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Contra Applicantem or Contra Proferentem Applicatio: The Need for Clarification of the Doctrine of Contra Proferentem in the Context of Insured-Created Ambiguities in Insurance Applications

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Contra Applicantem or *Contra Proferentem Applicatio*: The Need for Clarification of the Doctrine of *Contra Proferentem* in the Context of Insured-Created Ambiguities in Insurance Applications

I. INTRODUCTION

As *Time* magazine recognized when it declared "You" as the person of the year for 2006,[1] consumers are playing an unprecedented role in creating and shaping the products they use. Although *Time* focused on the Internet's user-run juggernauts like Wikipedia, YouTube and MySpace, the expansion of the consumer's role is no less important in the insurance industry. Today, consumers of insurance can take charge of fulfilling their insurance needs in ways that were not available a decade ago. For example, insurance consumers can log on to the Internet and—seemingly as fast as they can say "Quote, Buy, Print"[2]—obtain an insurance policy. They can compare the rates of several different insurance companies at the click of a mouse.[3] Consumers know that a mere "fifteen minutes could save [them] fifteen percent or more on [their] car insurance,"[4] and they can take comfort in the fact that getting insurance these days is "[s]o easy that even a caveman can do it."[5] Although

1. Lev Grossman, *Time Person of the Year: You*, TIME, Dec. 25, 2006, at 38.

2. *See* Esurance Auto Insurance, http://www.esurance.com (last visited Dec. 7, 2007) (displaying the slogan that embodies its business plan: "Quote. Buy. Print.").

3. *See* Progressive Auto Insurance, http://www.progressive.com (last visited Dec. 7, 2007). Progressive popularized the notion of allowing consumers to access its competitors' rates and choose the best one. Many other insurance companies have followed suit.

4. "Fifteen minutes could save you fifteen percent or more on car insurance" is the most popular and well-known slogans of Government Employees Insurance Company (GEICO), seen often in print and television media. GEICO Articles: The Government Employees Insurance, http://www.amazines.com/Geico_related.html (last visited Dec. 7, 2007).

5. Another popular GEICO ad campaign is the notion that getting GEICO insurance is "[s]o easy a caveman can do it." Welcome to GEICO!, http://www.geico.com/landingpage/go7.htm?soa=44837 (last visited Dec. 7, 2007). The popularity of this advertising campaign has even spawned a spoof, pro-caveman, GEICO-run Web site and a television sitcom pilot about the disgruntled cavemen featured in the advertisements. Up With Cavemen, http://upwithcavemen.com (last visited Dec. 7, 2007); *see* Michael Schneider, *ABC Developing 'Cavemen'*, VARIETY, Mar. 1, 2007, *available at*

insurance companies have not forsaken the we'll-take-care-of-you-in-tough-times angle in their advertising strategy, it is clear that insurance companies have not ignored consumers' desire to take an active role in determining and influencing how they obtain insurance coverage.

Fortunately, the same Internet age that has provided consumers with increased opportunities to control their participation in the creation of the products they consume has also produced ways of ensuring that consumers make fewer mistakes in shaping their products. For instance, many web pages are coded so as to apprise the consumer of illogical or conflicting responses to questions and other entries. Notwithstanding the safeguards that insurance companies may establish to deter mistake-making when consumers complete electronic applications, it is logical to assume that increased consumer participation in generating insurance contracts means that the potential for making mistakes in filling out insurance applications will also increase. For example, an insured may create an ambiguity when prompted to type in certain information.

While the insurance industry can anticipate with relative certainty that mistakes in insurance applications will become more frequent to the degree insurers give more responsibility to consumers in filling them out, it is less clear how the courts will apply the law in determining which party will bear the burden of those mistakes and ambiguities. The most widely applied doctrine for resolving ambiguities in insurance contracts is the doctrine of *contra proferentem*, which generally means that ambiguities in contracts should be construed against the party who drafted the contract.[6] With consumers shaping the terms and coverage of their insurance contracts by completing online or print forms, the potential application of the doctrine of *contra proferentem* begs the question of which party is truly the "drafter" of the insurance application. In other words, should courts invoke *contra proferentem* to construe ambiguities in insurance contracts against the applicant who "drafts" the responses to the application's questions or against the insurance company who drafts the language and creates the format of the

http://www.variety.com/article/VR1117960384.html?categoryid=1236&cs=1.

6. *See, e.g.*, Commerce Nat'l Ins. Servs., Inc. v. Buchler, 120 F. App'x 414, 416 (3d Cir. 2004) (noting that under the "well-accepted *contra proferentem* principle," ambiguities in contracts must be construed against the drafter (citation omitted)).

application? In order to examine this question and to distinguish these two possible interpretations of *contra proferentem* in the context of insurance applications, this Comment uses the terms *contra applicantem* and *contra proferentem applicatio*, which are Latin for "against the applicant" and "against he who offers the application," respectively.

Considering that current *contra proferentem* jurisprudence and scholarly commentary offers unclear guidance for which party should bear the burden of ambiguities created by a consumer when filling out an insurance application, this Comment proposes that courts should interpret ambiguities in favor of the consumer. In general, this Comment explores the doctrine of *contra proferentem* in the context of resolving insured-created ambiguities in insurance applications. Part II of this Comment offers a general background of the history and policies surrounding the adoption of the doctrine of *contra proferentem*. In order to illustrate the prevalence of the basic concern underlying this Comment, Part III discusses the need for clarification of the *contra proferentem* rule in the context of insurance applications. In light of this framework, Part III also proposes and defines the rules of *contra applicantem* and *contra proferentem applicatio* as clearer substitutes for the doctrine of *contra proferentem* when insureds create ambiguities. Part IV then offers arguments for and against each interpretation of the *contra proferentem* rule and ultimately concludes that *contra proferentem applicatio* is the better interpretation.

II. BACKGROUND AND POLICIES SURROUNDING THE DOCTRINE OF *CONTRA PROFERENTEM*

The doctrine of *contra proferentem* has its roots in English common law and is supported by three principal justifications. In *The Elements of the Common Laws of England*, Sir Francis Bacon declared that *contra proferentem* is "one of the most common grounds of the law" and defined the doctrine as the "rule[] that a man's deeds and his words shall be taken strongliest against himself."[7] Bacon observed that the primary role of the doctrine is to resolve ambiguities.[8] He also laid out three principal justifications for the doctrine: first, it

7. 3 FRANCIS BACON, *The Elements of the Common Laws of England*, *in* THE WORKS OF FRANCIS BACON 225, 225 (1857).

8. *Id.* at 225–26.

encourages parties to be careful with their words;[9] second, it favors upholding rather than striking executed acts;[10] and third, it allows for judicial economy.[11]

Despite the apparently cohesive rationale for the use of *contra proferentem* over a period of several centuries, the instances in which courts have applied the doctrine in modern times have changed drastically from its historical application. For example, in 1806, the Supreme Court first used the doctrine of *contra proferentem* to resolve an ambiguity in a statutory provision.[12] However, modern courts almost never apply the doctrine of *contra proferentem* to statutory inrerpretation, and many courts hold that, when specific insurance policy terms are dictated by statute, *contra proferentem* does not apply.[13] Aside from statutory language, American courts have historically used *contra proferentem* to resolve ambiguities of all sorts.[14] The modern hallmark of *contra proferentem*, however, is that it is limited almost exclusively to insurance contracts and other contracts of adhesion.[15]

9. *Id.* at 225 ("[*Contra proferentem*] is a schoolmaster of wisdom and diligence in making men watchful of their own business.").

10. *Id.* ("[*Contra proferentem*] favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors.").

11. *Id.* ("[*Contra proferentem*] makes an end of many questions and doubts about construction of words; for if the labour were only to pick out the intention of the parties, every judge would have a several sense; whereas this rule doth give them a sway to take the law more certainly one way.").

12. United States v. Heth, 7 U.S. (3 Cranch) 399, 409 (1806).

13. *See, e.g.*, Terra Indus., Inc. v. Commonwealth Ins. Co. of Am., 981 F. Supp. 581, 590 (N.D. Iowa 1997) ("[The] rules of statutory interpretation, rather than the *contra proferentem* rule, ought to apply when the terms of an insurance contract are dictated by statute."); State Farm Mut. Auto. Ins. Co. v. Messinger, 283 Cal. Rptr. 493, 500 (Cal. Ct. App. 1991) ("[W]here the language is that of the Legislature . . . 'the statute [and, hence, the insurance policy provision in conformity therewith] must be construed to implement the intent of the Legislature and should not be construed strictly against the insurer. . . .'" (alteration in original) (citations omitted)); Paul Revere Life Ins. Co. v. Haas, 644 A.2d 1098, 1103 (N.J. 1994) ("When terms in an insurance policy are included by statutory mandate, however, courts no longer construe the policy against the insurer; rather, the ordinary rules of statutory construction apply.").

14. For example, in early American *contra proferentem* jurisprudence, judges invoked the doctrine to analyze uncertain language in bills of sale and land grants. *See Heth*, 7 U.S. at 409; Duncan v. Cevallos' Ex'rs, 4 Mart. (o.s.) 571 (La. 1817); Segur v. Syndics of St. Maxent, 1 Mart. (o.s.) 231, 231 (Orleans 1811).

15. Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 539 (9th Cir. 1990) (observing that the rule of *contra proferentem* is "the most familiar expression in the reports of insurance cases" (citations omitted)).

It is because of the special relationship between insurers and insureds that courts have continued to use the doctrine to resolve ambiguities in insurance contracts. For example, courts have noted that invoking the doctrine of *contra proferentem* in interpreting insurance contracts is particularly appropriate because insurance companies are in a better situation to bear the risk of loss than are insureds,[16] and because insurance contracts are contracts of adhesion prepared unilaterally by the insurer[17] and are not normally negotiated between parties with equal sophistication or bargaining power.[18]

In sum, the doctrine of *contra proferentem*, once widely used as a basis for resolving any and all ambiguities in the legal realm, now enjoys only limited application, principally in the insurance industry. Although the rationale continues to encompass its centuries-old roots, courts have provided further reasons that have bolstered the rule such that for traditional interpretations of insurance contracts, insurance companies and consumers can be assured thar judges will invoke *contra proferentem* to resolve ambiguities. Despite the proliferation of the rule in modern insurance contract inrerpretation, it is unclear how courts should apply the rule in the context of ambiguities created by insureds when filling out insurance applications. The next section discusses this gap in the law and proposes two refined interpretations of the *contra proferentem* rule that courts could use to fairly resolve such ambiguities.

III. The Need for a Refined Rule to Address Ambiguities in Insurance Applications

The great irony of *contra proferentem*—a legal doctrine that is meant to efficiently resolve ambiguities—is that the term itself is ambiguous in its application. The first problem with the definition of *contra proferentem* is an etymological one. Although the general

16. *See generally* Snow v. City of Columbia, 409 S.E.2d 797, 800 (S.C. Ct. App. 1991) (noting that, all things being equal, a loss should be borne by the party "who is in a better position to spread the risk of the harm").

17. *See, e.g.*, Parrot v. Guardian Life Ins. Co. of Am., 866 A.2d 1273, 1280 n.11 (Conn. 2005) (explaining that, under *contra proferentem*, "ambiguous provisions in a contract of adhesion are interpreted against the drafter").

18. *See, e.g.*, Wismer Distrib. Co. v. Brink's Inc., No. Civ.A.H-03-5897, 2005 WL 1840149, at *8 (S.D. Tex. Aug. 2, 2005) ("[C]ontra proferentem [is] typically applied in interpreting standard form contracts and invoked against a party operating at a distinct bargaining advantage.").

uuderstanding of *contra proferentem* is that it means "against the drafter,"[19] courts often observe that the Latin phrase means "against the offeror,"[20] which is the most etymologically sound translation of the Latin maxim.[21] As a practical matter, the drafter and the offeror of most contracts are the same party, so the distinction between the literal translation and the general understanding of the term is usually irrelevant. However, in the insurance context, the drafter is almost always the insurance company,[22] and the offeror is technically the insured. The latter is true because the applications that would-be insureds fill out are considered invitations, by the insured, to make an offer—not offers themselves.[23] The insured makes the offer by delivering the completed application to the insurance company and the insurance company either accepts the offer by issuing a policy or refuses the offer by rejecting the application. Thus, in the insurance context, the drafter of the insurance contract, the insurance company, is not literally the same as the offeror, which is typically considered to be the insured.

The potential ambiguity of the term *contra proferentem* does not end with the drafter/offeror dichotomy that is unique to the insurance industry; it is compounded by the courts' attempts to define and simplify the doctrine. Many courts have condensed the doctrine to a simple rule that "courts will automatically construe ambiguities against the insurance company."[24] While this statement

19. *See* Boin v. Verizon S., Inc., 283 F. Supp. 2d 1254, 1266 (M.D. Ala. 2003).

20. *See, e.g.*, U.S. Fire Ins. Co. v. Gen. Reinsurance Corp., 949 F.2d 569, 573 (2d Cir. 1991) (noting that the literal meaning of *contra proferentem* is "'against the offeror'"); J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 550, 552 (Miss. 1998) ("[*Contra proferentem*] literally mean[s] 'all things are presumed against the offeror.'").

21. *See* Stefanie K. Beyer, *Recent Decision:* Hongkong and Shanghai Banking Corp. Ltd. v. Suveyke, 19 N.Y. INT'L L. REV. 157, 160 n.39 (2006).

22. When an insurance contract is negotiated between two sophisticated parties, the question of who drafted the contract is difficult to meaningfully ascertain and *contra proferentem* does not apply. *See* McNeilab, Inc. v. N. River Ins. Co., 645 F. Supp. 525, 547 (D.N.J. 1986), *aff'd*, 831 F.2d 287 (3d Cir. 1987) (holding that *contra proferentem* was inapplicable because Johnson & Johnson was a large and "sophisticated insured" aided by counsel in negotiating the policy, which included fifteen separate addenda).

23. *See* Coutts v. United States, 47 Fed. Cl. 118, 126 (Fed. Cl. 2000).

24. Moland v. Indus. Claim Appeals Office of Colorado, 111 P.3d 507, 511 (Colo. Ct. App. 2004); *see also* Lawson *ex rel.* Lawson v. Fortis Ins. Co., 301 F.3d 159, 162 (3d Cir. 2002) ("In keeping with the rule of *contra proferentem*, however, ambiguous terms should be strictly construed against the insurer."); Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc., 125 F.3d 794, 799 (9th Cir. 1997) (noting that the doctrine of *contra proferentem* requires that "[a]mbiguities in ordinary insurance contracts are construed against

of the rule does indeed accurately reflect the state of traditional *contra proferentem* jurisprudence, it does not make the task of interpreting insured-created ambiguities any less difficult. Thus, for courts trying to interpret insured-created ambiguities, the term *contra proferentem* can be reasonably defined three ways: "against the drafter," "against the offeror," or "against the insurer."

There is much opportunity in this new world of consumer independence for an insured to create ambiguity in filling out an insurance application. For example, an applicant may mark contradictory or mutually exclusive coverage provisions when filling out an application. This could happen in both a printed application form and an electronic form. On a Web page or other electronic insurance application, a consumer might also accidentally click both "Yes" and "No" in response to a question about a coverage provision, exclusion, or endorsement. On a printed form, if check boxes are located closely together, the consumer could unwittingly create a checkmark that covers more than one check box.[25] These possible situations, and all the others presented when an insured creates an ambiguity in the insurance application, create a question of who should bear the risk of that ambiguity when it finds its way into the insurance contract.

The traditional definitions of the doctrine of *contra proferentem* do not clearly answer the question of how such ambiguities should be resolved. Clearly, the definition of "against the insurance company" would save the insured from a construction of the ambiguity. However, if applying the "against the drafter" and "against the offeror" definitions of *contra proferentem*, it seems that the ambiguities could be construed either way, depending on a court's interpretation of who is the true drafter or the true offeror. In examining the "drafter" definition of *contra proferentem*, a court would have to consider whether the lone "drafter" of the problematic insurance contract is the insured. Aside from

the insurance company").

25. In Utah, Allstate uses an application form for waiver of uninsured/underinsured motorist coverage that looks roughly like this:

( ) dollar amount of coverage option 1 ( ) dollar amount of coverage option 2

( ) dollar amount of coverage option 3 ( ) dollar amount of coverage option 4

( ) dollar amount of coverage option 5

One can well imagine that a consumer who wants coverage option 3 might make a check mark that covers options 1 *and* 3, options 3 *and* 5, or possibly even options 1, 3, *and* 5.

considering that the insured may have created an ambiguity in the application, a court would have to consider which party chose the format of the application if the format contributed to the insured-created ambiguity.[26] In examining the "offeror" definition of *contra proferentem*, a court would have to assume the difficult task of pinpointing which parties made offers and counteroffers, as well as when they precisely were made. If a court used the "offeror" definition to determine that the ambiguity should be construed against the insured, the court would have to ignore the fact that the insured is never considered the offeror for the purpose of applying *contra proferentem* "against the offeror" in insurance contracts.

Although a strict definitional analysis of the term is of little value when compared to case law or statutory language that shapes the contours of *contra proferentem* in insurance law cases, scarce authority is available to give shape to these definitions. There is no statutory language that addresses insured-created ambiguities in insurance contracts, and there is only one case directly on point—*Bubis v. Prudential Property & Casualty Insurance Co.*[27] In *Bubis*, the insureds filled out an insurance application and marked both the "yes" and "no" boxes in response to a coverage question.[28] In interpreting the contract, the court recognized the general rule "that an ambiguity in an insurance contract should be read in favor of the insured" but refused to apply the rule when "that ambiguity is created by the insured."[29] In making its decision to refuse to construe the ambiguity against the insurance company, the court noted that the "[application] form itself was clear and unambiguous as were the questions posed."[30] While there are a handful of cases that cite to the *Bubis* court's ruling on *contra proferentem*, none of those cases deal with insured-created ambiguities in insurance applications.[31]

26. *See* Bubis v. Prudential Prop. & Cas. Ins. Co., 718 A.2d 1270 (Pa. Super. Ct. 1998).

27. *Id.*

28. *Id.* at 1271.

29. *Id.* at 1273.

30. *Id.*

31. *See* First Liberty Ins. Corp. v. Budow, No. 05-CV-88, 2007 WL 2071883, at *11 (E.D. Pa. July 17, 2007); State Farm Ins. Co. v. Taylor, 293 F. Supp. 2d 530, 536 (E.D. Pa. 2003); N. Ins. Co. of N.Y. v. Dottery, 43 F. Supp. 2d 509, 512 (E.D. Pa. 1998); Gilman v. John Hancock Variable Life Ins. Co., No. 02-00051 AB, 2003 WL 23191098, at *12 (Fla. Cir. Ct. Oct. 20, 2003); Foultz v. Erie Ins. Exchange, No. 3053 Feb. Term 2000, Control

The fact that *Bubis* is the lone case[32] that applies *contra proferentem* in the context of insurance applications evinces the fact that the doctrine is difficult to apply in that context. There are persuasive arguments for construing such ambiguities against the insured, and there are equally compelling reasons why the insurer should bear the risk of the insured's ambiguity. This Comment will utilize separate terms for each of these two alternative means of applying the doctrine of *contra proferentem* in order to directly and efficiently address ambiguities that appear in insurance applications. Each of these terms represents an interpretation of the *contra proferentem* rule that a court could potentially follow. The first term is *contra applicantem*, meaning that courts should construe insured-created ambiguities in insurance contracts against the applicant—that is, the insured. The *contra applicantem* interpretation reflects the *Bubis* ruling. The second term is *contra proferentem applicatio*, meaning that courts should construe insured-created ambiguities in insurance contracts against the party who created the application form—that is, the insurance company. It is helpful to reiterate that these terms are not necessarily new rules; they simply represent the two ways that the courts could apply the doctrine of *contra proferentem* in disputes about ambiguities created by insureds in insurance applications.

Even though the doctrine of *contra proferentem* is ambiguous in the context of interpreting insured-created ambiguities in insurance contracts, courts should not eschew the doctrine altogether when faced with such ambiguities. Instead, courts can weigh the public policy rationale in favor of each interpretation of *contra proferentem* offered in this Comment and decide which rule is the better rule. In order to facilitate the discussion and debate naturally engendered by these two competing rules, this Comment provides an analysis of the

07190, 2002 WL 452115, at *6 (Pa. Ct. Com. Pl. Mar. 13, 2002); Mattiola Const. Corp. v. Commercial Union Ins. Co., 60 Pa. D. & C.4th 412, 412 (Pa. Ct. Com. Pl. 2002); Regis Ins. Co. v. Mirante, No. 10132 OF 2001, 2001 WL 35927990 (Pa. Ct. Com. Pl. Sept. 20, 2001) (Trial Order); Sylvania Gardens Apts. v. Legion Ins. Co., No. 0734 Aug. Term 2000, 2001 WL 1807780, at *2 (Pa. Ct. Com. Pl. Feb. 14, 2001); Allstate Ins. Co. v. Fodor, 49 Pa. D. & C.4th 541, 550 (Pa. Ct. Com. Pl. 2000).

32. Another case exists where an ambiguity is purported to exist in an insurance application. *See* King-Jennings v. Liberty Mut. Ins. Co., 744 A.2d 607, 610 (N.H. 1999). However, the court in *King-Jennings* ruled that *contra proferentem* did not apply because the ambiguity was not in the insurance contract itself. *Id.*

pros and cons of each rule and concludes that *contra proferentem applicatio* is the better interpretation.

IV. ANALYSIS OF THE COMPETING RULES

A. Arguments for the Rule of Contra Applicantem

The proposed rule of *contra applicantem* would represent a rare jurisprudential victory for the insurance industry, as most rules of contract interpretation favor protecting the insured. Indeed, the use of *contra applicantem* in resolving ambiguities of the insured in insurance applications boasts some important public policy justifications. First and foremost, the insurance company is an innocent party in the construction context at issue because it has no incentive to construe ambiguities in insurance applications in favor of lower coverage or no coverage. In the classic insurance dispute, the insured complains of receiving no coverage or less coverage once he has suffered a loss and filed a claim with his carrier; clearly, no insured who has suffered a loss would complain that he received more coverage than he expected or coverage where he expected none. Then, if we take as a presumption that most insurance disputes are created when consumers receive less coverage than desired, that presumption entails that the insurance company charged a lower premium and therefore made less money from the insured. Accordingly, *contra applicantem* reflects the probability that insurance companies likely act in good faith when they try to discern an ambiguous response in the insured's application for insurance.

As further support of the insurance company's good faith, insurance companies have the practice of delivering a copy of the insurance contract—a contract that the insurance company issues based on the insured's responses on his application[33]—to the insured. The insured is normally presumed to have read and understood his

33. This assumes that the insurance application is part of the contract, which is normally the case but depends on the jurisdiction. *See, e.g.*, Peterson v. Schimek, 729 So. 2d 1024, 1030–31 (La. 1999) ("Whether the application is part of the insurance contract is determined by the parties' intent as reflected by the words in the policy."); *cf.* Schmidt v. Fortis Ins. Co., 349 F. Supp. 2d 1171, 1192 (N.D. Iowa 2005) ("Under Iowa law, an application for insurance becomes a part of the insurance contract."). *But see* Bedwell v. Sagamore Ins. Co., 753 N.E.2d 775, 779 (Ind. Ct. App. 2001) ("[A]n unincorporated application for insurance is not a part of the insurance contract.").

contract,[34] and, if he notes a discrepancy, he will surely petition his carrier to change his policy according to his original intent according to his application. However, common sense indicates that such a notion is a legal fiction: the vasr majority of those insured never read their policies, and, even if they did, they are not likely to understand its language.[35]

Another policy argument in favor of construing an insured's ambiguous application against him is that, just as *contra proferentem* encourages vigilance in drafting contract language, *contra applicantem* encourages consumers to be careful and cautious in filling out application forms. In addition, *contra applicantem* punishes the party who is most directly responsible for the ambiguity. The insurance company did not force the insured's hand in creating the insured's ambiguity and, as noted above, has no incentive in giving the insured less coverage or no coverage at all when there is a choice berween lower and higher coverage or an option to opt in or opt out of a coverage provision.

B. Arguments for the Rule of Contra Proferentem Applicatio

Notwithstanding the reasons in favor of construing ambiguities in insurance contracts against the insured, there are also compelling reasons ro construe the ambiguity against the insurance company, even though they did not directly create it. The primary reason for advocating a *contra proferentem applicatio* interpreration is that the insurance company is better situated to bear the burden of ambiguous responses in insurance applications. This is true for several reasons. First, the insurance company is the party that ultimately judges which possible interpretation of an ambiguous response makes it into the final version of the insurance contract. Why should the insured bear such a heavy burden when the confusion could be eliminated by a simple e-mail or telephone inquity to clarify the insured's intended coverage choice? Since the insurance company is the party who "translates" the insurance

34. *See, e.g.*, Payne v. Middlesex Ins. Co., 578 S.E.2d 470, 471 (Ga. Ct. App. 2003) ("An insurance policy is a contract, and 'parties to a contract are presumed to have read their provisions and to have understood the contents. One who can read, must read, for he is bound by his contracts.'" (citations omitted)).

35. Magnolia-Broadway Corp. v. Fire Ass'n of Phila., 137 N.Y.S.2d 918, 921 (Long Beach City Ct. 1955) ("It is common knowledge that the vast majority of people who carry insurance never read their policies.").

application into an insurance contract, the insurance company should be responsible for ambiguities that are "lost in translation," so to speak.

Second, insurance companies are in a better position to bear and spread the risk of the ambiguous responses to questions in applications. To an individual insured, the detriment of receiving lesser or no coverage on a claim can be financially and emotionally devastating. To an insurance company, having to pay out more than anticipated on an individual claim normally amounts to a drop in the bucket from the company's bottom line since the financial risk is spread among a large pool of insurance consumers.

Third, the insurance company is the party who chose the particular format of the insurance application, which may increase or decrease the likelihood of instances of insured-created ambiguities. This is especially important when the format of the application is prone to ambiguous responses, such as where coverage options are placed so close together that insureds may unintentionally mark more than one response. The idea that an insurance company's choice of format should be construed against the company is nothing new in insurance jurisprudence.[36] After all, courts have consistently held that contract provisions rendered in repetitive, meaningless boilerplate jargon and those buried in fine print are unenforceable.[37] In those cases, just as in the case of the chosen format of an insurance application, courts are concerned less with the semantic value of words than with the way the words are presented.[38]

Lastly, similar to the *contra applicantem* interpretation, *contra proferentem applicatio* recognizes that insureds, like insurance companies, probably have no incentive to create ambiguities. Most insureds purchase insurance in order to obtain "financial security and peace of mind."[39] Purposely creating an ambiguity on an insurance application would clearly undermine this principal purpose of insurance.

36. *See supra* note 15 and accompanying text.

37. *See, e.g.*, Harris v. Green Tree Fin. Corp., 183 F.3d 173, 182 (3d Cir. 1999) ("Pennsylvania law provides support for certain claims of procedural unconscionability that are based on inconspicuous or unclear contractual language, in particular, if the contracting parties have unequal bargaining power."); Gordinier v. Aetna Casualty & Sur. Co., 742 P.2d 277, 283–84 (Ariz. 1987); Moscatiello v. Pittsburgh Contractors Equip. Co., 595 A.2d 1190, 1196–97 (Pa. 1991).

38. *See supra* note 37 and accompanying text.

39. Goodson v. Am. Standard Ins. Co. of Wisconsin, 89 P.3d 409, 417 (Colo. 2004).

C. The Better Rule

Between ***contra applicantem*** and ***contra proferentem applicatio***, the latter rule is the better rule because, ultimately, it is the rule that provides greater predictability and puts the burden on the party that first receives notice of the ambiguity. First, ***contra proferentem applicatio*** would create an easily-applicable, bright-line rule. Accordingly, litigation would be discouraged because the parties would have a clear understanding of how courts would construe an insured's ambiguous responses. This is not necessarily the case with ***contra applicantem*** because insureds who want to avoid the ***contra applicantem*** rule would simply avoid raising the possibility of ambiguities in their insurance applications as they draft their complaints against the insurance company. While ***contra applicantem*** may also be a bright-line rule, ***contra proferentem applicatio*** would be a more predictable and consistent bright-line rule because it coincides with the law's general tendency to favor insureds in insurance disputes. In addition, the bright-line rule of ***contra proferentem applicatio*** would allow for fewer conflicts of interest related to an insured's duty to defend because it would eliminate one potential area of tension between the insured and the insurer. Lastly, the bright-line rule of ***contra proferentem applicatio*** would serve as more efficient notice to insurance companies than it would to insurance consumers. It is a dubious assumption that ***contra applicantem*** would affect the actions of an individual that is unfamiliar with the law; whereas ***contra proferentem applicatio*** would be more likely to change the practices of insurance companies since insurance companies have a compounded interest in knowing the law and modifying their business practices to avoid litigation.

The second reason that ***contra proferentem applicatio*** is the better rule is that it puts the onus of quelling the ambiguity on the party who first becomes aware of the problem. Assuming that insureds create ambiguities accidentally rather than on purpose, the insurance company employee who transcribes the information in an insurance application into an insurance contract is the first person who does or should have notice of the ambiguous response. The insurance company is at the first line of defense in preventing a binding policy from cementing a contract that does not accurately reflect the intention of the parties. Although the insured also has the

opportunity to review the insurance contract for errors after receiving a copy of the contract, as a practical matter, this rarely happens.[40] In sum, if judges know that one party is unlikely to ever notice an ambiguity, and that the other party inevitably notices the ambiguity by virtue of the fact that the ambiguity must be resolved in order for the contract to be executed, the latter should bear the burden of its unilateral interpretation of the ambiguity. Therefore, courts should employ the proposed rule of *contra proferentem applicatio* when charged with the task of resolving an insured's ambiguous responses in an insurance application rather than following the *contra applicantem* rule in *Bubis*.

V. CONCLUSION

In a world of greater consumer participation in shaping and molding products and services, companies will be forced to mitigate the errors that the masses will undoubtedly commit as they are given more responsibility in product design. In the insurance industry, consumers are participating to a greater degree in choosing the coverage that fits their insurance needs. Although insureds have completed insurance applications for decades, insurance companies are availing themselves of new technology to facilitate the application process.[41] Although the potential for ambiguous responses in insurance applications existed prior to these technological developments, these developments have expanded the consumer's participation in "drafting" an insurance application and will likely force courts to address this issue more thoroughly in the future.

Ambiguities in insurance applications are difficult to resolve using the doctrine of *contra proferentem* because the doctrine itself is ambiguous. In applying the traditional doctrine of *contra proferentem* to a consumer's responses in insurance applications, different judges could easily render different rulings on the same set of facts. Instead of attempting to decipher how *contra proferentem* fits into the context of insurance applications, courts should use one of two possible constructions of *contra proferentem*. That is, courts should either strictly construe insured-created ambiguities against the insured by following the proposed rule of *contra applicantem* or they should strictly construe such ambiguities against insurance

40. *See supra* note 35 and accompanying text.

41. *See supra* Part I.

companies by following the proposed rule of *contra proferentem applicatio*. Although there are compelling policy reasons for using either rule, the better rule is *contra proferentem applicatio* because (1) it creates a bright-line rule that is more predictable, logical, and judicially harmonious than the alternative and (2) it rightly puts the burden on the insurance company because the insurance company is likely the party that first notices an insured-created ambiguity.

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