulted in excessive pre-trial disposition).

> The essence of a plain meaning rule is that there are some instances in which the meaning of language, when taken in context, is so clear that evidence of prior negotiations cannot be used in its interpretation. If this is true, a court must make a preliminary determination that the meaning of the language in dispute falls short of that degree of clarity before admitting such evidence to interpret it. Can the meaning of language ever be that clear? Corbin thought not: "No parol evidence that is offered can be said to vary or contradict a writing unit by process of interpretation the meaning of the writing is determined. On this view, the plain meaning rule should be discarded and evidence of prior negotiations freely admitted with no preliminary determination as to clarity.[9]

Farnsworth describes the process of applying the plain meaning rule:

> Under a plain meaning rule there is a two-stage process. In the first stage the court makes a preliminary determination of whether the language in dispute lacks the required degree of clarity before going on to the second stage, that of interpretation. Only if the court determines that the language lacks this required degree of clarity will evidence of prior negotiations be admitted during the second stage of the purpose of interpretation. A question than arises as to whether evidence of prior negotiations is admissible during the first stage to aid the court in its preliminary determination, and it is this question about which controversy has swirled. Can evidence of prior negotiations be used to show whether contract language lacks the required degree of clarity, whether it is "ambiguous" as opposed to "plain"?[10]

Speaking directly to interpretation of text unencumbered by the parol evidence issue, Professor Farnsworth observed that

> [j]udges are fond of asserting that contract interpretation is a matter of "common sense" and that the "'plain and ordinary meaning' doctrine is at the heart of contract construction." In its search for that meaning, the court is free to look to all the relevant circumstances surrounding the transaction. This includes the state of the world, including the state of the law, at the time. It also includes all writings, oral statements, and other conduct by which the parties manifested their assent, together with any prior negotiations between them [subject to the parol evidence rule] and any applicable course of dealing, course of performance, or usage. The entire agreement, including all writings,

9. FARNSWORTH, *supra* note 7, at 462.

10. *Id.* at 464 (quoting Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 622 (1944) and discussing Alaska law as an exception to the majority rule that extrinsic evidence may be admitted only if the written documentation of a contractual agreement is ambiguous). See, for example, Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767, 771. N. 1 (Alaska 1982), which is still good law. *See* Mahan v. Mahan, 347 P.3d 91, 94–95 (Alaska 2015) (litigant "argues that extrinsic evidence may only be considered if the plain language of an agreement reveals ambiguity," [but] that is not the law in Alaska."); *id.* ("We examine 'both the language of the [agreement] and extrinsic evidence to determine if the working of the [agreement] is ambiguous.'") (citations omitted). The court found the term "profit" did not on its face have a plain meaning of total revenue minus total expenditures but could also mean gross revenue or gross revenue minus some but not all expenses, requiring consideration of additional information.

should be read together in light of all the circumstances. Since the purpose of this inquiry is to ascertain the meaning to be given to the language, there should be no requirement that the language be ambiguous, vague, or otherwise uncertain before the inquiry is undertaken.

Indeed, it is questionable whether a word has a meaning at all when divorced form the circumstances in which it is used. Dictionary definitions may be of help in showing the general use of words, but they are not necessarily dispositive. . . .[11]

Outlining "Rules in Aid of Interpretation," Professor Farnsworth provided further explanation by stating that:

> When interpreting contract language, courts start with the assumption that the parties have used the language in a way that reasonable person ordinarily do and in such a way as to avoid absurdity. This assumption covers matters of grammar and syntax as well as the meaning of words. The process of interpretation therefore turns in good part on what the court regards as normal habits in the use of language, habits that would be expected of reasonable persons in the circumstances of the parties. Often an asserted meaning is challenged on

11. As one might anticipate, Professor Farnsworth then quoted Learned Hand's famous dictum that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945). In the same vein, Judge Hand also observed that "[t]here is no surer way to misread any document than to read it literally." Giuseppi v. Walling, 144 F.2d 608 (2d Cir. 1944) (Hand, J., concurring). Continuing, Farnsworth stated:

> A word may be ambiguous, so that the dictionary gives both of the meanings asserted by the parties. Or a word may be vague, so that the application of the dictionary meaning to the particular case is uncertain. Furthermore, parties do not always used words in accordance with their dictionary definitions. Often the meaning attached to a word by the parties must be gleaned form its context, including all the circumstances of the transaction. Sometimes the nature of either the parties or the subject matter shows that the contract was made with reference to a specialized vocabulary of technical terms or other words of art. And sometimes it can be demonstrated that the parties contracted with respect to a usage in their trade or even with respect to a restricted private convention or understanding.
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> The significance of surrounding circumstances in interpreting contract language is reflected in a judicial emphasis on "purpose interpretation."
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> * * *
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> But even though a court may look at all the circumstances in the process of interpreting contract language, the language itself imposes a limit on how far the court will go in that process. . . . [This is] another area in which judicial attitudes differ. [Case outcomes often] turn not only on the language of the contract and other relevant facts [but also] on the attitude of the particular court toward the authority of words and the sanctity of written language used in the contracting process and toward the protraction of the judicial process that results from entertaining such disputes over the meaning of language. But even though judicial attitudes differ considerably, some generally accepted rules in aid of interpretation can be distilled from the collective attitudes of judges as a body.

Farnsworth, *supra* note 7, at 453–56.

> the ground that, if the parties had intended this meaning, these habits would have led them to express it in a different way . . . .[12]
>
> Some of these rules have been encapsulated in Latin maxims that have a special ring of authority, albeit sometimes a hollow one. None of these rules, however, has a validity beyond that of its underlying assumptions. Their use in judicial opinions is often more ceremonial (as being decorative rationalizations of decisions already reached on other grounds) than persuasive (as moving the court toward a decision not yet reached). Judicial opinions on problems of contract interpretation sometimes resemble bouquets of such rationalizations, plucked from among many and arranged so as to harmonize with the result. Indeed, a court can often select from among pairs of opposing or countervailing rules that seem to conflict, although it should come as no surprise to lawyers that there are situations in which two sound policies argue for opposite results. The resulting rules have a universality that fits them for use, for example, in connection with statutes as well as contracts.[13]

2. Calamari & Perillo

The Calamari and Perillo treatise historically has been more supportive of a textualist plain meaning approach than the more contextualist, legal realist-cum-cynical Farnsworth treatise. But support does not necessarily translate into a clear methodology for determining the clarity of text. In the most recent edition, Professor Perillo observes that the:

> Plain Meaning Rule states that if a writing, or a term is plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any kind. As stated by one court, "When the language of the contract is clear, the court will presume that the parties intended what they expressed, even if the expression differs from the parties' intentions at the time they created the contract." There are variations. Some plain-meaning jurisdictions allow evidence of surrounding circumstances.
>
> Despite the dominance of the rule, there is a division of authority within jurisdictions that follow it. They divide on the question of whether extrinsic evidence is admissible to show that a term of the written agreement is ambiguous. Some admit such evidence. The more rigid approach is to bar evidence to demonstrate that what appears to be a plain meaning is actually

12. *See, e.g.*, George Backer Mgt. Corp. v. Acme Quilting Co., 385 N.E.2d 1062, 1065 (N.Y. 1978) (If particularized meaning is intended, "surely no problem of draftsmanship would have stood in the way of its being spelled out.").

13. Farnsworth, *supra* note 7, at 456–57 (footnotes omitted). The case cited in the previous note provides an example of a court ruling against the contract drafter because it neglected to provide sufficient clarity that it could have presumably supplied. *See, e.g.*, George Backer Mgt. Corp., 385 N.E.2d at 1065. For a summary of the major canons of construction, *see* Antonin Scalia & Bryan Garner, Reading Law (2012); William N. Eskridge, Jr. et al., Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public policy 1151–71 (6th ed. 2020) (Appendix B); Edwin Patterson, *The Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833 (1964).

> ambiguous. Although many jurisdictions rule that evidence is inadmissible to show the existence of an ambiguity, the apparent rigidity of this approach is mitigated by allowing a proffer of evidence. Counsel is permitted to inform the court what the nature of the alleged ambiguity is and what evidence is available to show that court the actual intended meaning. Realistically viewed, such a proffer removes the blinder from the judge who is formally restricted to the four corners of the instrument. Another approach is to allow "objective" evidence to show that a writing that appears unambiguous is in fact susceptible to more than one meaning. This approach bars "self-serving, unverifiable testimony" to show that an ambiguity exits.
>
> The plain meaning rule has been properly condemned because the meaning of words varies with the "verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges)." Meaning may not be ascertained simply by reading the document. Although the Plain Meaning Rule has been condemned by the writers, the UCC, the Restatement (Second) and a number of courts, the great majority of jurisdictions still employ the rule. The dictionary is often used as a corroborating source. Some jurisdictions seem to have returned to a plain meaning approach after having adopted or flirted with more liberal approaches.[14]

Professor Perillo, in discussing the use of extrinsic evidence to resolve facially ambiguous contractual language, notes that "[i]n earlier cases, courts would admit extrinsic evidence to clarify a latent ambiguity but not a patent ambiguity" and that "[t]hese courts chose to decide what a patent ambiguity meant without the aid of extrinsic evidence."[15] He found that "[m]any of the modern cases, however, have abandoned the patent/latent distinction and hold that all relevant extrinsic evidence is admissible to clarify both types of ambiguities."[16] Perillo also notes that "[e]ven a plain meaning jurisdiction will admit parol evidence to define terms of art that, even if unambiguous, are not generally understood."[17] He adds that "[e]ven in a plain meaning jurisdiction[,]" if the:

> term in question does not have a plain meaning it follows that the term is ambiguous, that is, it is susceptible to more than one meaning. . . . It is for

14. Joseph M. Perillo, Calamari and Perillo on Contracts § 3.10, at 136–37 (7th ed. 2014) (footnotes omitted). Like Perillo, Scalia and Garner take issue with the Farnsworth criticism that text-centered interpretation without sufficient appreciation of context provides judges with undue discretion to apply personal outcome preferences. *See* Scalia & Garner, *supra* note 13, at xxix (finding that "textualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law" even though "language [is] notoriously slippery"); *see also id.* at xxix ("A system of democratically adopted laws cannot endure—it makes no sense—without the belief that words convey discernible meanings and without the commitment of legal arbiters to abide by those meanings.").

15. Perillo, *supra* note 14, § 3.10 at 134–37 (7th ed. 2014) (footnotes in original omitted).

16. *Id.*

17. *Id.* at 138.

> the court to say whether there is a "plain meaning" or whether an ambiguity exits. Mere disagreement by the parties as to the meaning of the contract at the time the dispute arises does not establish the existence of ambiguity. Even a disagreement in case law concerning the meaning of a standard term does not necessarily make its meaning ambiguous. Plain meaning judges dissent as to the plain meaning. Once it is found that an ambiguity exits, and conflicting extrinsic evidence is admitted, the jury determines the meaning.[18]

3. Corbin

Arthur Linton Corbin took the view that, even in cases of "integrated" contracts subject to the parol evidence rule, all relevant extrinsic evidence should be admissible regarding meaning, including evidence of subjective intent and any party communications or understandings regarding meaning.[19] Margaret Kniffin, an updater of the Corbin treatise, takes a similar view.[20]

4. Williston

In a Yin/Yang over-simplification, Corbin is often characterized as not only a contextualist but an extreme anti-textualist with little regard for the face of written contract terms. In contrast, Samuel Williston is caricatured as a rigid formalist taking a literalist view of contract text and as resisting any consideration of extrinsic evidence. The more nuanced reality is that Williston did not take a plain meaning/anti-extrinsic evidence attitude toward contract text unless the contract was fully integrated and subject to the parol evidence rule.[21]

In the case of integrated contracts, Williston did support barring the use of extrinsic information while Corbin, as discussed above, welcomed such evidence, even if the contract text appeared clear. This pronounced difference accounts for the often overstated view that these two experts were polar opposites. The truth is that although Williston was marginally more formalist, while Corbin was more of a functionalist willing to subordinate contract text to contract purpose, the two had largely compatible views concerning the use of extrinsic or contextual evidence – but neither did a particularly thorough job of defining exactly what is meant by the concept of plain meaning.

18. *Id.* at 137–38 (footnotes in original omitted).

19. *See* 5 Arthur L. Corbin, Corbin on Contracts §§ 24.7–24.9.

20. *See* Margaret Kniffin, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 Or. L. Rev. 643 (1995).

21. *See* Samuel Williston, Contracts §§ 31:1–31:13, 33:41 (4th ed. 2004 & Supp. 2021).

5. Ferriell

Treatise author Jeffrey Ferriell, like Farnsworth, addresses the rationale and policy driving the judicial popularity of the plain meaning approach and criticisms of the approach but does not give the concept much definition:

> Several reasons are usually advanced for adhering to the plain meaning of a written contract. Interpreting the document according to its plain meaning is said to minimize the ability of the court to rewrite the contract to mean something other than what it says. However, the plain-meaning approach is vulnerable to the criticism that it may rewrite the intent of the parties if that intent was poorly articulated in the written record. Thus, the plain meaning approach may detract from the principle of freedom of contract by imposing the general meaning of a term in place of that intended by the parties.
>
> [Regarding the parol evidence rule], parties who have taken the time to reduce their agreement to writing should be presumed to have drafted it carefully. To have selected their words with care, and course should not assume otherwise. However, this assumption is not always justified, particularly in the context of standard form contracts, which may have been well-crafted by one of the parties but not fully understood or even read by the other. Thus, the plain-meaning rule may be more appropriate in the context of written contracts that have been carefully negotiated by well represented, sophisticated parties. The strongest rationale in favor of the plain-meaning approach is that it enhances the parties ability to rely on the text of their written contract.[22]

6. The Department of Justice

In its manual addressing government contracts, the Justice Department appears to take a particularly textualist approach:

> 72. Principles of Contract Interpretation
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> Contract interpretation begins with the plain language of the contract. A court should first employ a "plain meaning" analysis to any contract dispute.
>
> The intention of the parties to a contract controls its interpretation. In construing the terms of a contract, however, the parties' intent must be gathered form the instrument as a whole in an attempt to glean the meaning of terms within the contract's intended context. Contract interpretation requires examination first of the four corners of the written instrument to determine the intent of the parties. An interpretation will be rejected if it leaves portions of the contract language useless, inexplicable, inoperative, meaningless or superfluous.[23]

22. Jeffrey Ferriell, Understanding Contracts 332–33 (4th ed. 2018).

23. U.S. Dep't of Just., Civil Resource Manual, Principles of Contract Interpretation (Sept. 2013), https://www.justice.gov/jm/civil-resource-manual-72-principles-contract-interpretation (citations omitted) (numbering of principles in original).

> 73. Ambiguities
>
> A contract term is ambiguous "[i]f more than one meaning is reasonably consistent with the contract language."
>
> A patent ambiguity is "glaring"; it is so obvious from the face of the contract that it would place a reasonable contractor on notice of a discrepancy. Patent ambiguities raise an exception to the general rule of contra proferentem, which courts use to construe ambiguities against the drafter: a contractor is under a duty to attempt to resolve a patent ambiguity prior to bidding if the contractor subsequently wishes to rely upon the provision.
>
> A latent ambiguity, by contrast, exists where a contract is reasonably, but not obviously, susceptible of more than one interpretation. In the case of a latent ambiguity, the role of contra proferentem applies to construe the ambiguity against the drafter if the nondrafter's opinion is reasonable, and the nondrafter relied upon that interpretation. The reasonableness of an interpretation is determined by ordinary principles of contract interpretation.[24]

7. The ALI Approach(es)

Despite a huge inventory of judicial decisions that are often if not usually unclear or tautological as to what constitutes plain meaning, observers have labored mightily in search of a workable definition of plain meaning and ground rules for applying the concept. Judging from the controversy surrounding the recently promulgated RLLI (a restatement of liability insurance law), achieving even a vague consensus is more difficult than one might imagine.

a. *The Liability Insurance Restatement*

Section 3 of the RLLI announces a "Plain-Meaning Rule"[25] for interpreting insurance policies, providing that:

> 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 an entire insurance policy.[26]

Further, the RLLI explains that, "[i]f the 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."[27] However, "[i]f a term does not have a plain meaning as defined in subsection (2), that term is ambiguous

24. *Id.*, https://www.justice.gov/jm/civil-resource-manual-73-Ambiguities (citations omitted).
25. When not discussing plain meaning in a quotation, this paper will continue to use two words rather than the needlessly hyphenated "plain-meaning" language used in the title to RLLI § 3 (but not in the text of the section itself).
26. RLLI, *supra* note 1, § 3(2).
27. *Id.* § 3(1).

and is interpreted as specified in § 4 [the RLLI's codification of the ambiguity principle]."[28]

But tellingly, the Reporters' Note to RLLI § 3, comment f concerning "*[d]etermining whether a term has a plain meaning or is ambiguous*," although referring to Illustrations and three court decisions upon which the illustrations are based, is barely more than 50 words, including the references and citations.[29] The cases, although useful in providing illustrations, do not actually address the process by which a court determines the clarity of meaning of contractual language. Like Section 3 and its comments, the Reporters' Note refers to RLLI Section 4's definition of ambiguity, which requires that a term have two or more reasonable meanings.

Like other attempts to define what is meant by plain meaning, the RLLI fails to articulate a means, formula, or methodology by which courts are to ascertain what constitutes a reasonable construction of text that goes much beyond *ipse dixit* or tautology. If the court accepts two or more proffered constructions as colorable, there is no plain meaning. If the court deems all but one advocated interpretation unreasonable, there is plain meaning.

The RLLI argues that its proposed plain meaning approach "promotes consistency of interpretation of insurance policies using the same language in similar contests, giving the parties to standardized insurance policies greater confidence that they will be uniformly enforced."[30]

Notwithstanding that the RLLI endorses a plain meaning textual approach, which is generally preferred by insurers (and commercial entities in general) over more contextual approaches,[31] this portion of the RLLI has received substantial insurance industry criticism, albeit primarily directed toward earlier drafts that gave less emphasis to text and exhibited

28. *Id.* § 3(3). Section 4 of the RLLI defines an ambiguous term as one where "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." Section 4 also sets forth the widely accepted rule that an ambiguous term is "interpreted against the party that supplied the term" but adds that this is not the case if the party authoring the unclear language "persuades the court that a reasonable person in the policyholder's position would not give the term that interpretation." *See id.* § 4.

29. *See id.* § 3, cmt. f (italics in original).

30. *Id.* § 3, cmt. a. This justification for a more exclusively textual approach is not particularly persuasive in a world where different courts often purport to find the very same insurance policy language clear but construe that congruent language to mean different things. *See* JEFFREY W. STEMPEL, ERIK S. KNUTSEN & PETER N. SWISHER, PRINCIPLES OF INSURANCE LAW, ch. 11 (5th ed. 2020) (presenting examples from general liability insurance coverage decisions); *see, e.g.*, Hazen Paper Co. v. U.S. Fid. & Guar. Co., 555 N.E.2d 576 (Mass. 1990). (administrative proceeding seeking environmental remediation a "suit" within the meaning of liability insurance policy); Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co., 959 P.2d 265 (Cal. 1998) (government action seeking remediation not a "suit" under policy with identical language).

31. *See* Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475 (2010).

greater receptiveness to extrinsic evidence.[32] Insurer opposition to Section 3 (and to the RLLI generally) continued, perhaps because the comments to the section continue to exhibit more receptiveness to extrinsic evidence than one would expect from the black letter of the Section.[33]

> Generally accepted external sources of meaning that courts consult when determining the plain meaning of an insurance policy term include: dictionaries, court decisions, statutes and regulations, and secondary legal authority such as treatises and law-review articles. Such external sources of meaning are not "extrinsic evidence," except in limited circumstances . . . . Rather, they are legal authorities that courts consult when determining the plain meaning of an insurance policy term, which is a legal question.[34]

The RLLI further notes that "[s]ome courts that follow a strict plain-meaning rule also consider custom, practice, and usage when determining the plain meaning of insurance policies" where this is "between parties who can reasonably be expected to have transacted with knowledge of that custom, practice, or usage."[35] Although this might sound like use of extrinsic evidence, the RLLI finds this sufficiently within the plain meaning approach so long as such sources of meaning can be discerned from public sources" through only limited discovery.[36] According to the RLLI, "[c]onsideration of custom, practice, and usage at the plain-meaning stage does not open the door to extrinsic evidence of the parties' specific or subjective intent or understanding regarding the insurance policy, such as drafting history, course of dealing, or precontractual negotiations."[37]

Publication of the RLLI will not, of course, end debate about what constitutes extrinsic evidence. For example, is dictionary use extrinsic evidence? Notwithstanding the RLLI assessment, which comports with longstanding judicial practice,[38] the literal answer must be "yes" in that the dictionary is

32. *See* Stempel, *Hard Battles*, *supra* note 2.

33. *See generally id.*

34. RLLI, *supra* note 1, § 3, cmt. b. The Comment continues by noting that "[w]hen sources such as treatises and law-review articles are relied upon for an evidentiary purpose—namely to prove the existence of an empirical fact—then their use would be subset to . . . standards concerning extrinsic evidence . . . in addition to any applicable rules of evidence, such as rules concerning the admission of hearsay and judicial notice."

35. *Id.* cmt. c.

36. *Id.* Comment c uses as an example of limited discovery proof "through an affidavit of an expert in the trade or business, who is subject to deposition, but without the need for extensive document requests." *Id.*

37. *Id.*

38. *See, e.g.*, Hartford Fire Ins. Co. v. T.A. Loving Co., 1995 U.S. Dist. LEXIS 13598, at *7–8 (E.D.N.C. Aug. 29, 1995) (referring to definitions of "waterborne" in *Webster's Third New International Dictionary*; noting multiple definitions and selecting the definition more favorable to policyholder "in the context of this case"); Martin v. Allianz Life Ins. Co., 573 N.W.2d 823, 825–26 (N.D. 1998) (giving literal enforcement to accident policy provision that loss of limb covered only if limb is "severed" within ninety days of event giving rise to injury and citing *American Heritage College Dictionary*).

evidence of word meaning outside the four corners of the insurance policy itself (whereas a resort to the Definitions section of a policy would not be use of extrinsic evidence, but merely part of the process of construing the policy as a whole).[39]

b. *The Contracts Restatement*

In contrast to the RLLI, the ALI's Second Restatement of Contracts ("R2K")[40] takes a "contextual approach" to contract interpretation in which "courts interpret insurance policy terms in light of all the circumstances surrounding the drafting, negotiation, and performance of the insurance policy."[41] The RLLI rejects the R2K on this point because the plain meaning approach, not the contextual approach, is "typically followed in insurance law" with "courts interpret[ing] an insurance policy term on the basis of its plain meaning, if it has one."[42]

The R2K does not enunciate a contextual approach in any one particular section. Rather, the "Meaning of Agreements" topic in Chapter 9 ("The Scope of Contractual Obligations") sets forth an array of contract construction provisions in Sections 200 through 229. Those provisions are generally receptive to indicia of meaning in addition to contract text and sets forth a number of public policy considerations, permitting courts to resolve uncertainty and fill gaps in order to reach reasonable results consistent with social policy and the purpose, function and operation of an agreement,[43] including avoidance of unfair results or disproportionate forfeiture of contract benefits.[44]

39. Relatedly, one might ask: If one needs a dictionary to be sure of the meaning of words in a contract document, does this not indicate that the text of the document is insufficiently plain according to the common parlance of citizens, policyholders, or businesspersons subject to the document at issue?

40. R2K, *supra* note 5.

41. RLLI, *supra* note 1, § 3, cmt. a.

42. RLLI § 3, cmt. a., April 2018 Draft at 17. Elaborating, Comment a. states that the RLLI "does not follow [the *Contracts Restatement*] contextual rule because a substantial majority of courts in insurance cases have adopted a plain-meaning rule. Moreover, because of the mass market nature of liability insurance, there is value in a rule that rewards and encourages the drafting of insurance policy terms that have a plain meaning."

43. *See, e.g.*, R2K, *supra* note 5, § 203 (preferring "reasonable" and "lawful" meaning); § 204 (permitting court to supply "reasonable" terms to complete gaps in contract); § 212 (permitting use of contextual evidence, even in cases of integrated agreements); § 214 (permitting fairly liberal of parol evidence rule and use of prior or contemporaneous agreements or negotiations under more circumstances than many jurisdictions); 216 (permitting consistent additional terms to be implied as part of the contract); §§ 219–23 (permitting consideration of custom, practice, usage in trade and course of dealing.

44. *See, e.g.*, *id.* § 205 (implying duty of good faith and fair dealing in all contracts); § 208 (restricting enforcement of unconscionable terms); § 211 (regarding interpretation of standardized agreements to avoid harsh results); § 229 (permitting excuse of a condition to avoid disproportionate forfeiture).

Despite all this, the R2K does not shed much light on what the law means by "plain meaning" and in its most direct discussion of the topic tends, like most treatises, to comingle it with discussion of the parol evidence rule and integrated agreements.

> § 212 Interpretation of Integrated Agreement
>
> The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in light of the circumstances, in accordance with the rules stated in this Chapter.
>
> A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.[45]

Elaborating, the ALI (in the 1981 R2K) stated:

> It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to causes where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statement made therein, usages of trade, and the course of dealing between the parties.[46]

45. *Id.* § 212.

46. *Id.*, cmt. b. Courts have cited Comment b in following a contextual approach to contract meaning, but not all that frequently as compared to simple invocation of the plain meaning principle. For example:

> ***Comment b to § 212(1) of Restatement (Second) of Contracts*** (1981) reads thus: "*Plain meaning and extrinsic evidence.* It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. See §§ 202, 219-23. But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention. Standards of preference among reasonable meanings are stated in §§ 203, 206, 207."

City of Boston v. Pro. Staff Ass'n, 807 N.E.2d 229, 233 n.5 (Mass. Ct. App. 2004) (boldface italics in original).

> "The goal in interpreting any contract is to give effect to the reasonable expectations of the parties." *Neal & Co. v. Ass'n of Village Council Presidents Regional Housing Auth.*, 895 P.2d 497, 502 (Alaska 1995) (internal citations and quotations omitted). "[W]hile extrinsic evidence should be consulted in determining the meaning of a written contract, nonetheless 'after the transaction has been shown in all its length

8. Corpus Linguistics

Corpus linguistics is of course not a treatise but rather an approach to assessing word meaning through examining word use on a large scale. Perhaps it is better regarded as a very large dictionary that provides more

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> and breadth, the words of an integrated agreement remain the most important evidence of intention.'" *Lower Kuskokwim Sch. Dist.*, 778 P.2d 581, 584 (citing *Restatement (Second) of Contracts, § 212 cmt. b* (1981)).

Brown v. J.W., 2007 U.S. App. LEXIS 21624, *2 (9th Cir. 2007).

> A statute is plain and unambiguous if 'virtually anyone competent to understand it, and desiring fairly and impartially to ascertain its signification, would attribute to the expression in its context a meaning such as the one we derive, rather than any other; and would consider any different meaning, by comparison, strained, or far-fetched, or unusual, or unlikely.' *New England Med. Center, Inc. v. Commissioner of Rev.*, 381 Mass. 748, 750, 412 N.E.2d 351 (1980), quoting from *Hutton v. Phillips*, 45 Del. 156, 160, 6 Terry 156, 70 A.2d 15 (1949). To the extent plain meaning depends upon context, compare *Restatement (Second) of Contracts § 212(1) comment b* (1981) (the "meaning [of a writing] can almost never be plain except in a context"), that context is here provided by the provisions of the enabling act in addition to the tax exemption, as set forth in note 1, *supra*, and discussed further, *infra*.

Martha's Vineyard Land Bank Comm'n v. Board of Assessors, 814 N.E.2d 1147, 1150 n.4 (Mass Ct. App. 2004) (boldface italics in original).

> The Restatement of Contracts makes clear that a court need not close its eyes to all the circumstances of the transaction and rely solely on the agreement, even if that agreement is an integrated agreement. "The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter." *Restatement (Second) Contracts § 212(1)* (1981). *Comment (b)* elaborates:
>
> > *Plain meaning and extrinsic evidence.* It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and course of dealing between the parties. See §§ 202, 219–23. But after the transaction has been shown in all its length and breath, the words of an integrated agreement remain the most important evidence of intention.
>
> *Id.* § 212 comment b at 126. Moreover, "Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . that the integrated agreement, if any, is completely or partially integrated [or] the meaning of the writing, whether or not integrated." *Id.* § 214(b) & *(c)*. With respect to interpretation of the *meaning* of an integrated agreement, the Restatement comments further explain, "Words, written or oral, cannot apply themselves to the subject matter. The expressions and general tenor of speech used in negotiations are admissible to show the *conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties*." *Id.* § 214 comment b at 133 (emphasis added).

WHS Homes, Inc. v. Traditional Living, Inc., 2016 N.H. Super. LEXIS 2, at *16–17 (Super. Ct., Merrimack Cnty., Jan 15, 2016) (italics in original).

contextual and connotative examples of word use than is possible in a traditional hardcopy lexicon. As described by one scholar:

> corpus linguistics may be thought of as a linguistic methodology that analyses language function and use by means of an electronic database called a corpus.
>
> * * *
>
> The data in the corpus are considered "natural" because they were not elicited for the purpose of study. That is, generally no one asks the speakers or writers whose words are represented in the corpus to speak or write for the purpose of subjecting their words to linguistic scrutiny. Instead, the architect of the corpus assembles her collection of speech and writing samples after the fact, from newspapers, books, transcripts of conversations, or interviews, etc.[47]

Writings in the area by both linguists and legal scholars have multiplied in the past decade,[48] in significant part because of the availability of large corpra [the plural of "corpus" according to those working in the field] such as the Corpus of Contemporary English ("COCE") and Corpus of Historical American English ("COHA").[49]

47. Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. Rev. 1915, 1954–55 (2010). One prominent linguist has posited unifying traits of the corpus methodology, in particular that it (1) is empirical and looks at patterns of use of natural text; (2) comes from a large and fairly assembled collection of natural texts (the "corpus"); (3) uses computer technology extensively, both to gather data and to interact with it; and (4) uses quantitative and qualitative techniques of data analysis. *See* Douglas Biber, *Corpus-based and Corpus-driven Analyses of Language Variation and Use*, *in* The Oxford Handbook of Linguistic Analysis 159 (Bernd Heine & Heiko Narrog eds., 2009); *accord* Paul Baker et al., A Glossary of Corpus Linguistics 65 (2006) ("In linguistics, empiricism is the idea that the best way to find out about how language works is by analyzing real examples of language as it is actually used. Corpus Linguistics is therefore a sternly empirical methodology."); *see also* Mourtisen, *supra*, at 1954–66 (explaining mechanics and technique of corpus linguistics research); James C. Phillips & Jesse A. Egbert, *Advancing Law and Corpus Linguistics: Importing Principles and Practices from Survey and Content-Analysis Methodologies to Improve Corpus Design and Analysis*, 2017 BYU L. Rev. 1589 (2017) (same).

48. *See, e.g.*, Douglas Biber & Randi Reppen, The Cambridge Handbook of English Corpus Linguistics (2015); Tony McEnery & Andrew Hardie, Corpus Linguistics: Method, Theory and Practice (2012); Tony McEnery & Andrew Wilson, Corpus Linguistics: An Introduction (2d ed. 2001); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788 (2018); Daniel Orner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. Pub. Int. L.J. 101 (2016); Stephen Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 Colum. Sci. & Tech. L. Rev. 156 (2011); Douglas Biber, *Representativeness in Corpus Design*, 8 Literary & Linguistic Computing 243 (1993); *see also* Brigham Young Univ., Corpus of Historical American English (2021), http://corpus.byu.edu/coha [http://perma.cc/N44U-NQ8T] [hereinafter COHA].

49. *See* Brigham Young University, Corpus of Contemporary English (2021), https://www.english-corpora.org/coca [hereinafter COCE].

> The COHA is "the largest structured corpus of historical English." It contains "more than 400 million words of text form the 1810s-2000s (which makes it 50-100 times as large as other comparable historical corpa of English) and the corpus

9. Layperson Surveys

Related to but distinct from the corpus linguistics approach is use of survey research specifically directed at eliciting layperson meaning of a contractual provision, which may be seen as a variant of use of surveys in trademark/antitrust/consumer confusion cases.[50] It differs in that it does not attempt to catch laypersons speaking "naturally" but instead asks them to interpret or construe terms. Respondents are presented with particular contract language and asked whether it does or does not have a particular meaning or compel a particular result.[51]

C. *Dictionary Definitions*

Although reliance on dictionaries has been particularly popular with the modern U.S. Supreme Court,[52] they are not particularly helpful in defining the concept for which they are often invoked. For example, dictionaries define "plain" to mean: "clearly"; unequivocally"; "in a plain manner"; "without obscurity or ambiguity"; "clear or distinct to the eye or ear"; "conveying the meaning clearly and simply"; "easily understood"; "clear to the mind"; "evident"; "manifest"; "obvious"; "easy to understand"; "understandable"; "not complicated"; "patent"; "definite"; and "open-and-shut."[53] This array of expression largely lists synonyms or provides definitions that stop well short of articulating what it means to be plain or clear and how one recognizes such clarity.

> is balanced by genre decade by decade." Using data from the COHA, [interpreters] can gather linguistic information from the date that a statute was enacted, going back approximately 200 years.

Lee & Mouritsen, *supra* note 48, at 835 (citations omitted); *see also id.* at 835–36 (describing other corpa collecting textual usage). For a friendly but thoughtful cautionary critique of the corpus linguistics approach, see Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. Rev. 1311; *see also* Lee & Mouritsen, *supra* note 48, at 865–76 (recognizing and responding to criticisms of corpus linguistics approach based on lack of "proficiency" of lawyers and judges with the tool, "propriety" of judicial research in databases, "practicality" concerns that assessing meaning via corpus linguistics will require inordinate investment of judicial resources; limitations on the observed data; and prospect of political opportunism).

50. *See, e.g.*, Omri Ben-Shahar & Lior Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U. L. Rev. 1753 (2017).

51. Erik Knutsen and I find this approach far less promising than corpus linguistics and even potentially pernicious to the extent it is used as anything other than a rough guide to lay perception of words in dispute in a given case. *See* Jeffrey W. Stempel & Erik S. Knutsen, *Turning Textualism Over to Amateurs: The Dangers of Contract Construction by Questionnaire* (Mar. 2019), https://coverage.memberclicks.net/assets/Annual_Meeting/2019AnnualMeeting/ACCC_2019Conference_MaterialsForAttendees_20190506.pdf.

52. *See* Mark Lemley, *Chief Justice Webster*, 106 Iowa L. Rev. 299 (2020).

53. Most of these definitions are derived from the Merriam-Webster online dictionary but are also assembled from randomly consulting widely available dictionaries, most of which use some combination of these terms in their definition of "plain."

Resort to dictionary treatment of "ordinary," a term often used along with "plain" in describing text a court deems "clear," are similar in tone. Examples include: "of a common quality, rank or ability"; "of a kind to be expected in the normal order of events"; "routine"; "usual"; "average"; "common"; "commonplace"; "cut-and-dried"; "every day"; "garden-variety"; "normal"; "routine"; "run-of-the-mill"; "standard"; "standard-issue"; "usual"; "workday"; "unexceptional"; and "unremarkable."

Consulting definitions of "clear" produces even less illumination: "in a clear manner"; "free from doubt"; "unqualified"; "absolute"; "transparent"; "crystalline" and "limpid."

This is not to say that dictionaries are utterly unhelpful, simply that they are not talismanic. Having reviewed the concepts of plain meaning set forth in various treatises and similar secondary sources, one next turns to legislative pronouncements, judicial opinions (and reaction to the opinions) for additional guidance.

III. ILLUMINATION BY OPPOSITION: THE *THOMAS DRAYAGE* LESS TEXTUAL APPROACH FAVORING REGULARIZED CONSIDERATION OF CONTEXTUAL INFORMATION

Sometimes one can better understand a concept by examining its counterpoint. Among the many famous opinions by California Supreme Court Justice Roger Traynor is *Pacific Gas & Electric v. G.W. Thomas Drayage & Rigging Co.*,[54] a case remembered less for its holding than its pronouncements on the role of extrinsic evidence in contract construction. *Thomas Drayage* dealt with the issue of textual interpretation by diminishing the power of text alone, taking the position that even text that may seem facially clear should be subject to having its meaning explained, tested, and confirmed through consideration of non-textual factors. It is the case most associated with ushering in the "California Approach," whereby extrinsic evidence may be used to determine the meaning of even seemingly clear text. Subsequent California cases have shown more fondness for textualism[55] but the state remains more receptive to non-textual information regarding contract meaning than New York or other plain meaning states.

54. Pac. Gas & Elec. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644–47 (Cal. 1968).

55. *See, e.g.*, Bank of the West v. Superior Court, 833 P.2d 545, 552 (Cal. 1992) ("If contract language is clear and explicit, it governs."); Hartford Cas. Ins. Co. v. Swift Distrib., Inc., 326 P.3d 253, 259 (determination of clear and explicit language done through giving words ordinary and popular meaning unless used by the parties in a technical sense); Gilkyson v. Disney Enters., Inc., 2021 Cal. App. LEXIS 593 (July 21, 2021) (language in contract document should be interpreted according to objective, rather than subjective, meaning of terms, and "[w]hen the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement").

Thomas Drayage has had both its fans and critics.[56] The opinion famously argued:

> If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry. The meaning of particular words or groups of words varies with the verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning. Accordingly, the meaning of a writing can only be found by interpretation in the light of all the circumstances that reveal the essence in which the writer used the words.[57]

In his response to *Thomas Drayage*, Professor Val Ricks has made a nuanced defense of plain meaning and seeks to define the term in part through opposition to *Thomas Drayage*. He argues that the plain meaning rule:

> [a]llows a judge, after finding unambiguous language (plain meaning) in a written contract, to refuse to look at other evidence of that language's meaning.
>
> The rule is heavily criticized, but claims against it have been exaggerated. One of these exaggerated claims is that plain meaning is impossible. This claim is found in the caselaw opinions that students are made to read [lamenting frequency with which *Thomas Drayage* is excerpted in law school casebooks] . . . [but] plain meaning does not require that words have "inherent meaning" or "absolute and constant referents." Plain meaning is possible and occurs quite apart from reference or another theory of inherent meaning. Plain meaning rests instead on our unreflective, public, conventional language use. Most meaning is plain.[58]

The Ricks critique of *Thomas Drayage* and defense of the plain meaning rule posits that word meaning is not inherently uncertain and is usually understandable to readers – at least if readers are generally aware of the subject of the contract document, an awareness that might be deemed a

56. Although not as insistent on considering contextual information as *Thomas Drayage*, the R2K and scholars like Farnsworth and Corbin can be viewed as supporters of the less text-bound approach of the case. As examples of criticism, see, for example, *Trident Center v. Connecticut General Ins. Co.*, 847 F.2d 564 (9th Cir. 1988) (applying California law) (in which now former judge Alex Kosinski melodramatically excoriated the decision as having eliminated the parol evidence rule in the state and creating undue indeterminacy regarding commercial transactions while purporting to be "forced" to apply the decision via the *Erie* Doctrine); Val D. Ricks, *The Possibility of Plain Meaning: Wittgenstein and the Contract Precedents*, 56 CLEV. ST. L. REV. 767 (2008) (taking similar but more measured view, supporting plain meaning concept, and lamenting support for Traynor view).

57. *Thomas Drayage*, 442 P.2d at 643–45 (internal quotations and citations omitted).

58. Ricks, *supra* note 56, at 767.

de facto but limited consideration of context. Among contracting veterans, this view has substantial force. The casual lay reader may not know what *pari passu* means but financiers dealing with sovereign debt are quite aware of its implications without much if any need for additional contextual background or explanation.[59]

Although I may misunderstand or under-appreciate the Ricks defense of plain meaning, which invokes Wittgenstein's philosophical explorations,[60] it seems that at the end of the day he is suggesting that, in context, contract text is usually unambiguous. This view is something less that hard-core textualism that strictly views text in isolation and refuses to consider non-textual information completely. In commenting on the difference between the plain meaning approach and one more receptive to extrinsic evidence as in *Thomas Drayage*, Professor Eric Posner raised the question "Which rule is better?" and answered thus:

> It depends on how much one trusts judges to interpret extrinsic evidence properly. If judges are sophisticated enough, they may be able to read the evidence properly. If they are not, then it would be better to require them to rely on the writing. The logic of the argument is the same as in the controversy over the plain meaning rule.[61]

The judiciary has in essence answered Professor Posner's question by asserting that judges are superb at discerning the meaning of documentary text but substantially less competent at construing additional information about the meaning of insurance policies and other documents. As Erik Knutsen and I have pointed out, this assumption is illogically lopsided, at least questionable, and probably wrong.[62] Judges are not trained linguists. Although legal training emphasizes reading and writing, it also stresses fact gathering and analysis. Put with more snark: if judges are not good at assessing non-textual information, why in the world do we have a legal system that permits them to determine what constitutes a "plausible" factual allegation, manage discovery, conduct trials, make evidence rulings, sentence criminal defendants, assess credibility, find facts in bench trials, and review and alter the factual determinations of juries in post-trial motions?

59. *See* Lori Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 Syracuse L. Rev. 451, 463 (2015) (citing Mitu Gulati & Robert E. Scott, The 3½ Minute Transaction: Boilerplate and the Limits of Contract Design 119–38 (2013) (conducting empirical analysis of widespread use and understanding of the term among those using the term)).

60. Ricks, *supra* note 56, at 785–99.

61. Eric A. Posner, Contract Law and Theory § 6.8, at 148 (2011) (also discussing parol evidence rule); *see also* Jeffrey Ferriell, Understanding Contracts 331 (4th ed. 2018) (noting distinction between plain meaning states and what might be termed "*Thomas Drayage*" states).

62. *See* Jeffrey W. Stempel & Erik S. Knutsen, *Rejecting Word Worship: An Integrative Approach to Judicial Construction of Insurance Policies*, 90 U. Cinn. L. Rev. (forthcoming 2021).

This is not to say that judges are necessary "bad" at textual construction. My modest point is that it is contradictory for defenders of a strict plain meaning approach to contend that judges are master interpreters of the face of a text but that it is risky to allow them to process other information about document meaning. More realistically, judges are roughly equally skilled at both tasks. In any event, the legal system regularly entrusts them to use both skillsets outside of this specific context, which of course contradicts the textualist notion that it is unduly risky to allow judges to consider anything but the text of statutes and contract documents.

Similarly, the risk of a judge engaging in nakedly result-oriented "activism" can be as easily accomplished through semantics as the sifting of extra-textual information. Contrary to the textualist canard, a judge assessing additional information as well as the naked text of a document has less freedom to elevate personal preferences over the demands of law or contract. Facts are stubborn things.[63] Words are more malleable. Or at least reaction to words is malleable and far less constrained than textualists admit. Consequently, both strict textual analysis and contextual assessment should be seen as legitimate judicial activity when faced with construing an insurance policy, other contract, or statute.

A logical but overstated justification for plain meaning and textualism generally is that the approach conserves judicial resources. Perhaps. But absent the type of "inside chambers" study that courts will probably never permit, it is difficult to determine whether the time judges and staff spent on textual analysis could be more efficiently deployed examining other indicia of meaning. In addition, in an adversary system, courts are not required to make *sua sponte* expeditions in search of contextual evidence. Lawyers must bring such material to the attention of the court in a form capable of court analysis. At that point, the judicial task is not materially more onerous or time-consuming than isolated textual analysis. Access to such information can in fact facilitate faster, more efficient decision-making by clarifying the

63. The statement is often attributed to John Adams and was purportedly said in his closing argument defending British soldiers accused of criminally firing upon the crowd in the infamous "Boston Massacre." But others contend that the statement and observation predate Adams. Today, of course, the aphorism is in wide use by politicians, policymakers, and commentators. Recent political polarization in the United States, where a sizeable portion of the population disputes results of the 2020 presidential election, suggests some unfortunate infirmity in the venerable quote.

For purposes of this article and legal analysis generally, my position is that there are indeed established facts surrounding the design and purchase of insurance policies, for example: What was the purpose and objective of the sale? Why did the insurer include or delete particular policy language? What did the drafter envision would be the effect of an endorsement? Are there explanatory materials? Who wrote them and why? What do they say? What was the understanding of a term by insurers and policyholders generally? What was the specific understanding of the disputants in a coverage case? Although the facts may be disputed, they are subject to judicial determination, something courts do at least as well as they interpret text.

situation and encouraging decisions that are less likely to be reversed by appellate judges that may have a different reaction than the trial judge to disputed words in isolation.

To the extent that Knutsen and I (and Traynor, Farnsworth, Corbin and others with whom we claim kinship) are correct, this argues for embracing a contextual rather than textualist approach to determining word meaning. But as reflected in the next section, this is unlikely to happen anytime soon. In the 40 years since publication of the R2K, contract (and statutory) jurisprudence has trended more textual. The New York approach dominates the California approach—but not by as wide a margin as commonly supposed. Further, as reflected in Section 3 of the RLLI and many court decisions applying the plain meaning approach, plain meaning does not necessarily mean hyper-literal textualism.

IV. A TENTATIVE PLAIN MEANING SCORECARD: THE CALIFORNIA/NEW YORK DIVIDE

Although plain meaning is the dominant judicial approach to construction of statutes, regulations, contracts and insurance policies, there are significant elements of the profession, particularly the academic community, that reject narrow textualism and advocate rather extensive (but not boundless) consideration of extrinsic and contextual evidence.[64] Using New York and

64. As well as significant elements of the legal community favoring substantial modification of the traditional contract model, at least as respects insurance policies. The most obvious is support for a strong version of the reasonable expectations approach to policy construction in which a policyholders objectively reasonable expectations determine contract meaning even if contradicted by the literal language of the policy. *See* JEFFREY W. STEMPEL & ERIK S. KNUTSEN, STEMPEL & KNUTSEN ON INSURANCE COVERAGE, § 4.11 (4th ed. 2016); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970) (Part I). In practice, however, nearly all jurisdictions at least purport to require a showing of textual ambiguity before considering policyholder expectations as a guide to word meaning. *See* RANDY MANILOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE ch. 22 (3d ed. 2015). Because court decisions involving the reasonable expectations concept are so interwoven with the dispute in question rather than a broad state "rule" on reasonable expectations, the authors of the Treatise elected to eliminate this chapter in the fourth and fifth editions.

In addition, there is some support for viewing insurance policies as products and assessing them in light of their performance and fitness for the ostensible purpose rather than focusing on text alone. *See, e.g.*, Christopher C. French, *Understanding Insurance Policies as Non-Contracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMPLE L. REV. 535 (2017); Jeffrey W. Stempel, *The Insurance Contract as Thing*, 44 TORT, TRIAL & INS. L.J. 813 (2009); Daniel Schwarcz, *A Product Liability Theory for the Judicial Regulation of Insurance Coverage*, 48 WM. & MARY L. REV. 1389 (2007). There is less support for viewing insurance policies as social instruments, Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489 (2010), or akin to legislation, Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203 (2010).

This is in addition to a rather large block of the academic community that, although adhering to a contract model of insurance policies, would prefer to de-emphasize textualism and

California law as illustrative points on the text-context continuum, Professor Miller provides a useful summary assessment of the divide:

> The differences between New York and California contract law turn out to align with the formalist-contextualist distinction in contract theory. New York judges are formalists. Especially in commercial cases, they have little tolerance for attempts to re-write contracts to make them fairer or more equitable, and they look to the written agreement as the definitive source of interpretation. California judges, on the other hand, more willingly reform or reject contracts in the service of morality or public policy; they place less emphasis on the written agreement of the parties and seek instead to identify the contours of their commercial relationship within a broader context framed by principles of reason, equity, and substantial justice.[65]

Accepting the dichotomy set forth by Professor Miller and others that there is a highly textualist New York approach and a highly contextualist California approach, one can make a rough alignment of the states. This list, however, requires the caveat that the Miller dichotomy necessarily minimizes the variance between judges in the same jurisdiction, an arguable ecological fallacy but also an occupational hazard whenever summarizing the law of a jurisdiction.

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increase contextualism beyond that approved in *the Restatement (Second) of Contracts*. *See, e.g.*, Lawrence A. Cunningham, *Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-for-the-Job*, 85 GEO. WASH. L. REV. 1625 (2018) (arguing for avoidance of fundamentalist textualist approach and advocating more eclectic approach to contract construction); James A. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation? Text Versus Context*, 24 ARIZ. ST. L.J. 995 (1992) (supporting contextualist approach and finding it more prevalent in caselaw than commonly thought in view of judicial rhetoric supporting textual focus); STEMPEL & KNUTSEN, *supra* note 64 (same regarding insurance policies); *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) (taking less eclectic view more cabined by text but recognizing substantial non-textual factors operating widely in contract and statutory interpretation cases).

65. *See* Miller, *supra* note 31, at 1478. Although stating that "[b]oth approaches to contract law are commendable" and "serve important social goals" as well as employing "sophisticated and well-reasoned doctrines in the service of these ends," in a victory for formalism fans, Professor Miller observed that

> contracting parties do take a position on this question [of which approach is better]. The testimony of the marketplace—the verdict of thousands of sophisticated parties whose incentives are to maximize the value of contract terms—is that New York's formalistic rules win out over California's contextualist approach. As predicted by theory, sophisticated parties prefer formalistic rules of contract law.

Id. at 1478; *see also* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1457 (2009) (finding New York favored in choice of law clauses by roughly 2:1 margin in contracts involving commercial firms); Avery Weiner Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 508–11 (2004) (positing that sophisticated contracting parties have the ability and motivation to choose the degree of formalism that best suits their needs of value maximization).

Not all 50 states are listed in the following classification, a result stemming from reluctance to list a state as in either "camp" if the precedents of the state high courts were not sufficiently clear and consistent. For example, my home state of Nevada is listed in neither column because of what I regard as conflicting or unclear precedent. An advocate can find both plain meaning and contextualist cases to cite in a brief without the existence of what I would regard as a definitive modern state supreme court decision on the matter. But for Nevada, as well as the other fifteen states not listed, some observers would deem this refusal to classify as too tentative.[66] Similarly, some observers may disagree with some of the following classifications. Even in New York, the archetypical home of textualist plain meaning, there is precedent receptive to consideration of non-textual evidence of meaning.[67]

66. And perhaps this understates the numerical advantage of the New York approach. If under duress to classify Nevada, I would probably put it in the plain meaning column based on recent decisions. *See, e.g.*, Pope Invs., LLC v. China Yida Holding Co., 2021 Nev. LEXIS 30, at *10 (Nev. July 8, 2021) (court "reviews matters of statutory interpretation de novo, applying the statue's plain meaning where not ambiguous"; legislative intent apparently only relevant where statutory text facially ambiguous); Wolfus v. Brunk, 489 P.3d 913, 914 (Nev. 2021) ("We will interpret a statute by its plain meaning unless some exception applies."); Legislature of Nevada v. Settelmeyer, 486 P.3d 1276, 1281 (Nev. 2021) (giving broad, arguably hyper-literal, construction to word "any" in state constitution and refusing to consider historical and contextual information deemed persuasive by counsel for the Legislature in ruling that revenue bill did not violate state constitutional provision requiring supermajority vote for tax increases); Franchise Tax Bd. of Cal. v. Hyatt, 485 P.3d 1247, 2021 Nev. Unpub. LEXIS 298, *9 (Apr. 23, 2021) (applying text of costs statute in literal fashion despite odd result that litigant prevailing in lion's share of a quarter-century of litigation is not entitled to costs and that litigant losing on most issues is entitle to costs and holding "Hyatt's reliance on equity . . . cannot override the Nevada statute's plain language").

I have refrained from putting Nevada squarely in the New York column not only because its contextualist precedents have not been overruled or disavowed but also because it often looks to California law and precedent for guidance in resolving cases. But perhaps this caution is excessive in light of the state supreme court's most recent textualist rhetoric. *But see* Galardi v. Naples Polaris, LLC, 301 P.3d 364, 367 (Nev. 2013) ("Modernly, courts consult trade usage and custom not only to determine the meaning of an ambiguous provision but also to determine whether a contract provision is ambiguous in the first place.").

67. *See, e.g.*, Beazley Ins. Co. v. ACE Am. Ins. Co., 880 F.3d 64, 71 (2d Cir. 2018) (applying New York law and finding that it permits consideration of custom, practice, usage, generally understood connotation of words within a trade or business); *see also* RLLI, *supra* note 1, § 3, Reporters' Note c (citing additional federal cases taking similar view of New York law).

States Expressly Expressing Receptiveness to Extrinsic Evidence (often citing California cases)

Alaska,[68] Arizona,[69] Arkansas,[70] California,[71] Idaho,[72] Illinois,[73] Iowa,[74] Maine,[75] Maryland,[76] Montana,[77] New Jersey,[78] New Mexico,[79] Utah,[80] Vermont,[81] and Washington.[82]

68. *See, e.g.*, Nautilus Marine Enters. v. Exon Mobil Corp., 305 P.3d 309 (Alaska 2013).

69. Taylor v. State Farm Mut. Auto Ins. Co., 854 P.2d 1134 (Ariz. 1993) (applying R2K contextual approach).

70. Hurt-Hoover Invs., LLC v. Fulmer, 433 S.W.3d 917 (Ark. 2014) (parol evidence rule does not prohibit introduction of extrinsic evidence where the evidence aids the court's interpretation).

71. Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968) (discussed in more detail, *infra*).

72. Anderson & Nafzier v. G.T. Newcomb, Inc., 595 P.2d 709 (Idaho 1979) (noting that in sale of goods case governed by Uniform Commercial Code, court will consider material other than text of contract).

73. Hessler v. Crystal Lake Chrysler-Plymouth, Inc., 788 N.E.2d 404 (Ill. 2003) (expressing support for R2K and broad receptiveness to extrinsic evidence).

74. Peak v. Adams, 799 N.W.2d 535 (Iowa 2011) (supporting R2K approach).

75. Rogers v. Jackson, 804 A.2d 379 (Me. 2002).

76. Clendenin Bros. v. U.S. Fire Ins. Co., 889 A.2d 387 (Md. 2006).

77. Mary J. Baker Revocable Trust v. Cenex Harvest States Coops., Inc., 164 P.3d 851 (Mont. 2007).

78. Conway v. 287 Corporate Center Assocs., 901 A.2d 341 (N.J. 2006).

79. Sanders v. FedEx Ground Package Sys., Inc., 188 P.3d 1200 (N.M. 2008).

80. Ward v. Intermountain Farmers Ass'n, 907 P.2d 264 (Utah 1995); *see also* Marke O. Morris & Elizabeth Evenson, *What's Happening to the Parol Evidence Rule? More Holes in the Dike*, 67 DEF. COUNSEL J. 209 (2003) (discussing case).

81. Madowitz v. Woods at Killington Owners' Ass'n, 6 A.3d 1117 (Vt. 2010).

82. Berg v. Hudsman, 802 P.2d 222 (Wash. 1990).

States Expressly Expressing Resistance to Extrinsic Evidence (often citing New York Precedent)

Alabama,[83] Colorado,[84] Connecticut,[85] Delaware,[86] Florida,[87] Georgia,[88] Hawaii,[89] Indiana,[90] Louisiana,[91] Nebraska,[92] New Hampshire,[93] New York,[94] North Dakota,[95] Oregon,[96] Pennsylvania,[97] Texas,[98] Virginia,[99] Wisconsin,[100] and Wyoming.[101]

V. STATE STATUTES ON PLAIN MEANING AND CONTRACT INTERPRETATION

Appendix A presents a listing of the states with statutes addressing contract interpretation. Many states also have statutes governing statutory interpretation methodology that could be pressed into service by counsel

83. Slaton v. Shell, 398 So. 2d 311 (Ala. Civ. App. 1981) (articulating traditional rule that written instruments may not be varied by parol evidence).

84. Am. Family Mut. Ins. Co. v. Hansen, 375 P.3d 115 (Colo. 2016); Montoya v. Cherry Creek Dodge, Inc., 708 P.2d 491 (Colo. App. 1985) (embracing traditional approach to parol evidence rule).

85. Heyman Assocs. No. 1 v. Ins. Co. of the State of Pa., 653 A.2d 122 (Conn. 1999); Neiditz v. Hous. Auth. of City of Harford, 651 A.2d 1295 (Conn. 1994) (finding ten-year warehouse lease integrated and refusing to consider extrinsic evidence in construction). *But see* discussion *infra*, regarding the Connecticut Supreme Court's 2003 move from a plain meaning approach to a contextual approach, with the legislature reinstating the plain meaning approach.

86. Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861 (D. Del. 1987) (rejecting extrinsic evidence seeking to vary text of price term of sales contract); Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228 (Del. 1997).

87. Dimmit Chevrolet, Inc. v. Se. Fid. Ins. Corp., 636 So. 2d 700 (Fla. 1993); Lakes Assoc., Ltd. v. Vargas, 881 So. 2d 12 (Fla. 4th Dist. Ct. App. 2004) (supporting traditional parol evidence rule but also entertaining inducement exception); *see also* Deni Assocs. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135 (Fla. 1998) (taking broad textual approach to reading of CGL policy pollution exclusion and rejecting reasonable expectations analysis).

88. Golden Peanut Co. v. Bass, 563 S.E.2d 116 (Ga. 2002) (taking restrictive view of consideration of usage in trade or course of dealing that may vary facially clear meaning of contract text).

89. MPM Hawaiian, Inc. v. World Square, 666 P.2d 622 (Haw. App. 1983) (embracing traditional parol evidence rule).

90. I.C.C. Protective Coatings, Inc. v. A.E. Staley Mfg. Co., 695 N.E.2d 1030 (Ind. App. 1998) (supporting traditional parol evidence rule).

91. La. Civ. Code Ann. art. 2046.

92. Henn v. Am. Family Mut. Ins. Co. 894 N.W.2d 179 (Neb. 2017).

93. Bates v. Phenix Mut. Fire Ins. Co., 943 A.2d 750 (N.H. 2008).

94. Selective Ins. Co. of Am. v. County of Rensselaer, 47 N.E.3d 458 (N.Y. 2016).

95. Hanneman v. Cont'l W. Ins. Co., 575 N.W.2d 445 (N.D. 1998).

96. N. Pac. Ins. Co. v. Hamilton, 22 P.3d 739 (Or. 2001).

97. Nat'l Union Fire Ins. Co. v. Shane & Shane Co., L.P.A., 605 N.E.2d 1325 (Ohio 1992).

98. Kelley-Coppedge, Ins. v. Highlands Ins. Co., 980 S.W.2d 462 (Tex. 1998).

99. Salzi v. Va. Farm Bureau Mut. Ins. Co., 556 S.E.2d 758 (Va. 2002).

100. Bethke v. Auto-Owners Ins. Co., 825 N.W.2d 482 (Wis. 2013).

101. Colo. Cas. Ins. Co. v. Sammons, 157 P.3d 460 (Wyo. 2007).

by analogy.[102] Of the states with contract interpretation statues, some (e.g., Iowa,[103] Nebraska[104]) are largely just codifications of the ambiguity approach,[105] while others restate basic contract construction doctrine such as the norms that contracts be construed as a whole[106] with a preference for legality and avoidance of forfeiture.[107] The statutes may also include

102. For example, in *Duane Reade, Inc. v. Cardtronics*, 863 N.Y.S.2d 14 (App. Div. 2008), the Appellate Division applied N.Y. Statutes Law § 254 ("Relative or qualifying words of clauses in a statute ordinarily are to be applied to the words or phrases immediately preceding.") when construing a contract.

103. IOWA CODE ANN. § 622.22 ("When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which a party had reason to suppose the other understood it").

104. NEB. REV. STAT. § 25-1217 ("When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.").

105. In states with more extensive contract interpretation statutes, codification of contra proferentem is also a common feature. *See, e.g.*, CAL. CIV. CODE § 1654 ("In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."); GA. CODE ANN. § 13-2-2(5) ("If the construction is doubtful, that which goes most strongly against the party executing the instrument or undertaking the obligation is generally to be preferred."); OKLA. STAT. ANN. tit. 15, § 170 ("In cases of uncertainty, not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.").

106. *See, e.g.*, CAL. CIV. CODE § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"); OKLA. STAT. ANN. tit. 15, § 157 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others."); MONT. CODE. ANN. § 28-3-202 (same).

107. *See, e.g.*, CAL. CIV. CODE § 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."); GA. CODE ANN. § 13-2-2(4)) ("The construction which will uphold a contract in whole or in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part"); CAL. CIV. CODE § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."); MONT. CODE ANN. § 28-3-201 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."); N.D. CENT. CODE § 9-07-08 (same); OKLA. ST. ANN. tit. 15, § 166 ("Particular clauses of a contract are subordinate to its general intent."); *id.* § 168 ("Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause, subordinate to the general intent and purposes of the whole contract."); *id.* § 159 ("A Contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."); N.D. CENT. CODE § 9-07-07 ("Several contracts relating to the same matters between the same parties and made as parts of substantially one transaction shall be taken together").

provisions regarding choice of law,[108] cannons of substantive law or policy,[109] gap-fillers,[110] or custom and practice cum public policy.[111] They also tend to expressly recognize the importance of trade usage, industry custom, and course of dealing as helpful factors in contract construction.[112]

Regarding plain meaning, state statutes, like common law, often exhibit an affinity for contract text.[113] Perhaps unsurprisingly, those statutes are often as vague or conclusory as court decisions as to what constitute plain meaning[114] and relatively receptive to non-textual information about meaning. From the cynic's view, this is further evidence that plain meaning is not only in the eye of the beholder but, like Justice Potter Stewart's (in)famous aphorism about pornography, is something judges know when they see it but can't quite describe.[115]

108. *See, e.g.*, OKLA. STAT. ANN. tit. 15, § 162 ("A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.").

109. *See, e.g.*, GA. CODE ANN. § 13-2-2(8) ("Estates and grants by implication are not favored"); *id.* § 13-2-2(9) ("Time is not generally of the essence of a contract; but, by express stipulation or reasonable construction, it may become so"); OKLA. STAT. ANN. tit. 15, § 174 ("Time is never considered of the essence of a contract, unless by its terms expressly so provided.").

110. *See, e.g.*, OKLA. STAT. ANN. tit. 15, § 173 ("Reasonable time allowed where not specified" in contract); *id.* § 176 ("A promise made in the singular number, but executed by several persons, is presumed to be joint and several.").

111. *See, e.g.*, IDAHO CODE § 29-109 ("Where a contract is party written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form, and if the two are absolutely repugnant, the latter must be so far disregarded."); OKLA. STAT. ANN. tit. 15, § 175 ("Promise presumed joint and several"); *id.* § 178 (providing that after divorce or annulment, contracts designating a former spouse as beneficiary will be interpreted such that "all provisions in the contract in favor of the decedent's former spouse are thereby revoked" absent six exceptions).

112. *See, e.g.*, GA. CODE. ANN. § 13-2-2(3) ("The custom of any business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became, by implication, a part of the contract . . . ."). In addition, almost every state has enacted the portions of the Uniform Commercial Code that provided for consideration of usage in trade, course of dealing, and course of performance. These provisions are controlling in sale of goods disputes and other cases where the Code may be applicable. In addition, courts in common law contract cases often look to the Uniform Commercial Code for guidance.

113. *See, e.g.*, OKLA. STAT. ANN. tit. 15, § 155 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this article.").

114. *See, e.g.*, MONT. CODE ANN. § 28-3-303 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of this Chapter."); *id.* § 38-3-401 (The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity."); TENN. CODE ANN. § 47-50-112 ("All contracts . . . shall be prima facie evidence of the true intention of the parties, and shall be enforced as written.").

115. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within

There are some attempts—none of which are very detailed—at fleshing out the notion of plain, ordinary, clear or apparent meaning. California law, notwithstanding its reputation as an extrinsic evidence state, not only pays homage to text but attempts to provide guidance, as do Georgia,[116] North Dakota,[117] Oklahoma,[118] and other states.[119] New York does not

that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case [*Les Amants*] is not that.").

116. *See, e.g.*, GA. CODE ANN. § 13-2-2(2) ("Words generally bear their usual and common signification; but technical words, words of art, or words used in a particular trade or business will be construed, generally, to be used in reference to this peculiar meaning. The local usage or understanding of a word may be provided in order to arrive at the meaning intended by the parties."); *id.* § 13-2-3 ("The cardinal rule of construction is to ascertain the intention of the parties. If that intention is clear and it contravenes no rule of law and sufficient words are used to arrive at the intention, it shall be enforced irrespective of all technical or arbitrary rules of construction.").

117. *See, e.g.*, N.D. CENT. CODE § 9-07-09 ("The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given them by usage, in which case the latter must be followed."); *id.* § 9-07-10 ("Technical words are to be interpreted as usually understood by person in the profession or business to which they relate, unless clearly used in a different sense."); *id.* § 9-07-12 ("A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."); *id.* § 9-07-13 ("However broad may be the terms of a contact, it extends only to those things concerning which it appears that the parties intended to contract."); *id.* § 9-07-14 ("If the terms of a promise in any respect are ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promise understood it."); *id.* § 9-07-15 ("Particular clauses of a contract are subordinate to its general intent"); *id.* § 9-07-17 ("Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to a repugnant clause subordinate to the general intent and purposes of the whole contract."); *id.* § 9-07-08 ("Words in a contract which are inconsistent with its nature or the main intention of the parties are to be rejected."); *id.* § 9-07-20 ("Stipulations which are necessary to make a contract reasonable or conformable to usage are implied in respect to matters concerning which the contract manifests no contrary intention."); *id.* § 9-07-21 ("All things that in law or usage are considered as incidental to a contract or as necessary to carry it into effect are implied therefrom, unless some of them are mentioned expressly therein. In such case, all other things of the same class are deemed to be excluded.").

118. *See* OKLA. STAT. ANN. tit. 15, § 160 ("The words of a contract are to be understood in their ordinary and popular sense, rather than their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given them by usage, in which case the latter must be followed."); *id.* § 161 ("Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.").

119. *See, e.g.*, MONT. CODE ANN. § 28-3-204 ("Repugnancies in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."); *id.* §§ 28-3-304, 28-3-305, 28-3-306, 28-3-307, 28-3-402, 28-3-501, 28-3-502, 28-3-503, 28-3-601, 28-3-701, 28-3-702, 28-3-703; OR. REV. STAT. §§ 42.220–42.280 (provisions similar to California regarding role of party intent, circumstances). Louisiana, despite having a civil law tradition, also has provisions similar to California and places significant emphasis on party intent and contract purpose. *See, e.g.*, LA. CIV. CODE ANN. art. 2045 ("Interpretation of a contract is the determination of the common intent of the parties."); *id.* art. 2051 ("Although a contract is worded in general terms, it must be interpreted to cover only those things it appears the parties intended to include."); *id.* arts. 2047, 2048, 2049, 2052, (provisions akin to California provisions) but

address contract construction in its statutes, its commitment to textualism a product of common law. Its statute on statutory interpretation is largely instruction on grammar.[120]

Perhaps surprising in light of *Thomas Drayage* and textualist criticism of the state's interpretative jurisprudence, California provides that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"[121] and further provides that "[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained form the writing alone, if possible [but] subject, however, to the other provisions" of the law.[122] This includes the command that "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."[123] In addition, "[w]hen, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded."[124]

In words unsurprising to those familiar with *Thomas Drayage* and other Traynor Court decisions of the 1960s, California law also provides that "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."[125] This contextual provision somewhere between *Thomas Drayage* and RLLI Section 3 is not a consequence of the Traynor Court, however. The statute was enacted in 1872.

Regarding interpretation of contract text, California's statutory attempt to clarify the concept of clear contract text fits comfortably within the mainstream of contract construction thought, stating:

> The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the

also providing that "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent."); *see also id.* arts. 2050, 2053, 2054, 2055, 2056 ("Each provision in a contract must be interpreted in light of the other provision so that each is given the meaning suggested by the contract as a whole.").

120. *See, e.g.*, N.Y. STAT. § 254 ("Relative or qualifying words of clauses in a statute ordinarily are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote, until the intent of the statute clearly indicates otherwise.").

121. CAL. CIV. CODE § 1638.

122. *Id.* § 1639.

123. *Id.* § 1636.

124. *Id.* § 1640.

125. *Id.* § 1647; *see also id.* § 1649 ("If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believe, at the time of making it, that the promise understood it.").

parties in a technical sense, or unless a special meaning is given them by usage, in which case the latter must be followed.[126]

Technical words are to be interpreted as usually understood by persons in the profession or business to which they related, unless clearly used in a different sense.[127]

However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.[128]

Particular clauses of a contract are subordinate to its general intent.[129]

Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract.[130]

Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected.[131]

Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention.[132]

All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things or the same class are deemed to be excluded.[133]

If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained.[134]

Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several.[135]

126. *Id.* § 1644.
127. *Id.* § 1645.
128. *Id.* § 1648.
129. *Id.* § 1650.
130. *Id.* § 1652.
131. *Id.* § 1653.
132. *Id.* § 1655.
133. *Id.* § 1656.
134. *Id.* § 1657.
135. *Id.* § 1659. In addition, "A promise, made in the singular number, but executed by several persons, is presumed to be joint and several." *Id.* § 1660.

Although statutes like these are helpful, they do not provide a clear or comprehensive methodology for determining when contract text is sufficiently clear or one that can assign meaning to text in the absence of context.

The state statutes regarding contract interpretation appear consistent with what might be termed the modern California approach or the RLLI approach in that they are not so much advocating admission of specific extrinsic evidence as endorsing an approach sufficiently contextual that it requires—or at least permits—contract text to be examined from the outset in light of all surrounding circumstances rather than solely on the basis of the court's reading of the face of the instrument.

For example, Oklahoma provides that "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates"[136] and also provides a potential avenue for evading literal text that a Traynor-like judge might drive a truck through: "[w]hen through fraud, mistake, accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded."[137] Georgia both eschews what might be termed "punctuational literalism" that determines meaning according to rigid application of classical punctuation rules,[138] and shows considerable

136. OKLA. STAT. ANN. tit. 15, § 163. Oklahoma also provides that "[h]owever broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract," *id.* § 164, which reads like an anti-literalism canon.

137. *Id.* § 156.

138. *See, e.g.*, GA. CODE ANN. § 13-2-2(6) ("The rules of grammatical construction usually govern, but to effectuate the intention they may be disregarded; sentences and words may be transposed, and conjunctions substituted for each other. In extreme cases of ambiguity, where the instrument as it stands is without meaning, words may be supplied.").

The term "punctual literalism" is my own and is used to describe punctuation rigidity by interpreting courts. For example, one relatively recent well-publicized decision made statutory construction turn on absence of a "serial" or "Oxford" comma" (i.e., a comma directly before the conjunction in a listing), to which the Court created ambiguity about whether a state law exempting from overtime pay requirements workers engaged in the "canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment[no comma] or distribution: of "perishable foods" applied to truckers working hauling dairy products. The trucker plaintiffs argued that the absence of a comma between "packaging for shipment" and "or distribution" meant that the exception applied only to employees who were engaged in "packing" for "shipment or distribution" as opposed to "packaging for shipment" on the one hand, and also employees in engaged in "distribution"—*e.g.*, truckers—on the other hand.

Although my heart is with truckers trying to get paid, the statute as a whole pretty clearly intended to exempt them from eligibility for additional pay—comma or no comma. By seizing on the absence of a comma before the conjunction, the Court gave the drivers leverage for obtaining a substantial settlement but in a manner that elevated punctuation punctiliousness over a broader assessment of the statute as reflected in the Maine legislature's subsequent amendment of the law to make it clearer that employers of dairy truck drivers were exempted overtime requirements. *See Oxford Comma Dispute Is Settled as Main Drivers Get $5 Million*, N.Y. TIMES (Feb. 9, 2018), nytimes.com/2018/02/09/us/oxford-comma-main.html (discussing O'Connor v. Oakhurst Dairy, 851 F.3d 69 (1st Cir. 2017) (applying Maine law).

concern for vindicating party intent and contract purpose, as do Montana,[139] North Dakota,[140] and Oklahoma.[141]

Likewise, state statutes that speak to the issue tend to caution against elevating particular text over party intent or purpose. For example, Oklahoma law provides that "[w]ords in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected"[142] and that "[s]tipulations which are necessary to make a contract reasonable and conformable to usage, are implied in respect to matters concerning which the contrary manifests no contrary intention."[143]

VI. JUDICIAL-LEGISLATIVE TENSION: THE CONNECTICUT EXAMPLE

Courts in these same states, may, however, be less inclined to worry about party intent, contract purpose, or public policy and more inclined to scrutinize text. Or, conversely, a court that appears insufficiently deferential to the "plain" text may run afoul of legislative sentiment (or powerful text-centric interests with legislative clout). This possibility was realized in Connecticut's experience with its statute concerning statutory interpretation. Connecticut General Statute § 1-2z states that:

> [t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statues. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.[144]

The statute was passed after *State v. Courchesne*,[145] which self-consciously deviated from the professed plain meaning approach that had previously been applied in the courts, prompting many to see the statute as a

139. *See* MONT. CODE ANN. § 28-3-301 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."). Intent is to be determined according to "the rules given in this chapter."); *see id.* § 28-3-202.

140. *See supra* note 80.

141. *See supra* notes 81, 82.

142. OKLA. STAT. ANN. tit. 15, § 169.

143. *Id.* § 171. Oklahoma statute also provides that "[a]ll things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded." *Id.* § 172.

144. However, Section 1-2z applies only to "statutory language that is clear and unambiguous." "The statute did not overrule the principle that ambiguous statutory language is not unconstitutionally vague if the legislative history establishes a clear meaning." Gonzalez v. Surgeon, 937 A.2d 24, 33 n.12 (Conn. 2007).

145. 816 A.2d 562, 586 (Conn. 2003).

legislative overruling of *Courchesne*.[146] But notwithstanding the statute, the Connecticut Supreme Court has continued to take the view that the "purpose or purposes" of legislation and "the context of [statutory] language, broadly understood, are directly relevant to the meaning of the language of the statute."[147]

Courchesne was perhaps controversial because it so openly and candidly departed from the textual orthodoxy of judicial ability to understand word meaning merely by seeing the word. The extensive discussion of the Court in *Courchesne* may strike some (and certainly struck me) as the type of sophisticated and reflective (albeit lengthy) discussion of interpretation that one would appreciate seeing more frequently in judicial opinions. And although readers may recoil a bit, I present an extensive excerpt to provide a flavor of the opinion that triggered legislative reaction and "overruling" of its methodology:

> This claim presents a question of statutory interpretation. "The process of statutory interpretation involves a reasoned search for the intention of the legislature.["] In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of this case, including the question of whether the language actually does apply. In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.[148]
>
> * * *
>
> We now make explicit that our approach to the process of statutory interpretation. . . . [We first engage in a] "reasoned search for the intention of the legislature," which we further defined as a reasoned search for "the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply." (Internal quotation marks omitted.) The rest of the formulation sets forth the range of sources that we will examine in order to determine that meaning. That formulation admonishes the court to consider all relevant sources of meaning of the language at issue—namely, the words of the statute, its legislative history and the circumstances surrounding its enactment, the legislative policy it was designed to implement, and its relationship to existing legislation and to common-law principles governing the same general subject matter. *Id.* We also now make explicit that we ordinarily will consider all of those sources beyond

146. *See* Envirotest Sys. Corp. v. Comm'r of Motor Vehicles, 978 A.2d 49 (Conn. 2009) (viewing statute as response to *Courchesne*).

147. Bell Atl. Nynex Mobile, Inc. v. Comm'r of Revenue Servs., 869 A.2d 611, 617 (Conn. 2005).

148. *Courchesne*, 816 A.2d at 544 (citations omitted); *see also id.* at 546–48 (conducting extensive linguistic analysis of statute).

the language itself, without first having to cross any threshold of ambiguity of the language.

We emphasize, moreover, that the language of the statute is the most important factor to be considered, for three very fundamental reasons. First, the language of the statute is what the legislature enacted and the governor signed. It is, therefore, the law. Second, the process of interpretation is, in essence, the search for the meaning *of that language* as applied to the facts of the case, including the question of whether it does apply to those facts. Third, all language has limits, in the sense that we are not free to attribute to legislative language a meaning that it simply will not bear in the usage of the English language.

Therefore—and we make this explicit as well—we always *begin* the process of interpretation with a searching examination of that language, attempting to determine the range of plausible meanings that it may have in the context in which it appears and, if possible, narrowing that range down to those that appear most plausible. Thus, the statutory language is always the starting point of the interpretive inquiry. [But] we do not end the process with the language.

The reason for this . . . is that "the legislative process is purposive, and . . . the meaning of legislative language (indeed, of any particular use of our language) is best understood by viewing not only the language at issue, but by its context and by the purpose or purposes behind its use."

Thus, the purpose or purposes of the legislation, and the context of that legislative language . . . are directly relevant to its meaning as applied to the facts of the case before us. See L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," 71 Harv. L. Rev. 630, 664 (1958) (it is not "possible to interpret a word in a statute without knowing the aim of the statute"); S. Breyer, "On the Uses of Legislative History in Interpreting Statutes," 65 S. Cal. L. Rev. 845, 853 (1992) ("[a] court often needs to know the purpose a particular statutory word or phrase serves within the broader context of a statutory scheme in order to decide properly whether a particular circumstance falls within the scope of that word or phrase"); F. Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum. L. Rev. 527, 538-39 (1947) ("Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose.").

Indeed, in our view, the concept of the context of statutory language should be broadly understood. That is, the context of statutory language necessarily includes the other language used in the statute or statutory scheme at issue, the language used in other relevant statutes, the general subject matter of the legislation at issue, the history or genealogy of the statute, as well as the other, extratextual sources . . . . All of these sources, textual as well as contextual, are to be considered, along with the purpose or purposes of the legislation, in determining the meaning of the language of the statute as applied to the facts of the case.[149]

149. *Id.* at 578–90, 587–93 (footnotes and case citations omitted).

The *Courchesne* Court then provided an extensive assessment of the plain meaning concept:

> This brings us to a discussion of what is commonly known as the "plain meaning rule." Although we have used many different formulations of the plain meaning rule, all of them have in common the fundamental premise, stated generally, that, where the statutory language is plain and unambiguous, the court must stop its interpretive process with that language; there is in such a case no room for interpretation; and, therefore, in such a case, the court must not go beyond that language.
>
> I[t] is useful to note that both the plain meaning rule and [more contextualist approaches] have, as a general matter, their starting points in common: both begin by acknowledging that the task of the court is to ascertain the intent of the legislature in using the language that it chose to use, so as to determine its meaning in the context of the case.
>
> [U]nder the plain meaning rule, there are certain cases in which that task must, as a matter of law, end with the statutory language. Thus, it is necessary to state precisely what the plain meaning rule means.
>
> The plain meaning rule means that in a certain category of cases—namely, those in which the court first determines that the language at issue is plain and unambiguous—the court is *precluded as a matter of law* from going beyond the text of that language to consider any extratextual evidence of the meaning of that language, no matter how persuasive that evidence might be. Indeed, the rule even precludes reference to that evidence where that evidence, if consulted, would *support or confirm* that plain meaning. Furthermore, inherent in the plain meaning rule is the admonition that the courts are to seek the objective meaning of the language used by the legislature "not in what [the legislature] meant to say, but in [the meaning of] what it did say." Another inherent part of the plain meaning rule is the exception that the plain and unambiguous meaning is *not* to be applied if it would produce an unworkable or absurd result.
>
> Thus, the plain meaning rule, at least as most commonly articulated in our jurisprudence, may be restated as follows: If the language of the statute is plain and unambiguous, and if the result yielded by that plain and unambiguous meaning is not absurd or unworkable, the court must not *interpret* the language (i.e., there is no room for construction); instead, the court's sole task is to apply that language literally to the facts of the case, and it is precluded as a matter of law from consulting any extratextual sources regarding the meaning of the language at issue. Furthermore, in deciding whether the language is plain and unambiguous, the court is confined to what may be regarded as the objective meaning of the language used by the legislature, and may not inquire into what the legislature may have intended the language to mean--that is, it may not inquire into the purpose or purposes for which the legislature used the language. Finally, the plain meaning rule sets forth a set of thresholds of ambiguity or uncertainty, and the court must surmount each of those thresholds in order to consult additional sources of meaning of the language of the statute. Thus, whatever may lie beyond any of those

thresholds may in any given case be barred from consideration by the court, irrespective of its ultimate usefulness in ascertaining the meaning of the statutory language at issue.

We now make explicit what is implicit in what we have already said: in performing the process of statutory interpretation, we do not follow the plain meaning rule in whatever formulation it may appear. ***We disagree with the plain meaning rule as a useful rubric for the process of statutory interpretation for several reasons.***

First, the rule is fundamentally inconsistent with the purposive and contextual nature of legislative language. Legislative language *is* purposive and contextual, and its meaning simply cannot be divorced from the purpose or purposes for which it was used and from its context. Put another way, it *does* matter, in determining that meaning, what purpose or purposes the legislature had in employing the language; it *does* matter what meaning the legislature intended the language to have.

Second, the plain meaning rule is inherently self- contradictory. It is a misnomer to say, as the plain meaning rule says, that, if the language is plain and unambiguous, there is no room for interpretation, because application of the statutory language to the facts of the case *is interpretation* of that language. In such a case, the task of interpretation may be a simple matter, but that does not mean that no interpretation is required.

The plain meaning rule is inherently self-contradictory in another way. That part of the rule that excepts from its application cases in which the plain language would yield an absurd or unworkable result is implicitly, but necessarily, premised on the process of going beyond the text of the statute to the legislature's intent in writing that text. This is because the only plausible reason for that part of the rule is that the legislature could not have intended for its language to have a meaning that yielded such a result. . . . [A]pplication of this aspect of the plain meaning rule requires an implicit inquiry into the legislature's intent or purpose, beyond the bare text, thus, in effect, permitting the court to *rule out* the plain meaning of the language because that meaning would produce an absurd or unworkable result. We see no persuasive reason for a rule of law that prohibits a court from similarly going beyond the bare text of the statute to *rule in* a *different* meaning that other sources of meaning might suggest in any given case. Yet such a prohibition is precisely what the plain meaning rule accomplishes.

Third, application of the plain meaning rule necessarily requires the court to engage in a threshold determination of whether the language is ambiguous. This requirement, in turn, has led this court into a number of declarations that are, in our view, intellectually and linguistically dubious, and risk leaving the court open to the criticism of being result-oriented in interpreting statutes. Thus, for example, we have stated that statutory language does not become ambiguous "merely because the parties contend for different meanings." Yet, if parties contend for different meanings, and each meaning is plausible, that is essentially what "ambiguity" ordinarily means in such a context in our language. See Webster's Third New International Dictionary, and Merriam-Webster's Collegiate Dictionary (10th Ed.), for the various meanings

of "ambiguity" and "ambiguous" in this context. For example, in Merriam-Webster's Collegiate Dictionary, the most apt definition of "ambiguous" for this context is: "Capable of being understood in two or more possible senses or ways." We also have stated that, although the statutory language is clear on its face, it contains a "latent ambiguity" that is disclosed by its application to the facts of the case, or by reference to its legislative history and purpose. Statutory language, however, always requires some application to the facts of the case. Therefore, the notion of such a "latent ambiguity" as a predicate to resort to extratextual sources simply does not make sense. Moreover, we have stated that the plain meaning principle does not apply where the statutory language, although clear and unambiguous, is not "*absolutely* clear and unambiguous . . . ." (Emphasis in original.) The line of demarcation between clear and unambiguous language, on one hand, and *absolutely* clear and unambiguous language, on the other hand, however, eludes us. We have stated further that the court may go beyond the literal language of the statute when "a common sense interpretation leads to an ambiguous . . . result . . . ." It is similarly difficult to make sense of the notion of otherwise clear language becoming ambiguous because it leads to an "ambiguous . . . result . . . ."

* * *

Eschewing the plain meaning rule does not mean, however, that we will not in any given case follow what may be regarded as the plain meaning of the language. Indeed, in most cases, that meaning will, once the extratextual sources of meaning contained in the *Bender* formulation *are* considered, prove to be the legislatively intended meaning of the language. *There are cases, however, in which the extratextual sources will indicate a different meaning strongly enough to lead the court to conclude that the legislature intended the language to have that different meaning. Importantly, and consistent with our admonition that the statutory language is the most important factor in this analysis, in applying the Bender formulation, we necessarily employ a kind of sliding scale: the more strongly the bare text of the language suggests a particular meaning, the more persuasive the extratextual sources will have to be in order for us to conclude that the legislature intended a different meaning. Such a sliding scale, however, is easier to state than to apply. In any given case, it necessarily will come down to a judgmental weighing of all of the evidence bearing on the question.*

* * *

[Although] no other jurisdiction specifically has adopted the particular formulation for statutory interpretation that we now adopt, there is really nothing startlingly new about its core, namely, the idea that the court may look for the meaning of otherwise clear statutory language beyond its literal meaning, even when that meaning would not yield an absurd or unworkable result. It stretches back to the sixteenth century.

The intent of the lawmakers is the soul of the statute, and the search for this intent we have held to be the guiding star of the court. It must prevail over the literal sense and the precise letter of the language of the statute. When one construction leads to public mischief which another construction will avoid, the latter is to be

favored unless the terms of the statute absolutely forbid. Sutherland on Statutory Construction [Ed. 1891] § 323 . . . .

In summary, we now restate the process by which we interpret statutes as follows: "The process of statutory interpretation involves a reasoned search for the intention of the legislature.["] In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. *In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." Thus, this process requires us to consider all relevant sources of the meaning of the language at issue,* ***without having to cross any threshold or thresholds of ambiguity****. Thus, we do not follow the plain meaning rule.*

In performing this task, we begin with a searching examination of the language of the statute, because that is the most important factor to be considered. In doing so, we attempt to determine its range of plausible meanings and, if possible, narrow that range to those that appear most plausible. We do not, however, end with the language. We recognize, further, that the purpose or purposes of the legislation, and the context of the language, broadly understood, are directly relevant to the meaning of the language of the statute.

This does not mean, however, that we will not, in a given case, follow what may be regarded as the plain meaning of the language, namely, the meaning that, when the language is considered without reference to any extratextual sources of its meaning, appears to be *the* meaning and that appears to preclude any other likely meaning. In such a case, *the more strongly the bare text supports such a meaning, the more persuasive the extratextual sources of meaning will have to be in order to yield a different meaning.*

* * *

[The dissent] suggests that judges, by employing a purposive approach to statutory interpretation rather than the plain meaning rule, will substitute our own notions of wise and intelligent policy for the policy of the legislature. We agree that this may happen; any court *may* be intellectually dishonest in performing *any* judicial task, whether it be interpreting a statute or adjudicating a dispute involving only the common law. We suggest, however, that *the risk of intellectual dishonesty is just as great, or as minimal, in employing the plain meaning rule as in employing the method of interpretation that we articulate. If a court is determined to be intellectually dishonest and reach the result that it wants the statute to mandate, rather than the result that an honest and objective appraisal of its meaning would yield, it will find a way to do so under any articulated rubric of statutory interpretation. Furthermore, by insisting that all evidence of meaning be considered and explained before the court arrives at the meaning of a statute, we think that the risk of intellectual dishonesty in performing that task will be minimized.* Indeed, resort to and explanation of extratextual sources may provide a certain transparency to the court's analytical and interpretive process that could be lacking under the employment of the plain meaning rule. In sum, we have confidence

> in the ability of this court to ascertain, explain and apply the purpose or purposes of a statute in an intellectually honest manner.[150]

The Connecticut situation in which a thoughtful, reflective court opinion prompted legislative backlash that on its face goes beyond typical application of the plain meaning approach is regrettable (the responsive statute seeks to ban consideration of not only clearly extrinsic evidence such as pre-contract statements of the parties, but also anything "extratextual"). It is more than a little disheartening to seeing the legislature of a state with presumably more pressing issues intervene to attack a reflective, erudite judicial opinion that, while disapproving of rigid application of a highly textualist plain meaning rule, hardly shuns statutory text.

Legislators should cheer rather than quash sophisticated judicial attempts to better interpret text and achieve correct construction of text. The Connecticut episode is also unusual in that courts tend to be proponents of a text-centered, plain meaning approach to contract interpretation—at least in theory and rhetoric—perhaps more so than the legislatures that have enacted contract construction statutes such as those discussed in the previous section. As shown above, legislated standards of contract construction may on the whole be more supportive of a contextual approach than the state court bench.

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150. *Id.* at 578–90 (footnotes and case citations omitted; emphasis added). Regarding the legislative-judicial interplay surrounding the *Courchesne* decision and reaction to it, see Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. Rev. 209, 264–65 (2015). Although Professor Staszewski does not bluntly accuse the Connecticut legislature and its relatively common notion of the right approach to interpretation as a "dumbing down," that inference can be made of his general attack on seeking simpler or reductionist interpretative methodologies in the interests of achieving uniformity and consistency.

For further examination of the Connecticut legislature's response to *Courchesne*, see Thomas A. Bishop, *The Death and Reincarnation of Plain Meaning in Connecticut: A Case Study*, 41 Conn. L. Rev. 827, 851–57 (2009) (noting that statute passed state house by vote or 144-0 and state senate by 20-16 vote and that key proponent of the legislation was Sen. Andrew McDonald, a liberal Democrat (*see* https://en.wikipedia.org/wiki/Andrew_J._McDonald; https://ctmirror.org/2021/01/14/once-controversial-judge-andrew-mcdonald-backed-for-reappointment-to-cts-high-court), who now sits on the Connecticut Supreme Court).

Such is the widespread allegiance to the plain meaning rule and arguably widespread misunderstanding about the rule and its contextual counterpoint. *See id.* at 853 (noting that "legislative history reveals that the judiciary committee believed *Courchesne* represented a radical departure from normative statutory interpretation and that the court's rejection of the plain meaning rule reflected judicial disrespect for legislative primacy in law making"—a view that I regard as a wildly inaccurate assessment of the nuanced analysis in *Courchesne*). *Courchesne* was a death penalty case where the statutory interpretation discussion was rather clearly dicta designed to make a statement about interpretation, rather than to decide the case and in which the court took a supportive view of the death penalty, which is normally the politically safer path for judges. The court concluded that the convicted defendant was death penalty eligible on the basis of an aggravating factor in one of the two murders he committed; the state need not demonstrate aggravating factors in the second murder. Adding to the irony of *Courchesne* is that it may be the only pro-death penalty decision triggering significant backlash against the rendering court.

In spite of the trouble it caused with the legislature, I cannot help but read the *Courchesne* opinion and wish more courts would engage in the same sort of transparent, self-conscious, sophisticated approach to discerning the meaning of text not only in statutes but also in regulations, contracts, and other documents—all of which typically have a purpose and a specific intent affecting public policy, private rights, or both. Particularly refreshing is the *Courchesne* Court's acknowledgment of (what is to me) an obvious point: textualism is every bit as subject to result-oriented judicial manipulation (perhaps more) as broader and more contextualist approaches to discerning word meaning and legal force.

VII. JUDICIAL TREATMENT OF PLAIN MEANING

A. *Generalized Tautology*

As noted at the outset, searching for court decisions using the term plain meaning provides an avalanche of cases too voluminous to wade through. Even limiting a search by year typically yields thousands of cases. Limiting by month still typically produces hundreds of cases. Even a narrower search for use of the term only in insurance coverage disputes yields a rough average of ten cases each week. For example, a LEXIS search of this type produced more than 350 cases in 2021 alone.[151]

Examining decisions on a case-by-case, trial-and-error method based on their ranking in response to various database searches does not (at least from my perspective) reveal decisions that are particularly enlightening as to what constitutes plain meaning. One is largely left with the view that courts indeed take an "I know it when I see it" approach to the determination.

Courts in some cases give some indication of what they meant by plain meaning. But they almost never explain how it was they discerned that meaning was plain – at least in the cases in which the court made this type of finding of sufficiently clear, unambiguous policy language. It is primarily in the cases where language was found not to be sufficiently plain that the courts offered some explanation of their lexical analysis. Typical of the caselaw are statements such as the following:

> unambiguous terms of an insurance policy require no construction, and the plain meaning of such terms must be given full effect . . . .[152]

151. For the Lexis search, use terms of date=2021 and name (insur! or assur! or Lloyd! or fidelity or surety and plain meaning) (conducted July 24, 2021).

152. Cont'l Cas. Co. v. H.S.I. Fin. Servs., Inc., 466 S.E.2d 4, 5 (Ga. 1996). This decision was quoted favorably in *Auto-Owners Ins. Co. v. Cribb*, 2019 U.S. Dist. LEXIS 17785, at *10–11 (N.D. Ga. Feb. 5, 2019).

> [an] unambiguous policy provision must be accorded its plain and ordinary meaning, and the court may not disregard the plain meaning of the policy's language in order to find an ambiguity where none exists.[153]

> Courts must give full effect to the plain meaning of clear and unambiguous insurance policy contract provisions.[154]

> Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written.[155]

> [I]f contractual language is clear and explicit, it governs.[156]

> [W]hen [policy] language 'is clear and unequivocal, [each] party will be bound by its plain meaning.[157]

> an insurance policy must be read as a whole and construed according to the plain meaning of its terms.[158]

> If the language of the policy is clear and unambiguous, then it will be given its ordinary and plain meaning.[159]

B. *Partial Explanation*

Occasionally, a court's discussion of plain meaning and the plain meaning rule is a bit more expansive.

> "[P]lain meaning is the one commonly understood in the context of insurance contracts."[160]

> "Nuanced connotations may represent the plain meaning of a term in context even though those connotations result from tacit knowledge, accumulated experience, and common sense that are not reflected well—if at all—in dictionary definitions."[161]

> Court looks at policy language "to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it."[162]

153. Bassuk Bros. v. Utica First Ins. Co., 768 N.Y.S.2d 479, 481 (App. Div. 2003).
154. Capitol Specialty Ins. Corp. v. Tayworsky LLC, 2019 U.S. LEXIS 12110, at *7 (S.D. W. Va., Jan. 25, 2019).
155. Wash. Nat. Ins. Corp. v. Ruderman, 117 So. 3d 943, 948 (Fla. 2013).
156. Powerine Oil Co. v. Superior Court, 37 Cal. 4th 377, 390 (2005).
157. IDT Corp. v. U.S. Specialty Ins. Co., 2019 Del. Super. LEXIS 55, at *17 (Jan. 31, 2019) (citation omitted).
158. KA Together, Inc. v. Aspen Specialty Ins. Co., 2019 U.S. Dist. LEXIS 12184, at *11 (E.D. Pa. Jan. 24, 2019) (quoting Selective Way Ins. v. Travelers Prop. Cas. Co. of Am., 724 F. Supp. 2d 520, 521 (E.D. Pa. 2010)).
159. Oldcastle Precast v. Concrete Accessories of Ga., 2019 U.S. Dist. LEXIS 16773, at *18 (D. Idaho Jan. 31, 2019).
160. Or. Mut. Ins. Co. v. Certain Underwriters at Lloyd's London, 2019 Or. App. LEXIS 152 (Jan. 30, 2019) (determining that one of two automobile policies was excess and the other primary).
161. State v. Gonzalez-Valenzuela, 365 P.3d 116, 121 (Or. 2015).
162. Waller v. Truck Ins. Exch., Inc., 900 P.2d 619, 627 (Cal. 1995).

> Plain meaning is the meaning "a layperson would ascribe to contract language."[163]
>
> [T]o determine the meaning of an ambiguous contract, the trier of fact must determine what a reasonable person would have understood the language to mean and the words used must be construed given their ordinary meaning.[164]
>
> We rely on the plain meaning of the test as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results.[165]

When courts refuse to find plain meaning in a policy term, they are more likely to offer a substantive assessment of what constitutes plain meaning as opposed to ambiguity.

> Language is ambiguous if it is "reasonably susceptible of different constructions and capable of being understood in more than one sense."[166]
>
> In addition to [dictionary] definitions, a plain meaning analysis must include reading words and phrases in context and construing them in accordance with the rules of grammar and common usage.[167]

163. AIU Ins. Co. v. Superior Court, 799 P.2d 1253, 1264 (Cal. 1990); *see also* Whittaker Corp. v. AIG Specialty Ins. Co., 2019 U.S. Dist. LEXIS 23744, at *22 (C.D. Cal. Feb. 6, 2019) ("When interpreting the language as a whole, one definition of the word 'accrue' makes sense: to come into existence as a legally enforceable claim"); *In re* Lair, 235 B.R. 1 (Bankr. M.D. La. 1999) ("'Plain meaning' does not mean 'simple to understand.' Several courts have used a plain meaning analysis to reach diametrically opposed interpretations of [11 U.S.C.] § 521(2)."); United Nuclear Corp. v. Allstate Ins. Co., 252 P.3d 798, 810–14 (N.M. Ct. App. 2011) (using dictionary to interpret term "sudden" in qualified pollution exclusion but also buttressing construction by reference to the text of the entire policy, the context surrounding the issuance of the policy, as well as examining precedent and noting division of authority on meaning of the qualified pollution exclusion). *But see* United Nuclear Corp. v. Allstate Ins. Co., 285 P.3d 644 (N.M. 2012) (reversing court of appeals and finding meaning of "sudden" sufficiently ambiguous to permit consideration of extrinsic evidence and that ambiguity remained unresolved, requiring construction against insurer as drafter of policy and in order to honor objectively reasonable expectations of the policyholder); Moore v. State, 34 A.3d 513, 519 (Md. 2011) ("When conducting a plain meaning analysis, we have observed that dictionary definitions 'provide a useful starting point for discerning what the legislature could have meant in using a particular term.") (citations omitted); *see also id.* at 519–22 (also examining structure of statute and legislative history as guides to statutory meaning but referring to its methodology as a plain meaning approach). *But see id.* at 518 (where statutory language unambiguous, court should not examine extrinsic evidence). The *Moore* court concluded that a "firearm" could include an inoperable weapon and—notwithstanding the rule of lenity—affirmed conviction for possession of an unregistered, but inoperable, gun.

164. Clark v. Prudential Prop. & Case. Ins. Co., 66 P.3d 242, 245 (Idaho 2003).

165. Willacy Cnty. Appraisal Dist. v. Sebastian Cotton & Grain, Ltd., 55 S.W.3d 29, 38 (Tex. 2018).

166. Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999).

167. Lane v. State, 933 S.W.2d 504, 515 n.12 (Tex. Crim. App. 1996); *accord* Bingham v. State, 913 S.W.2d 208, 209–10 (Tex. Crim. App. 1995).

> An ambiguous policy provision is one "reasonably susceptible of two different meanings or of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning."[168]
>
> [A court is] obligated to give an insurance contract that construction which comports with the reasonable expectations of the insured.[169]
>
> The standard is what a reasonable person standing in the shoes of the insured would expect the language to mean.[170]
>
> [Refusing to consider dictionaries and precedent in text construction] would relegate plain meaning analysis of statutory language to the subjective impression of appellate judges with no standards to guide interpretation.[171]

C. *More Pronounced Attempts to Articulate and Defend the Plain Meaning Concept*

Although not all opinions using the term plain meaning (and its cousins) are reductive and conclusory, thoughtful discussion of plain meaning such as *Courchesne* are rare. Decisions defending the plain meaning approach tend reflect considerably less depth than *Courchesne*-like contextualist analyses, as reflected in the cases discussed below.

1. Contract Case Examples

The Wyoming Supreme Court decision in *Schell v. Scallon* devotes more attention to the plain meaning concept than most cases, but still falls short of offering much explanation for the manner in which a court should determine the clarity of language. In addition, its holding raises questions about the efficacy of its approach and the correctness of the decision, which held that home buyers were without recourse against the seller for a house that had an inadequate well that ran dry shortly after the sale.

> We afford the contract's terms the plain meaning that a reasonable person would give to them. "We employ common sense and 'ascribed the words with a rational and reasonable intent.'" "We consider the language in the context

168. Glen Falls Ins. Co. v. Smith, 617 S.E.2d 760 (W. Va. 2005) (quoted approvingly in Capitol Specialty Ins. Corp. v. Tayworsky LLC, 2019 U.S. LEXIS 12110, at *7 (S.D. W.Va., Jan. 25, 2019)).

169. Burr v. Nationwide Mut. Ins. Co., 359 S.E.2d 626, 631 (W. Va. 1987).

170. Thompson v. State Auto. Mut. Ins., 11 S.E.2d 849, 850 (1940).

171. Lane v. State, 933 S.W.2d 504, 515 n.12 (Tex. Crim. App. 1996). Common terms "are to be construed in their natural, plain and ordinary sense, and courts may inform their understanding of such words by consulting a dictionary." C.H. Heist Carib Corp. v. Am. Home Assur. Co., 640 F.2d 479, 481 (3d Cir. 2018); *see also* KA Together, Inc. v. Aspen Specialty Ins. Co., 2019 U.S. Dist. LEXIS 12184, at *13 (E.D. Pa. Jan. 24, 2019). Determining that the term "entrust" is a commonly used term and that it means "to confer a trust on" or "to commit to another with confidence" based on a case); Grover Com. Enters., Inc. v. Aspen Ins. UK, Ltd, 202 So. 3d 877 (Fla. Dist. Ct. App. 2016) (making this determination on the basis of the *Merriam-Webster Collegiate Dictionary* (11th ed. 2005)).

> in which it was written, looking to the surrounding circumstances, the subject matter, and the purpose of the agreement to ascertain the intent of the parties at the time the agreement was made." "We presume each provision in a contact has a purpose, and we avoid interpreting a contract so as to find inconsistent provision or so as to render any provision meaningless."
>
> When the contract's provisions are clear and unambiguous, we look only to the "four corners" of the document to determine the parties' intent and we enforce the terms of the contract as written. "An ambiguous contract is one which either contains a double meaning or is obscure in its meaning because of indefiniteness of expression. Whether a contact is ambiguous is a matter of law, and the parties' disagreement as to a contract's meaning does not mean the contract is ambiguous. Because we use an objective approach to interpret contracts, evidence of the parties' subjective intent is not relevant or admissible in interpreting a contract."[172]

This court concluded that "[u]nder the plain meaning of its terms, we conclude the language was unambiguous and did not require Sellers to complete a well, before the date of closing, with any greater function than producing water."[173] The Court thus rejected the buyer's complaint that the well on the purchased property failed to comply with the provision when it developed significant problems within months of the April 2015 closing and stopped working altogether or ran dry by June 2016.[174]

172. Schell v. Scallon, 433 P.3d 879, 885 (Wyo. 2019) (citations omitted); *see also id.* (using dictionary definitions from *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) to determine the meaning of an agreement that a seller would "complete a fully functional water well prior to closing").

173. *Id.*

174. This type of well failure seems severe enough that it would violate the implied warranty of merchantability if the house were a "good" within the meaning of the Uniform Commercial Code, making *Schnell v. Scallon* seem—at least to me—a harsh decision. But the opinion also notes other aspects of the transaction that can reasonably be read as the sale having something akin to an "as is" character—and the buyers did not inspect the well, which was at least nominally working at the time of closing, prior to purchase.

The case provides an interesting clash of two opposing concerns in disputes over a sale that has disappointed a party to the transaction. Which is the more "just" result: providing a remedy to the disappointed party? Or refraining from imposing liability on a party that appears not to have committed fraud or otherwise acted dishonorably but nonetheless provided an inferior product?

Schell v. Scallon is silent as to the purchase price of the property. I would argue that this is relevant to determining how broad or narrow a construction to give to the contract duty of the seller to "complete a fully functional well." If the home purchase was bargain basement, the Wyoming Supreme Court's analysis (in a unanimous opinion) seems correct. If the home was sold a price associated with homes that had no well problems, the result seems harsh and unjust for the buyers. An examination of such evidence, which is only partially extrinsic, would be illuminating. The price presumably was on the face of the contract while the local real estate market is extrinsic information—but information capable of rather ready and accurate determination, almost in the manner of judicial notice pursuant to Federal Rule of Evidence 202, through a look at local listings and recent comparable sales, which are normally available in government records and through real estate websites such as Redfin.

The court was unsympathetic, reasoning that "[t]he parties were free to define 'fully functional" or the requirement's other terms, but did not, and we will not write terms into a contract under the guise of contract interpretation."[175] The court then, however "bolstered" its linguistic analysis "in the context of the purpose" of the contract and discussed the context of the purchase at sufficient length[176] that one could be forgiven for viewing this as the equivalent of a California-like examination of extrinsic evidence. However, the court rejected the buyers' "request that we look outside the four corners of the contract and consider circumstances surrounding execution of the agreement" such as "industry standards and the State Engineer's minimum construction standards for water wells.[177]

One non-insurance case provides an extensive discussion of the concept and the extent to which arguably clear contract language may qualify as having a plain meaning. In *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*,[178] the court reversed and remanded a trial court decision that had considered extrinsic evidence contradicting what the appellate court regarded as the plain meaning of a contract provision. Although not essential to the court's decision, its discussion of the plain meaning concept and consideration of extrinsic evidence is illustrative:

> In a world where semantics is a science instead of an art we might be able to read a contract and understand it without question. However, English is often a difficult and elusive language and certainly not uniform among all who use it. External indicia of the parties' intent other than written words are useful, and probably indispensable, in interpreting contract terms. If each judge simply applied his own linguistic background and experience to the words of a contract, contracting parties would live in a most uncertain environment.
>
> * * *
>
> It is the role of the judge to consider the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning. The trial judge must then determine if a full evidentiary hearing is warranted. If a reasonable alternative interpretation is suggested, even though it may be alien to the judge's linguistic experience,

My larger point is that, regardless of whether the *Schell v. Scallon* decision is "right" or "wrong," it would have been improved by a broader analysis of the disputed transaction and its documentation.

175. *Id.* at 885.

176. *Id.* at 885–86.

177. *Id.* at 886; *see also id.* at 886–87 ("Buyers arguments on this point are unconvincing for two reasons. First, the contract does not reference either set of standards. Second, Buyers have not shown that 'fully functional' has a particularized or technical meaning in the water well industry, or that, if it did, we should presume the parties intended 'fully functional' to imply compliance with standards for an industry in which neither party participates.").

178. 619 F.2d 1001 (3d Cir. 1980).

objective evidence in support of that interpretation should be considered by the fact finder. *See Corbin on Contracts* § 542.[179]

The Third Circuit further explained its view of the role of extrinsic evidence and the "four corners" rule in contract interpretation in a lengthy footnote:

> It is only by this approach that courts can achieve consistency in contract interpretation.
>
> The strict "four-corners" doctrine allows a court to sit in an isolated position and decide if words are "clear" or "ambiguous." Judges today come from a variety of backgrounds private law practice, government service, business, academia and their fields of experience represent an even wider variance. The parties who appear before the court in these times of complex commercial transactions come from a variety of specialized worlds of trade. It is the parties' linguistic reference that is relevant, not the judges'. The judge is in his or her linguistic field of expertise only when viewing words which lawyers have developed as terms of legal art. Even when the judge faces the need to interpret legal terms of art, extrinsic evidence and legal briefing are useful.
>
> For example, a contract might provide for a party to pay "$10,000 for 100 ounces of platinum." A judge might state that the quoted words are so clear and unambiguous that parol evidence is not admissible to vary their meaning. That judge might never learn that the parties have a consistent past practice of dealing only in Canadian dollars and follow a standard trade practice of measuring platinum in troy ounces (12 to the pound instead of 16). This is because that judge's linguistic frame of reference includes the dollars and the ounces he or she encounters in daily life. This is not the linguistic frame of reference of the commercial parties.
>
> There are many other examples which demonstrate the necessity of the approach we outline. A "pound" of caviar is always 14 ounces. One can readily see the difficulty counsel might have convincing a judge who never has eaten caviar that a "pound" can be 14 ounces. The case could also come before a judge who is a lifelong gourmet and consumer of caviar. To the gourmet judge it might be "clear and unambiguous" that a pound of caviar is 14 ounces. Similarly, in the lumber business a "two by four" is never really two inches by four inches, but somewhat smaller. The background of some judges might make them aware of this, the background of others might not. Following the approach we outline in this opinion a consistent result could be reached in each case the parties would be bound to the same meaning of the external signs of their intent. When the judge who knows only common usage is told that a specialized usage can be shown which is common to both parties, he will realize an ambiguity can exist and will admit evidence to determine the meaning by which the parties should be bound. Under a "four-corners" approach

179. *Id.* at 1010–11 (footnote omitted).

> to the question of ambiguity, the result would depend on which judge heard the case.[180]

But notwithstanding the Third Circuit's acknowledgment of numerous circumstances where extrinsic evidence could bear on the interpretation of what might upon first glance appear to be facially unambiguous terms, the decision ultimately held that the extrinsic evidence considered by the trial court exceeded the limited purposes for which such evidence could be considered:

> But our approach does not authorize a trial judge to demote the written word to a reduced status in contract interpretation. Although extrinsic evidence may be considered under proper circumstances, the parties remain bound by the appropriate objective definition of the words they use to express their intent. Generally parties will be held to definitions given to words in specialized commercial and trade areas in which they deal. Similarly, certain words attain binding definition as legal terms of art. Dates, numbers and the like generally cannot be varied [(but noting that example of "two by four" lumber shows even this textual norm has exceptions)]. For example, extrinsic evidence may be used to show that "Ten Dollars paid on January 5, 1980," meant ten Canadian dollars, but it would not be allowed to show the parties meant twenty dollars. Trade terms, legal terms of art, numbers, common words of accepted usage and terms of a similar nature should be interpreted in accord with their specialized or accepted usage unless such an interpretation would produce irrational results or the contract documents are internally inconsistent.
>
> We have concluded that the district court here exceeded the permissible boundary of interpretation. We believe its [narrower] interpretation of insolvency [as the term was used in the contract] was improperly restrictive. Commercial parties entered a Buy-Sell Agreement using a well defined commercial term and legal term of art [in using the word] "insolvent."[181]

2. Criminal Case Illustrations

In *United States v. Rodriguez*, 711 F.3d 541, 544 (5th Cir. 2013), the court stated that it would "adopt a plain-meaning approach to determining what constitutes a "crime of violence" for purposes of enhancement of a criminal sentence because of defendant's prior conviction for "sexual abuse of a minor" and "statutory rape" and set forth the following protocol:

> First, we identify the undefined offense category that triggers the federal sentencing enhancement. We then evaluate whether the meaning of that offense category is clear from the language of the enhancement at issue or its applicable commentary. If not, we proceed to step two, and determine whether that undefined offence category is an offense category defined at common law, or

180. *Id.* at 1011 n.12 (citations omitted).
181. *Id.* at 1013 (footnotes and citations omitted).

> an offense category that is not defined at common law. Third, if the offense category is a non-common-law offense category, then we derive its "generic, contemporary meaning" from its common usage as stated in legal and other well-accepted dictionaries. Fourth, we look to the elements of the state statute of conviction and evaluate whether those elements comport with the generic meaning of the enumerated offence category. This plain-meaning approach is faithful to the Supreme Court's decision in *Taylor v. United States*, [495 U.S. 575 (1990)] but does not impose a cumbersome methodological requirement on lower courts to conduct a nationwide survey and look to the majority of state courts—as well as the Model Penal Code, federal law, and criminal law treatises—when deriving the meaning of an undefined offense category enumerated in a federal sentencing enhancement.[182]

Rodriguez, like many cases discussing interpretative process at length, is a criminal case, which implicates the "rule of lenity" providing that criminal statutes must be sufficiently clear to support conviction and are strictly construed against the government. The lenity concept instructs the court to resolve unclear statutory language in favor of the defendant on the ground that a person should only be subjected to criminal punishment if the language of the statute is sufficiently clear. Jorge Cabeccera Rodriguez was before the court on a guilty plea for illegal reentry into the United States after his deportation (a violation of 8 U.S.C. 1326) and received a 23-month sentence, that was enhanced because of prior convictions in Texas, where he had engaged in sex with a 16-year-old girl (sexual assault of a "child" in violation of Texas Penal Code 22.011(a)(2)).

Cases discussing the plain meaning approach or textual interpretation at length often involve statutes rather than contracts. Statutes differ of course because they are the positive law of the sovereign rather than an agreement among persons or entities. Statutes are also inherently textual writings while contracts may be oral or written. Because statutes are law applicable to the public and not mere agreements among contracting parties, the stakes of statutory interpretation are perhaps considered sufficiently higher and therefore worth more extensive reflection and discussion by courts. But even though statutes, particularly criminal statutes, differ from contract documents, the basic ground rules of interpretation should apply in all cases. Judicial analysis of statutory language can thus illuminate what courts do – or at least say they do – in resolving disputes over textual meaning.

Rodriguez, despite its methodical four-step process, does not tell the reader much about how the judges of the *en banc* Fifth Circuit actually determined word meaning. But it does at least identify the sources

182. 711 F.3d at 544.

of meaning consulted by the court. These include dictionaries,[183] judicial precedent, model laws, and treatises. For example in *Rodriguez*, the LaFave & Scott criminal law treatise enjoyed status as an authority on word meaning in criminal statutes.[184]

Defendant Rodriguez argued that the sentencing enhancement should be based on the general national understanding of statutory rape and illegal sex with a child (the Rodriguez encounter was apparently consensual), which he argued was under age 16 and a four-year age difference between victim and perpetrator. Therefore, argued Rodriguez, it would be inappropriate to increase his sentence based on violation of the harsher Texas state law that applied to victims under 17 and requires only a three-year difference. (Rodriguez was 19 at the time of the infraction). The court rejected this argument, finding the statutory language clear.

Taylor v. United States involved the question of whether burglary constituted a "crime of violence" for purposes of sentence enhancement, with the Court taking the view that the term should be given its "generic" meaning rather than the particular meaning of the state law pursuant to which the defendant previously was convicted.[185] Based on this, the Fifth Circuit prior to *Rodriguez*, took the view that "lower courts [should] always look to the majority of state codes—as well as to other sources, including the Model Penal Code, federal law, and criminal law treatises" when assessing the "generic, contemporary meaning" of an offence category not specifically defined in federal criminal law.[186]

183. *See, e.g.*, Oxford English Dictionary (2d ed. 1989); Merriam-Webster's Collegiate Dictionary (11th ed. 2003), Webster's Third New International Dictionary (3d ed. 2002); Black's Law Dictionary (9th ed. 2009), all cited in *Rodriguez*, 711 F.3d at 559–61.

184. Wayne LaFave, Criminal Law (5th ed. 2010); *see also* Wayne LaFave & Austin Scott, Substantive Criminal Law (1986) (cited in Supreme Court's *United States v. Taylor* decision and several Fifth Circuit decisions regarding meaning of criminal statutes).

185. 495 U.S. at 598.

186. *Rodriguez*, 711 F.3d at 554; *see, e.g.*, United States v. Santiesteban-Hernandez, 469 F.3d 376, 379 (5th Cir. 2006); United States v. Munoz-Ortenza, 563 F.3d 112, 114–15 (5th Cir. 2009); United States v. Lopez-DeLeon, 513 F.3d 472, 474–75 (5th Cir. 2008); United States v. Mendez-Casarez, 624 F.3d 233, 239 (5th Cir. 2010). But these seemingly sensible approaches to determining plain meaning "are no longer valid [Fifth Circuit] precedent to the extent they use approaches other than a plain-meaning approach to define the "generic, contemporary meaning" of the "statutory rape" and "sexual abuse of a minor" offense categories" of the sentencing guidelines. *Rodriguez*, 711 F.3d at 548 n.6. Because of the unifying thread of federal law and a U.S. Supreme Court precedent, the Fifth Circuit is not alone in adopting a plain meaning approach to assessing sentence enhancement terminology. *See, e.g.*, Londono-Quintero, 289 F.3d at 153–54 (using *Random House Webster's Unabridged Dictionary* to define "sexual abuse of a minor"); United States v. Martinez-Carillo, 250 F.3d 1101, 1104 (7th Cir. 2001) (using *Black's Law Dictionary* to define generic meaning of "sexual abuse of a minor"); United States v. Graham, 982 F.2d 32155, 316 (8th Cir. 1992) (using *Black's Law Dictionary* to define "dwelling" and "burglary of a dwelling"); United States v. Romerio-Hernandez, 505 F.3d 1082, 1087–88 (10th Cir. 2007) (using *Black's Law Dictionary* to define "forcible sex offense"); United States. v. Diaz-Ibarra, 522 F.3d 343, 348–49 (4th Cir. 2008) (using *Webster's Third New International Dictionary* to define "sexual abuse of a minor"); United States v. De

In an insurance coverage matter, one court took that view that the plain meaning approach:

> means that a judicial interpretation should conform to the plain meaning that reasonable insurers and insureds likely would have attributed to the words.
>
> The search for this plain meaning does not myopically focus on a word here or a phrase there. Instead, it looks at a word in the context of a sentence, a sentence in the context of a paragraph, and a paragraph in the context of the entire agreement. The plain meaning of a word depends not merely on semantics and syntax but also on the holistic contact of the word within the instrument. Consequently, every word, clause, and provision of the policy 'should be considered and construed together and seemingly conflicting provisions harmonized when that can be reasonably done, so as to effectuate the intention of the parties as expressed therein.' If policy terms] 'are clear and unambiguous, their terms are to be taken in their plain, ordinary and popular sense.'[187]

Jesus-Ventura, 565 F.3d 870, 876–77 (D.C. Cir. 2009) (looking to definitions of terms in state codes, the Model Penal Code, and federal law to determine meaning of "kidnapping"); United States v. Marrero, 677 F.3d 155, 165–66) (3d Cir. 2012) (using Model Penal Code, state laws, and criminal law treatises to determine meaning of "murder"); United States v. McClenton, 54 F.3d 584, 587 (3d Cir. 1995) (using dictionary definitions of "dwelling").

But, on closer scrutiny, these courts all use differing methodologies of determining plain meaning despite the purported uniformity enhancing aspects of the plain meaning approach. Arguably, insurance law makes uniformity more elusive in that insurance law is highly state-centered and only seldom is subject to a controlling federal statute or court decision. The leading federal statute on insurance, of course, is the McCarran-Ferguson Act, which might better be termed a disunifying statute in that it commits insurance regulation and insurance law generally to the states.

But a majority decision does not necessarily mean judicial consensus. Three judges in *Rodriguez* concurred, stating that they were "perplexed" by the majority's "decision to rely solely on dictionary definitions." First, these judges thought "that courts are just as capable as the authors of dictionaries of determining how statutes 'usually' define 'minor.'" Second, the concurring judges saw "inconsistencies in how the court applies the dictionary definitions." 711 F.3d at 563, 567 (Owen, J., joined by Haynes & Graves, JJ., concurring).

Another judge dissented, labeling the majority's plain meaning approach "novel" and "unprecedented" by focusing on the meaning of terms such as "statutory rape" based on the state law under which the defendant was previously convicted, rather than upon broader national and historical connotations of a term. *See* 711 F.3d at 574, (Dennis, J., concurring); *see also* United States v. Rangel-Castaneda, 709 F.3d 373 (4th Cir. 2013) (finding generic, contemporary meaning of statutory rape to place age of consent at sixteen); United States v. Rodriguez-Guzman, 506 F.3d 738, 746 (9th Cir. 2007) (refusing to apply state law concept of age of consent as eighteen).

187. Erie Ins. Exch. v. EPC MD 15, LLC, 822 S.E.2d 351, 355 (Va. 2019) (quoting Floyd v. N. Neck Ins., 27 S.E.2d 193 (Va. 1993), and GEICO v. Moore, 580 S.E.2d 823 (Va. 2003)) (reversing, on the basis of policy language found clear, lower court finding that coverage was extended to a policyholder's acquired entity); *see also* Kwiecinski v. Ill Farmers Ins. Co., 2019 U.S. Dist. LEXIS 11511, at *4–5 (N.D. Ind. Jan. 22, 2019) (U.S. Postal Service vehicle that was driving on a daily mail delivery route for several years is a vehicle "furnished or available" within the plain meaning of the policy); *accord* Smith v. Allstate Ins. Co., 681 N.E.2d 220, 222 (Ind. Ct. App. 1997) (employer-owned van provided for delivery of newspapers on route was "furnished" for "regular use" as a matter of plain meaning); Estate of Kinser v. Ind. Ins. Co., 950 N.E.2d 23, 28 (Ind. Ct. App. 2011) (vehicle furnished for regular use where delivery

D. *Labeling Problematic Policy Text Ambiguous Rather Than Applying More Comprehensive Construction*

In cases that are numerous but not obvious,[188] courts decline to find a plain meaning for language that many would regard as sufficiently clear to have a plain meaning. In many if not the majority of jurisdictions, a finding of textual ambiguity is a prerequisite to consideration of many types of contextual evidence (e.g., usage in trade, course of dealing, the nature of the business or type of transaction involved, economic conditions, social conditions) and especially what might be regarded as overt extrinsic evidence (e.g., testimony or documents regarding party intent).

This prompts some courts to find ambiguity (or at least profess for find ambiguity) in order to gain access to this additional information, particularly in cases where enforcement of seemingly clear contract document text cannot be avoided under the jurisdiction's prevailing law of unconscionability, illegality, public policy or the "absurd result" exception to enforcement of clear contract text.[189] Even when not required by law, a court may be more comfortable declaring language ambiguous rather than admitting that it has consulted extrinsic information and that this information prompts the court not to give literal application of seemingly clear policy text.

In a variant of this, a court may decline to give a broad reading to policy text because such a reading seems at odds with either a reading of the policy as a whole or an understanding of what the policy is designed to accomplish.[190] Related to this is some uncertainty about when arguably straight-forward construction of policy text is (a) giving effect to a uniformly accepted understanding of the term or (b) engaging in dictionary hyper-literalism that gives the language a construction that may be

driver and employer had "mutual understanding that the driver would be given keys to access and permission to drive the vehicle to make deliveries").

188. Some of the difficulty in finding illustrative cases may also result because courts are deferring only partially to even clear text rather than being bound by the apparent single meaning of text.

189. *See, e.g.*, AstenJohnson, Inc. v. Columbia Cas. Co., 562 F.3d 213, 220–22 (3d Cir. 2009) (before declaring result of literal reading of text absurd, court considered extrinsic evidence to see if the information supported a non-absurd interpretation of policy language and, finding none, invoked the absurd result concept); *see id.* at 222.

190. *See, e.g.*, Groshong v. Mut. of Enumclaw Ins. Co., 985 P.2d 1284, 1289–90 (Or. 1999) (finding no personal injury coverage for housing discrimination claim; ruling that policy text referring to coverage for claims alleging interference with "right of private occupancy" was not clear on its face, but in context applied only to claims of infringement on rights of existing property interests and not to claims of discriminatory failure to grant a property interest; *see also id.* (stating that "[t]he meaning of a term is 'plain'—that is, unambiguous—if the term is susceptible to only one plausible interpretation"). As part of its contextual analysis, the *Groshong* court referred to *Webster's Third New International Dictionary* and conducted a functional analysis, concluding that giving the phrase "right of private occupancy" a narrower meaning than sought by the policyholder would not result in illusory coverage. *See id.* at 1288–90.

technically correct but is at odds with the way in which most laypersons use the language at issue in everyday speech.

A classic example of this definitional problem is application of the absolute pollution exclusion to claims alleging chemically-related injury that do not qualify as "pollution" as the term is commonly used. Is a court that applies the exclusion to bar coverage for carbon monoxide poisoning from a faulty furnace[191] giving the admittedly broad language of the exclusion its "plain" meaning or engaging in over-literalism? When a court finds the language ambiguous as applied to something like lead poisoning, the court may claim that the language itself is unclear; but it might be more accurate to say that the language is linguistically clear standing alone but inconsistent with the intent, purpose, and function of the insurance policy once other evidence of meaning is considered.[192]

In addition, to the extent that the policy language at issue is an exclusion or operates in the nature of an exclusion, the "real" basis for a decision adverse to an insurer may be that although the language is quite favorable to the insurer, the language is not so indubitably clear as to reach the threshold of plain meaning—which the RLLI and most courts have defined as a textual presentation admitting to only a single meaning—in light of the canon of construction that exclusions are to be strictly construed and the burden of persuasion placed on insurers to demonstrate applicability of the exclusion.

E. *The (Beneficial) Inconsistency of Courts Avoiding Arguably Clear Policy Language Without Disavowing the Plain Meaning Approach*

Notwithstanding that many courts may be more comfortable finding textual ambiguity and considering contextual and extrinsic evidence in order to resolve disputes over policy meaning, courts are in some circumstances quite willing to refuse application of seemingly clear text based on

191. Other examples include bat guano in an attic; drifting smoke that obscures vision and leads to a collision; contaminated drinking water at a golf tournament; and a direct hit by escaping fuel or insecticide that is confined to only one or a small group of victims in the immediate vicinity. In these types of cases, the courts have divided on coverage—as contrasted with cases of claims based on wider, more gradual contamination affecting a relatively larger group or area in which almost all courts have found the exclusion applicable.

192. Cases that place reliance on legislative intent in construing statutes illustrate this reduced "deference light" to text. *See, e.g.*, Baker v. Hedstrom, 309 P.3d 1047, 1050 (N.M. 2013) (stating that aim of statutory construction is to give effect to legislative intent, but court is to use "the plain language of the statute as the primary indicator of legislative intent") (quoting State v. Willie, 212 P.3d 369, 373 (N.M. 2009)). Contract and insurance coverage cases use similar approaches in at least acknowledging that contracting is about an agreement, but placing heavy reliance on text as the primary indicator of party intent. Because contracts normally lack the extensive background information surrounding statutes, this normally means that contract text prevails. Insurance is arguably a mix of the two in that widely used policy terms function as a type of private legislation that has a discernable drafting history or well-known purpose.

consideration of other factors. This inconsistency is largely just and beneficial in that in almost all of these instances, the result seems correct despite the facial clarity of the text at issue, as reflected in the examples below.

In the situations addressed below, courts reach sound results because they refuse to follow the literal language at issue. My question is why such instances are not more greatly appreciated as essentially refuting the plain meaning approach and arguing for a shift to more contextualized interpretation along the lines of the R2K. Devotees of plain meaning have not adequately answered the question. Although one must give at least muted celebration of correct case outcomes, a more candidly logical, less text-fixated approach to construction would merit louder cheers.

1. Anti-assignment Clauses

The case reports are strewn with decision that permit the policyholder to assign policy protections after fortuitous loss has occurred if the insurer faces no increase of hazard from policyholder's assignment of rights after contingent risk has become a chose in action.[193] The anti-assignment clause on its face, however, would appear to clearly forbid all assignments. Although this could just as easily be viewed as an absurd result or an unconscionable penalty creating disproportionate forfeiture in the event of assignment, the majority rule on this point could also be viewed as judicial rejection of clear text after examination of non-textual factors affecting insurance policy construction. The result is correct as a matter of logic and public policy, but clearly undermines the case for plain meaning literalism.

2. Rejecting Literal Application of Pollution Exclusion Text

Although the cases are divided, courts often refuse to give literal enforcement to the absolute or total pollution exclusion in cases that do not involve what ordinary folk would deem "pollution," such as carbon monoxide poisoning from a broken furnace or an adulterated drinking fountain.[194] However, courts that refuse literal application of the pollution exclusion text tend not to concede that these correct results are inconsistent with a strong form of the plain meaning approach and instead declare the text

193. *See, e.g.*, Wehr Constructors, Inc. v. Assurance Co. of Am., 384 S.W.3d 680, 682–89 (Ky. 2012) (collecting cases on majority rule versus minority rule on this issue; using functional and purposive analysis that finesses the issue of the clarity of the policy text); *accord* N. River Ins. Co. v. Mine Safety Appliances Co., 105 A.3d 369 (Del. 2014).

194. *See, e.g.*, Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992) (applying Illinois law) ("Without some limiting principle, the [text of] the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results."); *accord* Kent Farms, Inc. v. Zurich Ins. Co., 998 P.2d 292, 296 (Wash. 2000) (worker injured by spraying gas due to defective valve is not "polluted" as the exclusion was intended to be understood); Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 82 (Ill. 1997) (carbon monoxide poisoning from defective heater is injury due to vendor negligence rather than pollution).

ambiguous rather than noting that such facially clear policy text is simply inconsistent with the structure and function of the CGL policy, its purpose, and the intent of the industry in adopting the exclusion.[195]

3. Earth Movement Exclusions

Earth movement exclusions, often with anti-concurrent causation clauses, are a staple of property insurance policies and sometimes even found in liability policies. If read literally, they could in many cases unfairly gut coverage. As a result, many courts have read the exclusions as applying only to natural earth movement such as mudslides and earthquakes and not to earth movement created by human activity.

In such cases, the court refuses to read the exclusion literally or broadly, particularly an anti-concurrent causation clause, and limits excluded events to naturally occurring earth movement—such as an earthquake or mudslide rather than shifts in foundation due to broken pipe, equipment misuses, or inadequate stabilization by contractors.[196]

4. Treatment of Retentions and Deductibles

Although not specific or particularly clear, policy language requiring a self-insured retention or deductible of policyholders permits courts to read such language as requiring that these funds be paid out of pocket by policyholders as a condition precedent to coverage. But courts in these cases have generally refused to accord such language a "plain meaning" in favor of insurers.[197] The often implicit rather than express rationale is that

195. *See, e.g.*, Century Sur. Co. v. Casino W., Inc., 329 P.3d 614, 618 (Nev. 2014).

196. *See* Powell v. Liberty Mut. Fire Ins. Co., 252 P.3d 668, 672–74 (Nev. 2011) (collecting cases and concluding majority rule is to hold standard language earth movement exclusion applicable only to naturally caused earth movement despite its broad language but doing so largely on grounds of textual ambiguity); United Nat'l Ins. Co. v. Assurance Co. of Am., 2012 U.S. Dist. LEXIS 73630, at *13–15 (D. Nev. May 29, 2012) (taking similar approach to subsidence exclusion in general liability policy; expressly finding exclusion ambiguous, but also invoking reasonable expectations of builder policyholder and purpose of policy to provide protection to builders sued if faulty work causes injury to other property).

197. *See, e.g.*, Lasorte v. Certain Underwriters, 995 F. Supp. 2d 1134, 1140 (D. Mont. 2014) (holding that self-insured retention (SIR) provided for in policy did not actually have to be paid to trigger insurer duty to provide payment; it was sufficient that policyholder had incurred liability in excess of SIR amount); Intervest Constr. of Jax, Inc. v. Gen. Fid. Ins. Co., 133 So. 3d 494, 502–03 (Fla. 2014) (liability policy does not require SIR amount to be satisfied by payments made by policyholder; payment of retention amount by other source sufficient to obligate insurer to provide coverage). *But see* Lloyd's Syndicated No. 5820 v. AGCO Corp., 756 S.E.2d 520, 525 (Ga. 2014) (applying literal meaning of term "held legally liable" as measuring stick for insurer's responsibility to pay claim and refusing to construe term to trigger payment obligation merely because it had become apparent that policyholder was going to be found liable to third-party claimant). *Accord* RLLI, *supra* note 1, § 1(2), (12) ("Unless otherwise stated in the insurance policy, none of the insurer's duties with respect to defense or indemnification are contingent upon the insured's payment of the [deductible or self-insured retention].").

imposing this burden on most policyholders (i.e., those without sufficient resources to pay out of pocket) would undermine the purpose of the policy. Insurers are adequately protected so long as they can subtract a retention or deductible from their obligation without "up front" payment from the policyholder.

5. Use of a Motor Vehicle Provisions

In a win for automobile insurers, courts have tended not to read the "use of a vehicle" language in auto policies as broadly as they could, reducing the instances in which injuries taking place while the vehicle is stationary (e.g., carjacking, loading or unloading, sleeping overnight) are within coverage.[198] Although these cases tend to narrow rather than expand coverage, they fit a pattern of courts tending to refrain from broad literal notions of what constitutes plain meaning.

"Use" of an auto is a broad term. If applied in a literal fashion (and perhaps a plain meaning fashion as well), the bus driver with TB, the drive-by shooting, unloading a trunk, and carbon monoxide poisoning from a defective heater would all qualify as auto "use" triggering coverage. But many and perhaps even most cases take a narrower approach, effectively treating these events as general liability exposures rather than auto exposures in spite of the broad text standard auto policies.

The situation is complicated in many states by statutes affecting the area, but I think it is correct to say that in these cases courts do not apply facially clear textual meaning but instead consider a number of extrinsic factors, including what they perceive to be the purpose of auto insurance as opposed to other forms of insurance, to determine whether the incident in question should be treated as an auto liability policy matter.

One may quarrel with some decisions that refuse to find "use" of a vehicle where, as a practical matter, that finding leaves a policyholder without a defense or a victim without compensation where the vehicle was concededly a "but for" cause of loss (e.g., if the victim had not returned to the car in the parking lot, she would not have been robbed). Consequently, I would prefer that courts addressing use-of-vehicle issues take the additional step of acknowledging that, in order to reach what they regard as good decisions consistent with the structure and function of auto policies, they have backed away from the plain meaning approach and are making the hard decision of where to confine cause in fact with a de facto concept

198. *See, e.g.*, Lancer Ins. Co. v. Garcia Holiday Tours, 345 S.W.3d 50, 58 (Tex. 2011) (claims by passengers for exposure to tuberculosis due to infected bus driver did not "result from" use of motor vehicle); *accord* Imperium Ins. Co. v. Unigard Ins. Co., 16 F. Supp. 3d 1104, 1122 (E.D. Cal. 2014) (liability for negligently unsecured gate across road did not arise out of vehicle use even though vehicle was used by workers leaving gate unsecured).

of proximate cause so that auto insurers are not required to cover risks better suited to property, life, health, and disability insurance.

6. Declining Strict Enforcement of "Visible Marks" Requirements

Some of the classic reasonable expectations cases have involved burglary claims where the insurer has refused coverage because of a lack of "visible marks of entry" and courts have refused to give the provision literal application.[199] Courts in these cases (and there are of course others to the contrary) deviate from a plain meaning approach even though the visible marks language has a purpose, albeit one the language does not further very well.[200]

7. Narrow Construction of the Business Pursuits Exclusion

Most homeowners policies, which are by design sold to individuals, contain an exclusion barring coverage for losses or claims arising out of business activities conducted by the homeowner. The rationale for the limitation is that commercial activity increases risk and should only be covered if that risk is disclosed, underwritten by the carrier, and paid for by the policyholder through an increased premium or purchase of an endorsement. Although there many cases applying the limitation, which is written in rather broad language arguably implicating even a policyholder's episodic care of a neighbor's dog or occasional babysitting for modest remuneration, there are also cases implicitly rejecting or at least de-emphasizing the text of the coverage limitation in favor of an assessment of whether the activity giving rise to the loss or claim is actually inconsistent with the risk assumed by the insurer selling a homeowners policy.[201]

8. Refusing Literal Enforcement of Representations or Warranties

Representations or warranties are staples of property insurance and in many cases are quite clear on their face (e.g., requiring a janitor or guard on or occupying premises). Courts have on more than a few occasions construed this type of rather clear, plain, absolute language not to bar coverage where the janitor or guard makes a fast food run during which time theft

199. *See, e.g.*, Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co., 366 N.W.2d 271 (Minn. 1985); C&J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975).

200. The purpose is to avoid coverage for "inside job" burglaries, the rationale being that an inside job is less likely to produce visible marks of forced entry—a rationale undermined by a policyholder thief who has the minimal cleverness required to break a window or pry open a door after using insider status to steal policyholder property that will be the subject of the claim.

201. *See, e.g.*, Springer v. Erie Ins. Exch., 94 A.3d 75, 87–91 (Md. 2014) (business pursuits exclusion to liability coverage component of homeowner's insurance policy is construed to mean something other than mere minimum commercial activity or activity for which compensation is received; exclusion applies only where there is a continuity of the insured's alleged business interests and a profit motive).

takes place or a fire breaks out,[202] or when differently named parts serve the same function as a warranted component.[203] These cases, although generally good decisions from a public policy perspective, are inconsistent with the professed "plain meaning" law of many states, a conflict that should spur some rethinking of legal system's professed admiration of plain meaning jurisprudence.

9. Refusing Strict Enforcement of Time Limit Conditions

This is seen primarily in accident or health policies where medical necessity or disability may be defined in terms of concrete physical symptoms or treatment within a proscribed period of time. Modern courts have tended not to enforce these provisions literally even if typically professing support for plain meaning analysis.[204]

VIII. CONCLUSION

What exactly, then, is "plain" meaning? Everyone appears to agree on the basic contours of the concept in general, including contextualists, who typically privilege the text of insurance policies and other contract documents over other indicia of meaning. But there is pronounced division within the legal community as to the nature, extent, and purpose of non-textual information that may be used to determine whether a term has more than one reasonable reading.[205] While there tends to be steady debate regarding

202. *See* Vlastos v. Sumitomo Marine & Fire Ins. Co., 707 F.2d 775 (3d Cir. 1983) (warranty providing that third floor of insured building would be occupied as janitor residence satisfied when janitor was living in building but off-premises during time theft took place) (applying Pennsylvania law).

203. *See* Gold Mine Invs., Inc. v. Mount Vernon Fire Ins. Co., 300 P.3d 1113, 1118 (Kan. Ct. App. 2013) (finding that use of fuses satisfies clause requiring circuit breakers because this is the reading that a reasonable policyholder would give the policy text). But, even without hyper-literalism, it would seem clear that a circuit breaker is not a fuse. The court's emphasis is on functional analysis, risks presented, and objectively reasonable expectations. But the court could have reached this result by acknowledging that the text appeared to have a plain meaning of requiring circuit breakers, but that application of this meaning would be inappropriate in light of the extrinsic evidence of policy purpose and objectives. Once again, however, we have a first-party illustration, rather than a liability insurance illustration.

204. *See, e.g.*, Strickland v. Gulf Life Ins. Co., 242 S.E.2d 148, 152 (Ga. 1978) (reversing literal application of 90-day requirement for amputation and remanding for consideration of functional analysis and consideration of public policy). However, this more functional and purposive approach may be the minority rule. *See, e.g.*, Martin v. Allianz Life Ins. Co., 573 N.W.2d 823, 827–28 (N.D. 1998) (in requiring severance of limb within ninety days for coverage, court reviews caselaw and finds its approach to be clear majority with cases like *Strickland* as a distinct minority); *see also* Hawes v. Kan. Farm Bureau, 710 P.2d 1312, 1316–17 (Kan. 1985) (collecting cases).

205. Significant elements of the legal community favor substantial modification of the traditional contract model, at least as respects insurance policies. The most obvious is support for a strong version of the reasonable expectations approach to policy construction in which a policyholders objectively reasonable expectations determine contract meaning even

the boundaries of acceptable consideration of material outside documentary text, the core issue of what constitutes a sufficiently plain, clear, or unambiguous text continues to receive relatively little attention, perhaps because it is insoluble. This undermines the rationale for the supremacy of the plain meaning approach and argues powerfully for regular judicial use of a broader contextualist approach statute, contract, and policy construction that is more receptive to non-textual indicia of meaning.

The perhaps uninspiring answer to the question of what constitutes plain meaning seems to be: whatever convinces the judge that the text is sufficiently understandable that further inquiry is unnecessary or unlikely to be worth the temporal, economic, social, or doctrinal cost. Contract meaning is plain when the judge is satisfied that it is clear—a determination that varies not only with the background, orientation, and linguistic preferences of the individual judge but also according to contextual factors and extrinsic evidence that is often unacknowledged.

Although trial judges making such a determination are affirmed more often than not, their findings of inarguably "plain" meaning as a matter of

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if contradicted by the literal language of the policy. *See* STEMPEL & KNUTSEN, *supra* note 64, § 4.11; Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970) (Part I). In practice, however, nearly all jurisdictions at least purport to require a showing of textual ambiguity before considering policyholder expectations as a guide to word meaning. *See* RANDY MANILOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE, ch. 22 (3d ed. 2015). Because court decisions involving the reasonable expectations concept are so interwoven with the dispute in question rather than a broad state "rule" on reasonable expectations, the authors of the treatise elected to eliminate this chapter in the fourth edition of the treatise.

In addition, some support exists for viewing insurance policies as products and assessing them in light of their performance and fitness for the ostensible purpose rather than focusing on text alone. *See, e.g.*, Christopher C. French, *Understanding Insurance Policies as Non-Contracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMPLE L. REV. 535 (2017); Stempel, *supra* note 64; Daniel Schwarcz, *A Product Liability Theory for the Judicial Regulation of Insurance Coverage*, 48 WM. & MARY L. REV. 1389 (2007). There is also some support (but likely less support) for viewing insurance policies as social instruments, *see* Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489 (2010), or akin to legislation, *see* Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203 (2010)).

This is in addition to a rather large block of the academic community that, although adhering to a contract model of insurance policies, would prefer to de-emphasize textualism and increase contextualism beyond that approved in the second *Contracts Restatement*. *See, e.g.*, Lawrence A. Cunningham, *Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-for-the-Job*, 85 GEO. WASH. L. REV. 1625 (2018) (arguing for avoidance of fundamentalist textualist approach and advocating more eclectic approach to contract construction); James A. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation? Text Versus Context*, 24 ARIZ. ST. L.J. 995 (1992) (supporting contextualist approach and finding it more prevalent in case-law than commonly thought in view of judicial rhetoric supporting textual focus); Jeffrey W. Stempel & Erik S. Knutsen, *Rejecting Word Worship: Integrative Interpretation to Improve Judicial Construction of Insurance Policies*, 90 U. CINN. L. REV. (forthcoming 2021) (same regarding insurance policies); *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) (taking less eclectic view more cabined by text but recognizing substantial non-textual factors operating widely in contract and statutory interpretation cases).

law are reversed with sufficient frequency (somewhere between a quarter and a third of the time in contract disputes challenged before an appellate court, depending how one characterizes and counts)[206] that one can be forgiven for questioning the cosmic correctness of a court's determination that the meaning of a contract term is inarguably clear.[207]

And there remains the core problem of the plain meaning approach: its intellectual incoherence.

On its surface, the rule has an intuitive appeal. It seems like a safe intermediate position between strict textualism (which resists acknowledging ambiguity, admits no absurd result exception and limits or even bars recourse to extrinsic evidence even in cases of ambiguity) and some form of all-things-considered eclecticism or pragmatism. But if we poke below the surface, we ought to see that the basic structure of the plain meaning rule is quite puzzling. In our normal lives, and in most contexts under the rules of evidence, information is either useful or not: "Information that is relevant shouldn't normally become irrelevant just because the text is clear. And vice versa, irrelevant information shouldn't become useful just because the text is less than clear."[208]

Seen in this light, the RLLI version of plain meaning might be described as a fusion of the New York and California approaches as well as a reflection of what courts are "really" doing in contract cases. Recall that Section 3 of the RLLI defines the plain meaning of an insurance policy term as "the single meaning to which the term is reasonably susceptible when applied to facts of the claim at issue in the context of the entire insurance policy,"[209] a definition consistent with that of courts and treatise writers as well as with principle that contract terms should not be assessed in isolation and that

206. *See* Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 Loyola L.J. 627 (2012) (noting that roughly a third of summary judgments appealed result in partial reversal or remand, undermining the efficiency claims of summary judgment).

207. In addition, any single individual's conclusion that contract text is clear may be undermined by "false consensus bias," the tendency of human beings to believe that everyone would agree with their assessment of the "natural," "obvious," or "clear" meaning of a term. *See* Lawrence M. Solan et al., *False Consensus Bias in Contract Interpretation*, 108 Colum. L. Rev. 1268 (2008).

208. William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. Chi. L. Rev. 539, 540 (2017) (providing extensive criticism of plain meaning approach even if not applied in rigidly hyper-textualist manner and finding criticisms applicable to contract construction as well as statutory interpretation); *id.* at 564 (positing that judicial reaction to extrinsic evidence such as a committee report is as predictable and cabined as judicial reaction to language); *see also* Bishop, *supra* note 150, at 857–60 (defending plain meaning concept in part but conceding that may be inapt in many cases). In light of the malleability of language and differing reader perceptions, one might also amend the Baude & Doerfler quote to substitute "appears superficially clear" for "is clear."

209. *See* RLLI, *supra* note 1, § 3(2). Pursuant to RLLI § 3(1), "If the 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."

contracts should be read as a whole, an approach that inherently encourages some appreciation of the basic setting and purpose of the transaction at issue.

As noted in the Reporter's Note to Section 3 of the RLLI: "the difference between the [RLLI] plain-meaning approach and the contextual approach lies, not in the consideration of context altogether, but rather in the extent of the context that is considered. [RLLI § 3] allows the court to consider the policy, the purpose of the policy, dictionaries, primary and secondary legal authorities and trade usage."[210] While, this approach may leave both textualists and contextualists dissatisfied, it is a workable if imperfect approach.[211]

Section 3 labels a term "ambiguous" if the term "does not have a plain meaning" and refers readers to Section 4, which states the widely accepted contra proferentem approach. If there is more than a "single 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*,"[212] the term is by definition not plain and subject to Section 4, which permits consideration of a wide range of information bearing on contract meaning, with construction against the contract drafter held in reserve as a tie breaker in the event meaning remains uncertain after analysis of non-textual indicia of meaning.[213]

Although the RLLI states that it is rejecting the contextual approach of the R2K, an observer might be forgiven for thinking that the ALI protests too much.[214] Although the RLLI does not embrace a full-throated

210. RLLI, *supra* note 1, § 3, Reporters' Note (a) (citing with approval MALCOLM A. CLARKE, THE LAW OF INSURANCE CONTRACTS § 15-3, at 419 (4th ed. 2002) ("The ordinary meaning of words is the meaning when read not in isolation but in contexts. The context is a series of circles: the phrase, the sentence, the paragraph, the part of the policy, the whole of the policy, and then, outside the policy itself, the past dealing of the parties, the trade context, and the objects which the policy was intended to achieve.")).

211. My continuing objection to RLLI § 3 is that, if construed narrowly, it is too resistant to potentially illuminating information such as the origin, background, objective, development, drafting history, and deployment of policy language. For example, in current disputes over COVID-19 coverage, insurers have opposed discovery of ISO personnel and materials concerning these aspects of the widely used virus exclusion and may be able to successfully invoke Section 3 in these efforts, which would be unfortunate. Background information about the genesis of the exclusion is of course relevant to its construction as well as industry understanding of the scope of coverage in policies that do not contain the exclusion.

212. *See* RLLI, *supra* note 1, § 3(2) (emphasis added).

213. *See id.* § 4.

214. *See* WILLIAM. SHAKESPEARE, HAMLET, act III, sc. II (originating the now-accepted saying to describe situation in which one makes representations inconsistent with or out of proportion to conduct, which correspondingly suggestions insincerity). The term "protest" in Shakespeare's time, generally meant to declare solemnly or to vow rather than the more modern usage of protest as implying dissent or visible disagreement. Labelling RLLI § 3 insincere would be unfair and inaccurate—but it is fair to note that, notwithstanding its embrace of plain meaning nomenclature, RLLI § 3 does not endorse a narrow, crabbed, or unduly literal reading of policy text in a vacuum.

contextual approach in the manner of Corbin or Farnworth, neither is it taking a narrow textualist view in the manner of Justice Scalia addressing statutory language. The black letter of Section 3 itself nods significantly to context, stressing the "claim at issue" and the "context of the entire" policy as well adopting a lower threshold for finding ambiguity than many courts ("reasonable susceptibility" of language to more than one meaning rather than facial ambiguity, patent ambiguity, or the like).

The Comments and Reporters' Note to RLLI Section 3 makes its semi-contextual approach more apparent. Courts following the RLLI method may consider as "generally accepted sources of plain meaning" dictionaries, court decisions, statutes, regulations, treatises, law review articles and other secondary authority. The RLLI regards these not as extrinsic evidence but as "legal authorities that courts consult when determining the plain meaning of an insurance policy term, which is a legal question,"[215] as is contract construction generally. In addition, Section 3 makes an ample place at the table for custom, practice, and usage, expressly approving introduction of expert affidavits and testimony (via deposition if not at trial or before a jury),[216] which begins to look a lot like extrinsic evidence. However, the RLLI draws a line excluding "extrinsic evidence such as drafting history, course of dealing, or precontractual negotiations"[217] unless the text as issue is deemed ambiguous.

Notwithstanding these limitations, textualists—and many elements of the insurance industry—are upset with Section 3. Entities with the bargaining power to draft contract documents and who think (perhaps mistakenly, probably mistakenly?) that they can do this consistently well and obtain absolute textual advantage will naturally be resistant to consideration of any information that might undermine their efforts or reduce these advantages. They become zealots for strict textualism, conveniently forgetting that when it is to their advantage, they are happy to seek the benefit of implied terms, the overall purpose of the instrument, public policy, and perhaps other extrinsic evidence as well.[218]

215. RLLI § 3, *supra* note 1, cmt. b.

216. *Id.* § 3, cmt c.

217. *Id.* (but also emphasizing that the "facts of the claim," although extrinsic to the policy text, are not extrinsic evidence as the term is generally understood or should be understood.).

218. Insurer reliance on non-textual arguments about the design, purpose, intent, and function of insurance underly coverage defenses based on lack of fortuity, public policy prohibitions on coverage for punitive damages, and noncoverage of claims that sound more in restitution than damages. Even the insurance industry's thus far successful campaign to avoid coverage for COVID-19 business interruption claims regarding policies lacking a virus exclusion makes considerable use of non-textual argument along with contentions that policy terms such as "physical loss" and "physical damage" have a plain meaning. The dictionary definitions of these words are clearly broad enough to impose coverage, but insurers have argued both in court and in the arena of public relations that the business income component

Policyholders and their allies are at least equally justified in complaining about Section 3 in that it not only embraces the nomenclature and ideology of plain meaning but also places limits on consideration of probative non-textual indicia of meaning such as drafting history. Section 3 also gives short shrift to the reasonable expectations doctrine,[219] to say nothing of interpretative perspectives informed by the insurance policy's role as a product, private legislation, part of a regulated industry, governance, or a socioeconomic instrument.[220]

But love it or hate it, the RLLI does as good a job as any authority of capturing the approach actually applied by most courts when interpreting contract and insurance policy text. Although professing to privilege party intent, the focus of the court is on documentary text out of a professed belief that the parties' intent is best reflected in that text—so much so that courts are wary (particularly if the parol evidence rule applies) of considering non-textual evidence unless the text is sufficiently unclear.

Even strongly textual courts implicitly surround their hermeneutic endeavors with at least some context, typically using at minimum the

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of property insurance was never intended to cover losses occasioned by infectious disease and is outside the scope and purpose of such insurance, and that the industry would suffer disastrous consequences if coverage is required. *See* Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Creating Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L.J. 185 (2021).

219. Perhaps calling it "short shrift" is a bit unfair:

> The rules stated in this Section and in § 4 are broadly consistent with the principle that insurance policy terms are to be interpreted according to the reasonable expectations of the insured, provided that the understanding of what makes an expectation "reasonable" incorporates the concept of plain meaning. The term "reasonable expectations" is not used in the black letter of this or other Sections because of the wide variation in a way that courts have employed the term. By requiring that the meaning be one to which the words are reasonably susceptible, this Restatement does not follow the strong formulation of the reasonable-expectations doctrine, pursuant to which an insurance policy is to be interpreted according to the reasonable expectations of the insured even if the insurance policy language is to the contrary. So stated, the reasonable-expectations doctrine is not actually a rule of interpretation. Rather, it is a rule regarding the enforceability of terms that are inconsistent with the reasonable expectations of the insured . . . the enforceability of insurance policy terms is governed by legal rules other than those regarding interpretation.

RLLI, *supra* note 1, § 3, cmt. h.

220. *See* Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653 (2013) (noting that, in addition to contract and product perspectives, insurance can be analogies to regulated industry because of similarity of insurance, which is highly regulated regarding reserves, financial strength, policy forms, and pricing to utilities or other regulated industries; also noting insurance as a regulator or instrument of governance, which has similarities to insurance policies as statutes and as social instruments); *see also* RICHARD ERICHSON ET AL., INSURANCE AS GOVERNANCE (2004) (noting degree to which availability of insurance and conditions regarding insurance impact social and economic behavior); Aviva Abramovsky, *Reinsurance: The Silent Regulator*, 15 CONN. INS. L.J. 345 (2009) (same regarding reinsurance).

factual setting of the case, the type of policy at issue (e.g., general liability, D&O, commercial property), dictionaries, precedent, and legal commentary, and perhaps custom and practice.

Likewise, strongly contextualist courts place strong emphasis on contract/policy text as determinative of meaning. Although these courts may be more receptive to extra-textual information than others, it requires very probative extra-textual evidence of meaning to displace the court's immediate reaction upon simply reading the text.

The resulting blend of eclectic interpretation may thus be the de facto approach to judicial decision-making notwithstanding the rhetorical claims of the courts. Although the meaning of plain meaning remains elusive, the approach may in practice be considerably less strictly textually rigid than its proponents assert.

APPENDIX A[221]

STATE	STATUTE(S) Setting Forth the Manner in Which Contracts Should Be Interpreted
Alabama	None
Alaska	None
Arizona	None
Arkansas	None
California	Cal. Civ. Code § 1635 et seq.
Colorado	None
Connecticut	None
Delaware	Del. Code Ann. tit. 10 § 5403
Florida	None
Georgia	Ga. Code. Ann. §§ 13-2-1 to 13-2-4
Hawaii	None
Idaho	Idaho Code § 29-109
Illinois	None
Indiana	None
Iowa	Iowa Code Ann. § 622.22
Kansas	None
Kentucky	None
Louisiana	La. Civ. Code Ann. art. 2045 et seq.
Maine	None
Maryland	None
Massachusetts	None
Michigan	None
Minnesota	None
Mississippi	None
Missouri	None
Montana	Mont. Code Ann. §§ 28-3-101 to 28-3-704
Nebraska	Neb. Rev. Stat. § 25-1217

221. This Appendix is limited to state statutes expressly governing *contract* interpretation. More common are provisions pertaining to interpretation of *statutes*. *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L.J. 341, 411 (2010) (Appendix); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2089 n.10 (2002) (collecting state laws).

STATE	STATUTE(S) Setting Forth the Manner in Which Contracts Should Be Interpreted
Nevada	None
New Hampshire	None
New Jersey	None
New Mexico	None
New York	None
North Carolina	None
North Dakota	N.D. Cent. Code §§ 9-07-01 to 9-07-23 and § 1-02-02
Ohio	None
Oklahoma	Okla. Stat. Ann. tit. 15, §§ 151 to 178
Oregon	Or. Rev. Stat. §§ 42.210 to 42.300 & Or. Rev. Stat. § 174.010
Pennsylvania	None
Rhode Island	None
South Carolina	None
South Dakota	None
Tennessee	Tenn. Code Ann. § 47-50-112(a)
Texas	Tex. Gov't Code Ann. § 311.011(a)–(b)
Utah	None
Vermont	None
Virginia	None
Washington	None
West Virginia	None
Wisconsin	None
Wyoming	None