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## A Study of Ambiguity: Does Illinois Law Permit Insurers to Submit Extrinsic Evidence to Resolve Insurance Policy Ambiguities?

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# A STUDY OF AMBIGUITY: DOES ILLINOIS LAW PERMIT INSURERS TO SUBMIT EXTRINSIC EVIDENCE TO RESOLVE INSURANCE POLICY AMBIGUITIES?

*Stanley C. Nardoni\**

## I. INTRODUCTION

Insurance law practitioners often hear that all ambiguities in insurance policies are resolved in favor of insureds. It has been said that “[t]he words, ‘the contract is to be construed against the insurer’ comprise the most familiar expression in the reports of insurance cases.”<sup>1</sup> Surprisingly, what this insurance ambiguity rule means for Illinois policyholders is itself ambiguous. Illinois appellate court opinions conflict on whether a court confronted with ambiguous policy terms must interpret the policy in favor of the insured as a matter of law or first allow the parties, including the insurer, a chance to persuade the court of the proper interpretation in light of evidence outside of the language of the policy.

This article reviews authority on the insurance ambiguity rule under the law of Illinois and elsewhere. It explains that although the rule “purports to be an application” of the doctrine of contra proferentem, that “general principle of contract law that doubtful language is to be interpreted most strongly against the party who used it in drafting the contract,”<sup>2</sup> the insurance

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<sup>1</sup> 2 STEVEN PLITT ET AL., COUCH ON INSURANCE § 22:14 (3d ed. 2011).

<sup>2</sup> COUCH, *supra* note 1, § 22:14.

ambiguity rule is much stronger. Under general contract law, the interpretation of an ambiguous agreement is deemed to present a question of fact for resolution with evidence extrinsic to the contract, sometimes called parol evidence.<sup>3</sup> Contra proferentem is employed as a tie-breaker to pick a winner if the extrinsic evidence fails to persuade the factfinder of either side's interpretation. The insurance ambiguity rule, on the other hand, construes policy ambiguities against the insurer as a matter of law in the first instance.

The article concludes that, although the Illinois Supreme Court has not explicitly discussed the varying approaches appellate court cases have taken, its holdings have embraced the strict insurance ambiguity rule. Courts applying Illinois law should take the Illinois Supreme Court's decisions into account when confronting insurer offers of extrinsic evidence.

## II. CONTRA PROFERENTEM UNDER GENERAL CONTRACT LAW

Under general contract law, the interpretation of a written contract may present issues of both fact and law, depending on the clarity of the agreement. The initial review is conducted by the judge hearing the case. If the judge sees no doubt as to the contract's meaning, he or she will interpret it as a matter of law.<sup>4</sup>

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<sup>3</sup> *Utica Mut. Ins. Co. v. Vigo Coal Co., Inc.*, 393 F.3d 707, 711 (7th Cir. 2004) ("evidence outside the contract . . . is, extrinsic evidence"); *Duval Motors Co. v. Rogers*, 73 So. 3d 261, 265 (Fla. App. 2011) ("[E]vidence outside the contract language . . . is known as parol evidence.").

<sup>4</sup> 5-24 ARTHUR L. CORBIN ET AL., CORBIN ON CONTRACTS § 24.30 (2012) ("If, then, the words of the agreement, whether oral or written, are definite and undisputed, and if there is no doubt as to the relevant surrounding circumstances, the interpretation of the words is ordinarily held to be a matter for the court. . . . The decision as to whether a contract is ambiguous is made by the court."). *See also* *Gryce v. Lavine*, 675 A.2d 67, 69 (D.C. 1996) ("Whether or not a contract is ambiguous is a question of law for the court."); *Richard Feiner & Co. Inc. v. Paramount Pictures Corp.*, 941 N.Y.S.2d 157, 161 (App. Div. 2012) ("Of course, the matter of whether the contract is ambiguous is a question of law for the court."); *Gawryluk v. Poynter*, 654 N.W.2d 400, 404 (N.D. 2002) ("Whether a contract is ambiguous is a question of law for the court to decide."); *Hawkins v. Greenwood Development Corp.*, 493 S.E.2d 875, 879 (S.C. App. 1997) ("It is a question of law for the court whether the language of a contract is ambiguous."); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) ("Deciding whether a contract is ambiguous is a question of law for the court.").

If, on the other hand, the judge believes the contract can reasonably be understood multiple ways, the agreement will be deemed ambiguous, and its interpretation will be treated as a question of fact to be decided by a jury or the judge sitting as factfinder.<sup>5</sup> The factfinder will be allowed to consider extrinsic evidence such as communications between the parties that led up to the formation of the contract, acts reflecting what the parties understood it to mean, and trade usage, all in an effort to decide what the parties intended in entering into the agreement.<sup>6</sup>

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<sup>5</sup> CORBIN, *supra* note 4 § 24.30 (“The weighing of this evidence and the determination of the inferences to be drawn—the interpretation—is for the jury or other trier of the facts, once the court has determined that ambiguity exists. . . . If the only issue presented by the conflicting evidence is the interpretation of language, it is a question of fact with which no question of law is ‘mixed.’”); *Med. Ctr. of Cent. Georgia v. Denon Digital Employee Benefit Plan*, No. 5:03CV32 (DF), 2005 WL 1630017, at \*3 (M.D. Ga. July 11, 2005) (“[W]here a contract is ambiguous, its interpretation is a matter for the jury [i.e. the factfinder]. Since this case was tried without a jury, the Court, in this instance, serves as the factfinder”); *Bishop Trust Co., Ltd. v. Cent. Union Church of Honolulu*, 656 P.2d 1353, 1356 (1983) (“Where the language of the contract is ambiguous, so that there is some doubt as to the intent of the parties, that intent is a question of fact.”); *Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447, 453-54 (Mich. 2003) (“It is well settled that the meaning of an ambiguous contract is a question of fact that must be decided by the jury.”); *Browning-Ferris Indus., Inc. v. Casella Waste Management of Mass., Inc.*, 945 N.E.2d 964, 971 (Mass. App. 2011) (“Once a contractual ambiguity emerges, the meaning of the uncertain provision becomes a question of fact for the trier.”).

<sup>6</sup> CORBIN, *supra* note 4 § 24.30. *See also* *Elda Arnhold and Byzantio, L.L.C. v. Ocean Atlantic Woodland Corp.*, 284 F.3d 693, 701 (7th Cir. 2002) (“When considering extrinsic evidence, the factfinder should focus, in descending order of importance, on: (1) the parties’ negotiations over the contract at issue; (2) their course of performance; (3) their prior course of dealing; and (4) trade usage in the relevant industry.”); *Cent. Heights Imp. Co. v. Mem’l Parks*, 105 P.2d 596, 605 (Cal. App. 1940) (“The trial court admitted . . . parol and extrinsic evidence consisting of conversations between the parties and Goodcell occurring before, during, and subsequent to the execution of the agreement of April 14th. . . . The evidence was admissible . . . for the purpose of aiding the court in ascertaining the true intent and meaning of the language used there.”); *Browning-Ferris Indus., Inc. v. Casella Waste Mgmt. of Mass., Inc.*, 945 N.E.2d 964, 971 (Mass. App. 2011) (“Once a contractual ambiguity emerges [ . . . ] [t]he fact finder may then consult extrinsic evidence including the circumstances of the formation of the agreement and the intentions and objectives of the parties.”); *L.L.C. v. Ream*, 933 N.E.2d 819, 824 (Ohio App. 2010) (“[E]xtrinsic evidence may include (1) the circumstances surrounding the parties at the time the contract was made, (2) the objectives

Although general contract law recognizes the doctrine of *contra proferentem* to deal with ambiguities, it is highly restricted. The doctrine operates to interpret ambiguities against whichever party drafted the agreement, but only where the factfinder cannot interpret the agreement after considering the extrinsic evidence. As one commentator explains:

In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds . . . Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely . . . to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.

. . .

The “*contra proferentem*” rule has been described as being applicable only as a last resort, when other techniques of interpretation and construction have not resolved the question of which of two or more possible reasonable meanings the court should choose. One court wrote that it is “a tie breaker” when there is no other sound basis for choosing one contract interpretation over another.<sup>7</sup>

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the parties intended to accomplish by entering into the contract, and (3) any acts by the parties that demonstrate the construction they gave to their agreement.” (internal quotation marks omitted)).

<sup>7</sup> CORBIN, *supra* note 4 § 24.27 (2012) (footnotes omitted) (quoting from RESTATEMENT (SECOND) OF CONTRACTS § 206, § 206 cmt a, and *Pitcher v. Principal Mut. Life Ins. Co.*, 870 F. Supp. 903, 915 (S.D. Ind. 1994), *aff’d* 93 F.3d 407 (7th Cir. 1996)). *See also* *Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447, 456-57 (Mich. 2003) (“[I]f, after the jury has applied all other conventional means of contract interpretation and considered the relevant extrinsic evidence, the jury is . . . unable to determine what the parties intended, the jury should then construe the ambiguity against the drafter. . . .

### III. THE INSURANCE “AMBIGUITY RULE” EVOLVED FROM CONTRA PROFERENTEM

Although it evolved from the contract doctrine of *contra proferentem*, the insurance ambiguity rule is significantly different in scope. “In contract law, *contra proferentem* is a doctrine to be used as a last resort, as a way of breaking ties, but in insurance law, it is used as a primary rule (perhaps even *the* primary rule) of interpretation for insurance policies.”<sup>8</sup> A federal court applying Delaware law summarized this difference in approach as follows:

Normally, in contract actions, analyzing contract disputes is potentially a two step process; first, the court determines whether the contractual language is ambiguous as a matter of law. If the Court finds as a matter of law that a contract is ambiguous, the fact finder must then determine which conflicting interpretation of the contract reflects the parties’ intent. Thus, under usual contract principles, if the Court finds ambiguity in a contract provision, the ambiguity raises an issue of fact which must be resolved at trial, thereby precluding summary judgment.

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The rule of *contra proferentem* is a rule of last resort because “it does not operate as an aid to identify the intent of the parties but as ‘a rule of legal effect’ . . . to ascertain the winner and the loser in connection with a contract whose meaning has eluded the jury despite all efforts to apply . . . conventional rules of interpretation, including an examination of relevant extrinsic evidence.”); *Garment v. Zoeller*, No. 97CIV7175(LAP), 2001 WL 708895, at \*5 (S.D.N.Y. June 19, 2001) (“*Contra proferentem* provides that where extrinsic evidence is conclusory or does not shed light upon the intent of the parties, a court may construe any ambiguities in a contract against the drafter as a matter of law. However, as in the present case, ‘where the relevant extrinsic evidence offered “raises a question of credibility or presents a choice among reasonable inferences” the construction of the ambiguous terms of the contract is a question of fact which precludes the application of the *contra proferentem* rule.’”), *aff’d*, 35 Fed. Appx. 22 (2d Cir. 2002) (quoting from *Morgan Stanley Group, Inc. v. New England Ins. Co.*, 36 F. Supp. 2d 605, 609 (S.D.N.Y.1999), and *Alfin, Inc. v. Pacific Ins. Co.*, 735 F. Supp. 115, 199 (S.D.N.Y.1990)).

<sup>8</sup> 1 JEFFREY E. THOMAS AND FRANCIS J. MOOTZ, III, *NEW APPLEMAN ON INSURANCE LAW* § 5.02 (Library ed. 2009) (footnote omitted). *See also* Scott G. Johnson, *Resolving Ambiguities in Insurance Policy Language*, 33 WTR Brief 33, 33 (2004) [hereinafter Johnson] (The ambiguity rule is “used as an interpretive rule of first resort in insurance contract disputes”).

In the insurance context, however, Delaware courts have formulated special rules of contract construction which differ from those applied to most other contracts. If there is any ambiguity in the policy, it must be resolved in favor of the insured and against the insurer that drafted the policy. When presented squarely with ambiguous insurance provisions at summary judgment, Delaware courts have adhered to this rule of *contra proferentem*, consistently construing ambiguities in favor of the insured as a matter of law.<sup>9</sup>

The evolution from *contra proferentem* to the insurance ambiguity rule accompanied the standardization of insurance policies. According to one review of the relevant history:

Insurance contracts used to be construed much as other business contracts, but this changed when insurance policies became mass-marketed. Unlike a negotiated business contract, these insurance policies used standardized language drafted by the insurer and effectively became “contracts of adhesion.” Policyholders typically had no bargaining power and no effective means of changing the terms of the insurance contract. The courts’ logical reaction to this was to place the onus of ambiguous terms on the insurers, because they had the better bargaining position and were in a better position to avoid the ambiguity.<sup>10</sup>

Insurance coverage disputes became particularly distinguished from all other contract cases as the market for homeowner’s fire insurance grew and disputes over the scope of that coverage increased.<sup>11</sup> “Since fire insurance policies were most often drafted by over-bearing insurance companies, courts began to feel justified in applying *contra proferentem* against the insurers without first exhausting all other interpretive tools.”<sup>12</sup> The rationale was then extended to other types of insurance. By “the time insurance law was recognized as sufficiently distinct

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<sup>9</sup> *Oglesby v. Penn Mut. Life Ins. Co.*, 877 F. Supp. 872, 881 (D. Del. 1994) (citations omitted).

<sup>10</sup> Johnson, *supra* note 8, at 33.

<sup>11</sup> David S. Miller, *Note: Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849, 1850 (1988).

<sup>12</sup> *Id.* at 1852.

from contract law to warrant its own treatise” in the nineteenth century, “contra proferentem had become known as the ‘ambiguity rule.’”<sup>13</sup>

Today, states differ on how forcefully they apply contra proferentem in the insurance context. Many states have chosen to adhere to the general contract law approach, viewing the interpretation of ambiguous insurance policies as a question of fact,<sup>14</sup> with contra proferentem retained as a last resort where considering extrinsic evidence failed to determine party intent.<sup>15</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> See e.g., *Hancock v. N.Y. York Life Ins. Co.*, 899 F.2d 1131, 1135 n.8 (11th Cir. 1990) (stating that under Alabama law, “[i]f an ambiguous and unclear policy . . . can be construed only with the aid of evidence aliunde or facts in pais, it is the province of the jury to ascertain those facts and draw inferences therefrom.”); *Western Line Consol. School Dist. v. Continental Cas. Co.*, 632 F. Supp. 295, 301 (N.D. Miss. 1986) (“Once an ambiguity is determined by the court to exist, the question of its meaning is one for the trier of fact.”); *E & S Facilities, Inc. v. Precision Chipper Corp.*, 565 So. 2d 54, 59 (Ala. 1990) (“As we have stated, the policy was ambiguous and those ambiguities could be resolved only through evidence and facts outside the document itself. . . . It was for the jury to examine the testimony of the parties involved and to determine exactly what the parties intended.”); *Elam v. First Unum Life Ins. Co.*, 57 S.W.3d 165, 297 (Ark. 2001) (“Where . . . parol evidence has been admitted to explain the meaning of the language, the determination becomes one of fact for the jury to determine.”); *New York v. Home Indem. Co.*, 486 N.E.2d 827, 829 (N.Y. 1985) (“If . . . the language in the insurance contract is ambiguous . . . the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact.”); *Western Fire Ins. Co. v. Wallis*, 613 P.2d 36, 41 (Or. 1980) (“This court has previously held that when the terms of an insurance policy are ambiguous, the intention of the parties is a question of fact which should be submitted to and decided by the jury as trier of the facts.”).

<sup>15</sup> See e.g., *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 619 (Md. 1995) (“Maryland does not follow the rule, adopted in many jurisdictions, that an insurance policy is to be construed most strongly against the insurer.” Nevertheless, “if no extrinsic or parol evidence is introduced, or if the ambiguity remains after consideration of the extrinsic or parol evidence that is introduced, it will be construed against the insurer as the drafter of the instrument.”) (quoting *Cheney v. Bell National Life*, 556 A.2d 1135, 1138 (Md. 1989)) (citations omitted); *Home Indem. Co.*, 486 N.E.2d at 829 (“Generally, the courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies. If, however, the language in the insurance contract is ambiguous and susceptible of two reasonable interpretations, the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact. On the other hand, if the tendered extrinsic evidence is itself



Still others hold to the strict version of the insurance ambiguity rule, thereby automatically interpreting ambiguities against the insurer.<sup>16</sup>

#### IV. AMBIGUITY IN ILLINOIS

Outside of the insurance context, at least, Illinois courts clearly apply the tie-breaker approach to resolving contractual ambiguities. In *Farm Credit Bank of St. Louis v. Whitlock*,<sup>17</sup> in reviewing a summary judgment that interpreted a contractual release, the Illinois Supreme Court held:

A release is a contract, and therefore is governed by contract law. The intention of the parties to contract must be determined from the instrument itself, and construction of the instrument where no ambiguity exists is a matter of law. A contract will be considered

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conclusory and will not resolve the equivocality of the language of the contract, the issue remains a question of law for the court. Under those circumstances, the ambiguity must be resolved against the insurer which drafted the contract.” (citations omitted).

<sup>16</sup> “Jurisdictions that use modern *contra proferentem* to automatically construe policy ambiguities in favor of coverage include New Jersey, Indiana (at least as to patent ambiguities), and Texas.” 1 DAVID L. LEITNER, REGAN W. SIMPSON & JOHN M. BJORKMAN, LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 1:11 (2012) (footnotes omitted). *See e.g.*, Carrizales v. State Farm Lloyds, 518 F.3d 343, 346 (5th Cir. 2008) (applying Texas law) (“Ambiguities in insurance contracts giving rise to two reasonable interpretations, one providing and the other denying coverage, are read *contra proferentem* and in favor of the insured. . . . Ambiguity is a question of law for the court.”); Am. Nat’l Fire Ins. Co. v. Rose Acre Farms, Inc., 107 F.3d 451, 457 (7th Cir. 1997) (“Under Indiana law, when an ambiguity is patent, meaning it arises from within the document itself and cannot be resolved by reference to the document, the court may not consider extrinsic evidence in resolving the ambiguity.”); State Farm Mut. Auto. Ins. Co. v. Fermahin, 836 P.2d 1074, 1077 (Haw. 1992) (“Because insurance contracts are contracts of adhesion, they must be construed liberally in favor of the insured and all ambiguities are resolved against the insurer.”); Adams Golf, Inc. v. T & F, LLC, No. 07 L 010766, 2011 WL 6933718 (Cir. Ct. Cook County, Ill.) (applying Texas law) (“The Court finds that . . . the language in the notice provision is ambiguous. Based on the arguments, evidence and the Texas Supreme Court cases . . . the language in the contract must be strictly interpreted against the insurer. The Court cannot look to extrinsic evidence where the language is ambiguous.”).

<sup>17</sup> *Farm Credit Bank of St. Louis v. Whitlock*, 581 N.E.2d 664 (Ill. 1991).

ambiguous if it is capable of being understood in more sense than one. Where a court determines that a contract is ambiguous, its construction is then a question of fact, and parol evidence is admissible to explain and ascertain what the parties intended.<sup>18</sup>

The supreme court decided that the release was ambiguous in failing to make clear whether it extended to one or two loans. In light of that ambiguity, the court reversed the summary judgment that had been entered against the bank and remanded for interpretation as a matter of fact.<sup>19</sup> Without suggesting that the release should be construed against its drafter, the court held:

[W]e conclude that the parties' intent must be determined from an examination of extrinsic evidence by the trier of fact.

In granting a motion for summary judgment it is improper for the court to speculate in order to determine the parties' intent, as the courts below have done. Caution must be exercised in granting summary judgment so as not to preempt the right of a party to present the factual basis of his case to the fact finder.<sup>20</sup>

In line with this reasoning, Illinois courts have consistently held that where terms of a contract are ambiguous, extrinsic evidence is admissible to determine party intent as a question of fact.<sup>21</sup> Intent will then be decided by a jury or a judge sitting as

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<sup>18</sup> *Id.* at 667 (citations omitted).

<sup>19</sup> *Id.* at 665-67.

<sup>20</sup> *Id.* at 667.

<sup>21</sup> *See, e.g., Highland Supply Corp. v. Illinois Power Co.*, 973 N.E.2d 551, 558 (Ill. App. Ct. 2012) ("In construing a contract, the court's primary focus is to ascertain and give effect to the intent of the parties. If no ambiguity exists in a contract, its construction is a question of law. However, "[w]here a court determines that a contract is ambiguous, its construction is then a question of fact, and parol evidence is admissible to explain and ascertain what the parties intended.") (citation omitted); *Bradley Real Estate Trust v. Dolan Assocs. Ltd.*, 640 N.E.2d 9, 11-12 (Ill. App. Ct. 1994) ("If the language is ambiguous, extrinsic evidence is admissible to determine the parties' intent and the interpretation of the language is a question of fact."); *see also Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d 882, 884 (Ill. 1999) ("If . . . the trial court finds that the language of the contract is susceptible to more than one

factfinder.<sup>22</sup> A judge's interpretation as factfinder will be reviewed on a manifest weight of the evidence standard rather than the de novo standard applicable to interpreting unambiguous contracts.<sup>23</sup> Contra proferentem is a last resort if

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meaning, then an ambiguity is present. Only then may parol evidence be admitted to aid the trier of fact in resolving the ambiguity.") *Hubbard Street Lofts LLC v. Inland Bank*, 963 N.E.2d 262, 317-18 (Ill. App. Ct. 2011) ("It is well established that if a contract is ambiguous, it presents a question of fact and cannot be decided on a motion to dismiss."); *Quake Const., Inc. v. American Airlines, Inc.*, 565 N.E.2d 990, 994 (Ill. 1990) ("If the language of an alleged contract is ambiguous regarding the parties' intent, the interpretation of the language is a question of fact which a circuit court cannot properly determine on a motion to dismiss."); *Chicago Inv. Corp. v. Dolins*, 418 N.E.2d 59, 62 (Ill. App. Ct. 1981) ("If the court should find that the document's language is ambiguous, and thus that construction of its meaning is a question of fact, it is improper to utilize a section 45 motion [to dismiss] to resolve the matter.") (citation omitted).

<sup>22</sup> See, e.g., *Nat'l Tea Co. v. Commerce & Indus. Ins. Co.*, 456 N.E.2d 206, 210 (Ill. App. Ct. 1983) ("Thus, only if the contract is ambiguous and the extrinsic facts necessary to determine the parties' interpretation thereof are in controversy should the question of interpretation be left to a jury.") (citation omitted); *Nerone v. Boehler*, 340 N.E.2d 534, 536 (Ill. App. Ct. 1976) ("When the court has determined that an ambiguity exists in the contract, evidence of prior and contemporaneous transactions and other extrinsic facts may be introduced by the parties and considered by the court in ascertaining the true meaning of the contract. . . . [I]f the extrinsic facts and circumstances are controverted or if the meaning of the contract is uncertain in light of the extrinsic evidence, then the intent of the parties to the contract must be determined as a question of fact by the jury or by the court in a trial without a jury.") (citations omitted); *Vole, Inc. v. Georgacopoulos*, 538 N.E.2d 205, 211 (Ill. App. Ct. 1989) ("Whereas in the instant case, the construction to be placed on an agreement is dependent not only upon the meaning of the words employed, but also upon extrinsic facts and circumstances, and upon the construction which the parties themselves have placed upon the agreement, and as these facts are controverted, any inferences to be drawn are for the trier of fact."); see also *Bank of Ravenswood v. Polan*, 628 N.E.2d 194, 198 (Ill. App. Ct. 1993) ("Extrinsic evidence may be introduced to show the intent of the parties and resolve an ambiguity in a contract. If the intent of the parties can be determined from facts not in dispute, then the meaning of the contract can be determined by the court as a matter of law. But if the ambiguity can only be resolved by resort to facts in dispute, then the contract must be construed by the trier of fact.") (citations omitted).

<sup>23</sup> See, e.g., *InsureOne Indep. Ins. Agency, LLC v. Hallberg*, 2012 IL App (1st) 092385 ¶ 101 ("A trial court interprets the meaning of clear and unambiguous contract terms as a matter of law, and its interpretation is subject to de novo review."); *Lease Mgmt. Equip. Corp. v. DFO P'ship*, 910 N.E.2d 709, 714 (Ill. App. Ct. 2009) ("Where the language of a contract is clear

the factfinder cannot decide on an interpretation.<sup>24</sup>

In the insurance context, on the other hand, although they generally say that insurance policies are controlled by the same rules of construction as other contracts, Illinois courts have spoken of *contra proferentem* more forcefully. In *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co.*, for example, the Illinois Appellate Court stated:

Contracts of insurance are subject to the same rules of construction applicable to other types of contracts. The paramount objective is to give effect to the intent of the parties as expressed by the terms of the agreement. If the language of the policy is ambiguous or otherwise susceptible to more than one reasonable interpretation, it will be construed in favor of the insured, under the doctrine of *contra proferentem* requiring that ambiguities be strictly construed against the drafter of the instrument.<sup>25</sup>

Despite the apparent strength of this statement, Illinois appellate court decisions have conflicted on when *contra*

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and unambiguous, construction of the contract is a matter of law subject to *de novo* review.”); *Bunge Corp. v. N. Trust Co.*, 623 N.E.2d 785, 791 (Ill. App. Ct. 1993) (“If the terms of an alleged contract are ambiguous or are capable of more than one interpretation, parol evidence is admissible to ascertain the parties’ intent. . . . Factual determinations regarding the meaning of contract language should not be overturned unless they are contrary to the manifest weight of the evidence.”).

<sup>24</sup> See, e.g., *William Blair & Co., LLC v. FI Liquidation Corp.*, 830 N.E.2d 760, 777-78 (Ill. App. Ct. 2005) (“Moreover, Spectra correctly points out that *contra proferentem* is a secondary rule of interpretation that should be invoked only after ‘ordinary interpretive guides have been exhausted.’ Thus, . . . Blair’s invocation of *contra proferentem* is, at best, premature because as this case was decided by the circuit court on summary judgment, there has not yet been any attempt to resolve the ambiguity through the ‘ordinary interpretive guides’—namely, a consideration of the extrinsic evidence.”) (citations omitted); *City of Chicago v. Dickey*, 497 N.E.2d 390, 393-94 (Ill. App. Ct. 1986) (“[T]he circuit court explicitly found that the instrument was ambiguous on the question of the parties’ intent. This finding necessitated resort, not to the doctrine of *contra proferentem* or the summary judgment mechanism, but to an evidentiary hearing on the parties’ intent. . . . [T]he court erred in applying the doctrine without first permitting the parties an opportunity to present extrinsic evidence.”).

<sup>25</sup> *International Minerals & Chemical Corp. v. Liberty Mutual Ins. Co.*, 522 N.E.2d 758, 764 (Ill. App. Ct. 1998).

proferentem applies in the insurance context. While cases favoring either the tie-breaker or the strict ambiguity rule exist, the Illinois Supreme Court's decisions indicate that the latter rule should be followed in insurance cases.

*A. Some Appellate Opinions Apply The General Contract Approach In Insurance Cases*

An Illinois appellate court applied the general contract law approach to an insurance case in *LaSalle Nat'l Insurance Co. v. Executive Auto Leasing Co.*<sup>26</sup> There, the parties disputed the interpretation of the term "gross receipts" in an insurance policy's retrospective premium endorsement. The endorsement did not expressly state what the parties meant by the term, and the contractual definition was "susceptible of either LaSalle's or Executive's construction."<sup>27</sup> The agreement was thus ambiguous because "the words used by the parties are fairly susceptible of being understood in more than one sense."<sup>28</sup> Citing general contract cases rather than insurance decisions, the court stated:

In the construction of a contract the determining factor is the intention of the parties. If possible, the intention must be ascertained from the language employed in the contract but if this is impossible, the language may be explained by extrinsic evidence so that the true intention of the parties may be learned.

The present policy requires extrinsic evidence to ascertain the intent of the parties at the time they entered into it. Admissible facts and circumstances surrounding the making of the contract, the interpretation placed upon it by the parties contemporaneously with its making or by their performance under its terms, acts by one party which may have indicated acceptance of the other's interpretation, may aid the court or jury in reaching the correct construction. The ambiguity of the policy created a genuine issue of material fact.<sup>29</sup>

The trial court had entered summary judgment for the insurer, but the appellate court agreed with Executive Auto

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<sup>26</sup> *LaSalle Nat'l Ins. Co. v. Executive Auto Leasing Co.*, 257 N.E.2d 508 (Ill. App. Ct. 1970).

<sup>27</sup> *Id.* at 512.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 512-13 (citations omitted).

Leasing Co.'s contention that summary judgment was improper in the circumstances, and the case had to be remanded for a trial, instead.<sup>30</sup>

Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit concluded that the *LaSalle National* case means Illinois follows the tie-breaker approach in insurance cases.<sup>31</sup> In *Harbor Insurance Company v. Continental Bank Corporation*, which dealt with director and officer liability insurance as well as a dispute over the meaning of "indemnity" in the bank's charter, his opinion for the court stated:

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<sup>30</sup> *LaSalle Nat'l Ins. Co.*, 257 N.E.2d at 513. Other Illinois Appellate Court cases have similarly expressed openness to considering extrinsic evidence to resolve policy ambiguities, but most saw no need to do so because they judged the policy unambiguous. *E.g.*, *Westfield Ins. Co. v. FCL Builders, Inc.*, 948 N.E.2d 115, 120 (Ill. App. Ct. 2011) ("We may only consider extrinsic evidence outside of the contract if the contract is ambiguous. The policy provision in this case is not ambiguous. . .") (citation omitted); *Sharp v. Trans Union L.L.C.*, 845 N.E.2d 719, 726-27 (Ill. App. Ct. 2006) ("The court may look to extrinsic materials only where the policy's language is ambiguous. . . . The language of exclusion (g) is not ambiguous.") (citation omitted); *CNA Cas. v. E.C. Fackler, Inc.*, 836 N.E.2d 732, 736 (Ill. App. Ct. 2005) ("[I]f the court finds that the language of the Policy is susceptible to more than one meaning . . . we may consider parol evidence to resolve the ambiguity . . . [but] the plain language of the insolvency exclusion at issue" bars coverage if certain facts occur) (citation omitted); *Young v. Allstate Ins. Co.*, 812 N.E.2d 741, 749 (Ill. App. Ct. 2004) ("Because we conclude that the meaning of the policy can be determined on the face of the policy, it is unnecessary to consider the extrinsic documents . . ."); *Pre-Fab Transit Co. v. Northbrook Prop. & Cas. Ins. Co.*, 600 N.E.2d 866, 869, 871 (Ill. App. Ct. 1992) ("If the terms of an alleged contract are ambiguous or capable of more than one interpretation, parol evidence is admissible to ascertain the parties' intent. . . . We conclude that the retrospective premium endorsement in the present case is unambiguous. . .") (citation omitted); *Seeburg Corp. v. United Founders Life Ins. Co.*, 403 N.E.2d 503, 506 (Ill. App. Ct. 1980) ("[I]f the terms are ambiguous and uncertain, the court should consider extrinsic matters," though the policy was "clear and unambiguous"). At least one case concluded that extrinsic evidence supported the insurer's reading of the policy but ruled in favor of coverage anyway because "the principles of insurance contract construction" required it to interpret an ambiguous coverage rejection form against the insurer. *Carroll Tiling Serv. v. Gen. Cas. Co. of Ill.*, 796 N.E.2d 702, 708-10 (Ill. App. Ct. 2003). Another court recited that extrinsic evidence is permissible to resolve ambiguities but relied on case law to construe the policy. Where it found endorsement language "[a]t best" ambiguous, it held any such "ambiguity must be resolved . . . in favor of coverage." *University of Ill. v. Continental Cas. Co.*, 599 N.E.2d 1338, 1345-51 (Ill. App. Ct. 1992).

<sup>31</sup> *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 366 (7th Cir. 1990).

The charter is ambiguous, and therefore testimony, including expert testimony-including in suitable cases testimony by a lawyer-was a permissible aid to interpretation. This is black-letter law, and neither side questions it. And yet it might seem to jostle with the familiar principle of interpretation, as well established in Illinois as anywhere, that ambiguities in insurance contracts are to be resolved against the insurance company. Given this rule-if there is an ambiguity, the insured wins-why would there ever be an occasion for attempting to resolve an ambiguity in an insurance contract by evidence? Yet that is exactly what was done in *LaSalle National Ins. Co. v. Executive Auto Leasing Co.* Reconciliation is possible along the following lines. If an insurance contract is ambiguous either party should be allowed to introduce evidence to disambiguate it. But if, all such evidence having been considered, the meaning of the contract is still uncertain, then the insured wins. In other words, the interpretive principle (favor the insured) is merely a tie-breaker.<sup>32</sup>

In line with this view, a federal district court judge recently looked to extrinsic evidence to interpret an exclusion she deemed ambiguous.<sup>33</sup> The extrinsic evidence included expert testimony offered by the insured on the meaning of a policy phrase that was a “term of art.”<sup>34</sup> The judge issued summary

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<sup>32</sup> *Id.* at 365-6 (citations omitted). Judge Posner repeated his understanding of the rule in opinions for the court in *Stone Container v. Hartford Steam Boiler Inspection & Ins. Co.*, 165 F.3d 1157, 1161 (7th Cir. 1999) (“[T]he rule that ambiguities in insurance contracts are to be resolved in favor of the insured comes into play only after the insurance company has had an opportunity to present evidence designed to dispel the ambiguity.”), and *Rhone-Poulenc Inc. v. Int’l Ins. Co.*, 71 F.3d 1299, 1305 (7th Cir. 1995) (“[A]lthough ambiguities in insurance contracts are to be resolved against the insurer, this principle comes into play only after reasonable efforts at interpretation have failed, including the taking of evidence concerning the drafting or negotiation of the contract.”).

<sup>33</sup> *Carolina Cas. Ins. Co. v. Merge Healthcare Solutions, Inc.*, No. 11 C 3844, 2012 WL 1532266, \*2 (N.D. Ill. Apr. 30, 2012). The court cited Illinois general contract case law in deciding that “[b]ecause the contract language is ambiguous, the court may consider extrinsic evidence to ascertain the parties’ intent.” *Id.* (citing *Ancraft Prods. Co. v. Universal Oil Prods. Co.*, 427 N.E.2d 585, 585 (Ill. App. Ct. 1981)).

<sup>34</sup> *Id.* at \*3.

judgment in favor of the insured based on the insured's interpretation of the term of art and because the insurer "present[ed] no evidence supporting its suggested reading of the policy."<sup>35</sup>

*B. Other Appellate Opinions Employ the Insurance Ambiguity Rule*

A contrary approach was taken by another Illinois appellate court panel in *Aguilar v. Safeway Insurance Co.*<sup>36</sup> There, the insureds sued their uninsured motorist carrier claiming that their insurance company's policy required them to file suit if they wanted the insurance company to reimburse their costs.<sup>37</sup> They urged that a policy provision saying that a "suit seeking recovery" under the uninsured motorist coverage section "must be filed within two years of the accident" created an ambiguity in the policy.<sup>38</sup> They claimed that this language could be read to require them to sue uninsured motorists.<sup>39</sup> Having done so, they claimed they were entitled to reimbursement for their costs of bringing that litigation.<sup>40</sup> The insurer, on the other hand, claimed the language limited the insureds' time to sue the insurer not the uninsured motorist.<sup>41</sup> A trial judge accepted the insurer's reading of the policy on its face and dismissed the insureds' complaint with prejudice for failing to state a cause of action.<sup>42</sup>

The appellate court disagreed. Reading the two-year suit provision in light of other parts of the policy, it concluded that the language was subject to different interpretations.<sup>43</sup> Because it was "ambiguous as a matter of law," the court interpreted the language in favor of the insured.<sup>44</sup> Remanding with directions to reinstate the complaint, it explained:

In light of those ambiguities, we are compelled to construe the policy as against the defendant-drafter of

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<sup>35</sup> *Id.*

<sup>36</sup> *Aguilar v. Safeway Ins. Co.*, 157 Ill.App.3d 877, 1135 (Ill.App. 1987).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1136.

<sup>39</sup> *Id.* at 1135.

<sup>40</sup> *Id.* at 1136.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1135.

<sup>43</sup> *Id.* at 1137.

<sup>44</sup> *Id.*



the policy. Such construction leads to the inevitable conclusion that defendant, by the terms of the policy as alleged in the complaint, required plaintiffs to file suit against the uninsured motorists. As further alleged in the complaint, by requiring the initiation of those law suits, defendant has become obligated to reimburse plaintiffs for court costs associated with those cases.<sup>45</sup>

One member of the panel dissented. He agreed that the policy language was ambiguous, but he claimed it was too soon to resolve that ambiguity against the insurer. The dissenter maintained:

Because . . . an appeal from a dismissal for failure to state a cause of action preserves for review only the legal sufficiency of the complaint and since the resolution of an ambiguity presents a factual questions, the majority having found the language ambiguous should have vacated the judgment and remanded for further proceedings which would include the resolution of the ambiguity in which parol evidence would be admissible to explain and ascertain the meaning of the language in question.... However, instead of vacatur and remandment as suggested above, the majority has resolved the ambiguity, a factual determination, in favor of plaintiffs, and in so doing has improperly predetermined the liability of the defendant without giving it the opportunity to negate allegations in the complaint or to assert possible policy defenses.<sup>46</sup>

Read in light of the dissent, the *Aguilar* case presents an approach to resolving ambiguity directly opposite from the one taken in in *LaSalle National*.

A longtime practitioner of Illinois insurance law recently described that strict ambiguity rule as the dominant one in Illinois. Writing in the Illinois Bar Journal, Jack Leyhane, a Chicago attorney with decades of experience in the representation of insurance carriers and others in significant coverage litigation,<sup>47</sup> observed:

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1138 (Sullivan, J. dissenting).

<sup>47</sup> *E.g.*, John Burns Const. Co. v. Indiana Ins. Co., 700 N.E.2d 763 (Ill.

Whether a contract is ambiguous is determined as a matter of law. If a contract is found to be ambiguous, depending on the type of contract being construed, parol evidence may be admissible to ascertain the true intent of the contracting parties. (Although insurance policies are ordinarily construed like any other contract, they are different from other contracts in this important respect: If an insurance contract is determined to be ambiguous, it will be strictly construed against the insurer, the drafter of the policy.)

. . .

It has been said that every contract is written for three parties: The party of the first part, the party of the second part, and the judge or arbitrator who must decide which of the other two is in breach. This is of particular import in the law of insurance, because if a court cannot understand what a policy means in a given instance, whether a competing interpretation is offered or not, it may well conclude that the provision is ambiguous because it is “obscure in meaning through indefiniteness of expression.” Because the insurer cannot bring in parol evidence in that situation to explain what it *meant* to say, the insurer may be unable, as a matter of law, to enforce or rely upon the disputed policy provision.<sup>48</sup>

*C. The Illinois Supreme Court Applies the Insurance Ambiguity Rule*

The Illinois Supreme Court has not expressly stated whether insurers are permitted to offer extrinsic evidence to interpret ambiguous insurance policies. The closest it seems to have come to addressing the point was a footnote rejecting the

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App. Ct. 1998), *rev'd*, 727 N.E.2d 211 (Ill. App. Ct. 2000) (establishing Illinois’ unique “targeted tender” rule); *Indiana Ins. Co. v. Liaskos*, 697 N.E.2d 398 (Ill. App. Ct. 1998); *Lyon v. Lumbersmens Mut. Cas. Co.*, 566 N.E.2d 388 (Ill. App. Ct. 1990); *LaSalle Nat. Bank v. Allstate Ins. Co.*, 519 N.E.2d 944 (Ill. App. Ct. 1987).

<sup>48</sup> Jack Leyhane, *The Two Faces of Contract Ambiguity Claims*, 100 ILL. BAR J. 264, 267 (2012) (footnotes omitted) (quoting from *Platt v. Gateway Intern. Motorsports Corp.*, 813 N.E.2d 279, 283 (Ill. App. Ct. 2004)).

insureds' offer of an insurer document to interpret language the court deemed unambiguous in *Avery v. State Farm Mut. Auto. Ins. Co.*<sup>49</sup>

A study of the way the Illinois Supreme Court has resolved insurance policy ambiguities, however, reflects that it employs the strict insurance ambiguity rule rather than the general contract law approach. That it favors the strict ambiguity rule is evidenced by three facts. First, the court has repeatedly prescribed the rule for resolving ambiguities without referencing any potential for extrinsic evidence. Second, the court identifies insurance policy interpretation as exclusively a question of law even when ambiguities are involved. Finally, the court has resolved ambiguities against insurers on the pleadings pursuant to motions that did not allow submission of extrinsic evidence. Each of these points is discussed below.

1. The Court Phrases the Rule Without Suggesting Submission of Extrinsic Evidence

The Illinois Supreme Court summarized the basic rules of insurance policy construction in *Gillen v. State Farm Mutual Automobile Insurance Company*:

Our primary objective when construing an insurance policy is to ascertain and give effect to the intention of

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<sup>49</sup> *Avery v. State Farm mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005). The supreme court observed that “[a]bsent a finding” that a policy promise was “ambiguous, such extrinsic evidence is irrelevant to the meaning of this contractual provision. . . . We make no such finding of ambiguity.” *Id.* at 828 n.5. It is not clear that the court was saying that extrinsic evidence is necessarily proper to interpret insurance policies or that insurers would be allowed to present such evidence. The court cited two prior decisions, but neither held extrinsic evidence admissible to resolve policy ambiguities. *Grzeszczak v. Illinois Farmers Ins. Co.*, 659 N.E.2d 952, 956 (Ill. 1995) (refusing insured widow’s attempt to rely on rule of construction known as “the premium rule” where the antistacking provisions of underinsured motorist coverage were unambiguous); *Dempsey v. National Life & Acc. Ins. Co.*, 88 N.E.2d 874, 876 (Ill. 1949) (saying merely that policy and its attachments “must be construed according to the sense and meaning of the terms which the parties have used, and if the language is clear and unambiguous it must be taken and understood according to its plain, ordinary and popular sense”). The first case actually considered it “well established that if an insurance clause is ambiguous, it must be construed in favor of the insured.” *Grzeszczak*, 659 N.E.2d at 956.

the parties, as expressed in the policy language. The construction we give to an insurance policy should be a natural and reasonable one. Undefined terms will be given their plain, ordinary and popular meaning, *i.e.*, they will be construed with reference to the average, ordinary, normal, reasonable person. If the policy language is susceptible to more than one reasonable meaning, it is considered ambiguous and will be construed against the insurer. Importantly, a policy provision that purports to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite, and specific.<sup>50</sup>

The Illinois Supreme Court has said that it resolves ambiguities against insurers “because there is little or no bargaining involved in the insurance contracting process, the insurer has control in the drafting process, and the policy’s overall purpose is to provide coverage to the insured.”<sup>51</sup> It has also observed that because third-parties injured by insureds must rely on the insureds’ policies for compensation, public policy warrants interpreting policies in favor of coverage.<sup>52</sup> The court has firmly rejected the idea that large sophisticated policyholders should lack the protection of the insurance ambiguity rule.<sup>53</sup> The court’s recitation of the rule without reference to extrinsic evidence and its reasons for holding to the rule suggest the court does not contemplate the admission of extrinsic evidence from insurers to reduce the scope of coverage.

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<sup>50</sup> *Id.* at 582 (citation omitted).

<sup>51</sup> *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1217 (Ill. 1992).

<sup>52</sup> *State Security Ins. Co. v. Burgos*, 583 N.E.2d 547, 554 (Ill. 1991) (“In the context of liability insurance policies, public policy considerations also dictate that a liberal construction in favor of coverage be applied as the recovery of an injured third party is involved.”).

<sup>53</sup> *Id.*; *Outboard Marine*, 607 N.E.2d at 1218-19 (“The insurance industry is powerful and closely knit. As evidenced by the CGL policies in the instant case, most policies are standard-form, are worded very similarly, and are offered on a take-it-or-leave-it basis. Any insured, whether large and sophisticated or not, must enter into a contract with the insurer which is written according to the insurer’s pleasure by the insurer. Generally, since little or no negotiation occurs in this process, the insurer has total control of the terms and the drafting of the contract. This rule of construction recognizes, *inter alia*, these facets of the insurance contracting process.”).

## 2. The Court Views Interpretation as Always a Question of Law

In contrast with its approach for other types of contracts, the Illinois Supreme Court has consistently identified insurance policy interpretation as solely a question of law. Although a few of its decisions have spoken of that as the rule for “unambiguous” policies,<sup>54</sup> the typical formulation states that all policy interpretation issues are questions of law.<sup>55</sup> Even when reviewing

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<sup>54</sup> *E.g.*, *Roberts v. Northland Ins. Co.*, 705 N.E.2d 762, 764 (Ill. 1998) (“The construction of an unambiguous insurance policy provision is a question of law subject to de novo review.”); *American Family Mut. Ins. Co. v. Savickas*, 739 N.E.2d 445, 448-49 (Ill. 2000) (“The construction of an unambiguous insurance policy provision is a question of law, and the policy’s terms are to be applied as written unless those terms contravene public policy.”).

<sup>55</sup> *E.g.*, *Pekin Ins. Co. v. Wilson*, 930 N.E.2d 1011, 1016 (Ill. 2010) (“[T]he construction of the provisions of an insurance policy is a question of law for which our review is de novo.”); *Schultz v. Illinois Farmers Ins. Co.*, 930 N.E.2d 943, 948 (Ill. 2010) (“Construction of the terms of an insurance policy and whether the policy comports with statutory requirements are questions of law properly decided on a motion for summary judgment.”); *Addison Ins. Co. v. Fay*, 905 N.E.2d 747, 751 (Ill. 2009) (“The construction of a provision of an insurance policy is a question of law . . .”); *Guillen v. Potomac Ins. Co. of Ill.*, 785 N.E.2d 1, 6 (Ill. 2003) (“The construction of an insurance policy, which is a question of law, is also reviewed de novo.”); *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 757 N.E.2d 481, 491 (Ill. 2001) (“The construction of the provisions of an insurance policy is . . . a question of law.”); *State Farm Mut. Auto. Ins. Co. v. Villicana*, 692 N.E.2d 1196, 1199 (Ill. 1998) (“We begin our discussion by noting that the construction of an insurance policy is a question of law.”); *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 75 (Ill. 1997) (“Finally, the construction of an insurance policy is a question of law subject to *de novo* review.”); *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 655 N.E.2d 842, 846 (Ill. 1995) (“The construction of an insurance policy and its provisions is a question of law.”); *Outboard Marine*, 607 N.E.2d at 1204 (“The construction of an insurance policy’s provisions is a question of law.”); *United Farm Bureau Mut. Ins. Co. v. Elder*, 427 N.E.2d 127, 129 (Ill. 1981) (“The sole question is whether the Volkswagen was a replacement or an additional vehicle as defined in the policy. That question is one of law, to be determined by the court.”); *Rockford Ins. Co. v. Storig*, 24 N.E. 674, 674-75 (Ill. 1890) (“It is to be premised that what is meant by the term ‘vacant and unoccupied,’ in a policy of insurance, is a question of law, but whether the building was at the time of the loss ‘vacant and unoccupied,’ within the meaning of the policy, is a question of fact.”); *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64, 70 (Ill. 1879) (“Now, what is meant by the term vacant or unoccupied, in the connection in which it occurs in the policy, is a question of law; but whether the house was, at the time of the fire, within the meaning of the policy, vacant and unoccupied, was a question of fact for the determination of the jury.”).

an appellate decision that held an exclusion ambiguous, the supreme court stressed that “the construction of an insurance policy is a question of law subject to de novo review” and that all ambiguous terms “will be construed strictly against the insurer who drafted the policy.”<sup>56</sup> The court has explicitly held that insurance policy interpretation is a matter “for the trial judge and not for the jury.”<sup>57</sup>

[W]ell settled rules of interpretation or construction govern the court when it construes an insurance contract . . . [I]f there is doubt or uncertainty as to the meaning of the language employed in the contract of insurance, and the language is reasonably susceptible of two meanings or interpretations, one of which is favorable to the insured and the other to the insurance company, the interpretation that favors the insured will be adopted.<sup>58</sup>

In *Zurich Insurance Co. v. Raymark Industries, Inc.*,<sup>59</sup> the Illinois Supreme Court affirmed the striking of a jury demand in a suit for a declaratory judgment on insurance policies. The court saw no place for a jury because the sole purpose of the insurer’s complaint and the insured’s counterclaim were to obtain a declaration of rights over the construction of the policies. These were “questions of law, the determination of which rests exclusively with the court,” leaving “no right to a jury trial on either the complaint or the counterclaim.”<sup>60</sup>

### 3. The Supreme Court Has Resolved Ambiguities on the Pleadings Alone

Finally, the Illinois Supreme Court has itself resolved insurance policy ambiguities without directing submission of extrinsic evidence to resolve the ambiguity. One example is *Employers Ins. of Wausau v. Ehlco Liquidating Trust*.<sup>61</sup> There, the court affirmed rulings in a judgment on the pleadings that an

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<sup>56</sup> Koloms, 687 N.E.2d at 74-75.

<sup>57</sup> Treolo v. Iroquois Auto Ins. Underwriters, 180 N.E. 575, 576 (Ill. 1932).

<sup>58</sup> *Id.* (citation omitted).

<sup>59</sup> *Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150, 166 (Ill. 1987).

<sup>60</sup> *Id.*

<sup>61</sup> *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 708 N.E.2d 1122 (Ill. 1999).

Arkansas action brought to enter a previously-signed consent decree constituted a “suit” within the meaning of Wausau’s promise “to defend any suit against the insured.”<sup>62</sup> The court rejected an appellate court ruling that such an action was insufficiently adversarial to qualify as a “suit” under Wausau’s policy.<sup>63</sup> In refusing Wausau’s narrow interpretation of the term “any suit,” the court held:

Even assuming, *arguendo*, that Wausau’s interpretation of “any suit” is reasonable, at best it would create an ambiguity in the policy language. “A policy provision is ambiguous only if it is subject to more than one reasonable interpretation.” Wausau’s interpretation would then compete with the definition of suit, set forth above. Where competing reasonable interpretations of a policy exist, a court is not permitted to choose which interpretation it will follow. Rather, in such circumstances, the court must construe the policy in favor of the insured and against the insurer that drafted the policy. Since Wausau’s interpretation affords less coverage to Ehlco, we would be required to reject it. Wausau’s argument thus fails in any event.<sup>64</sup>

The court would not have said the disputed term could be interpreted as a matter of law pursuant to a judgment on the pleadings if extrinsic evidence must be considered before applying the ambiguity rule. As the *Ehlco* court recognized, judgment on the pleadings is proper only where “the admissions in the pleadings disclose that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.”<sup>65</sup> A judgment on the pleadings cannot issue where the pleadings leave open material disputes of fact.<sup>66</sup> Illinois courts

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<sup>62</sup> *Id.* at 1129-31.

<sup>63</sup> *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 687 N.E.2d 82, 85-89 (Ill. App. Ct. 1997), *aff’d in part and rev’d in part*, 708 N.E.2d 1122 (Ill. 1999).

<sup>64</sup> *Employers Ins.*, 708 N.E.2d at 1130 (citations omitted).

<sup>65</sup> *Id.* at 1129 (quoting 3 R. MICHAEL, ILLINOIS PRACTICE § 27.2, at 494 (1989)).

<sup>66</sup> *Gillen v. State Farm Mut. Auto. Ins. Co.*, 830 N.E.2d 575, 577 (2005) (“Judgment on the pleadings is proper where the pleadings disclose no genuine issue of material fact and the movant is entitled to judgment as a matter of law. In ruling on a motion for judgment on the pleadings, the court will

may not even consider extrinsic evidence in deciding whether to issue a judgment on the pleadings.<sup>67</sup>

The court again took a similar approach in *Hoglund v. State Farm Mutual Auto. Insurance Co.*<sup>68</sup> In *Hoglund*, the court considered whether the setoff terms of policies providing uninsured motorist coverage allowed the insurer credit for payments by another insurer where an accident resulted from negligence of insured and uninsured parties and the payment from the insured tortfeasor failed to compensate for the insured's full damages. Relying on the policy language, a trial judge granted judgment on the pleadings to State Farm. The Illinois Supreme Court acknowledged that "a literal interpretation of the policy language" allowed such a setoff, but it judged that those terms were ambiguous when considered in light of the insured's reasonable expectations, the purpose of uninsured motorist coverage, and the facts of the underlying cases.<sup>69</sup> That ambiguity had to be resolved in favor of the insured as a matter of law. The court thus held:

We have previously noted that the public policy behind the uninsured motorist statute is to place the injured party in substantially the same position he would be in

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consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record.") (citations omitted); *State Farm Fire & Cas. Co. v. Young*, 968 N.E.2d 759, 763 (Ill. App. Ct. 2012) ("A motion for judgment on the pleadings asserts the allegations in the pleadings and the exhibits to the pleadings, which are considered part of the pleadings, permit only one disposition as a matter of law. Judgment on the pleadings is proper only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.") (citations omitted).

<sup>67</sup> See *M.A.K. v. Rush-Presbyterian-St.-Luke's Medical Center*, 764 N.E.2d 1, 9 (Ill. 2001) ("In ruling upon a motion for judgment on the pleadings, a court may consider only (1) facts apparent from the face of the pleadings, (2) matters subject to judicial notice, and (3) judicial admissions in the record. Extrinsic evidence may not be considered.") (citation omitted); *Romano v. Village of Glenview*, 660 N.E.2d 56, 61 (Ill. App. Ct. 1995) (The motion "attacks only defects apparent on the face of the complaint, and extrinsic evidence cannot be considered").

<sup>68</sup> *Hoglund v. State Farm Mut. Auto. Ins. Co.*, 592 N.E.2d 1031 (Ill. 1992).

<sup>69</sup> *Id.* at 1035 (The court spoke of those general circumstances as "extrinsic evidence" showing the policy was ambiguous, but it did not suggest this ambiguity called for extrinsic evidence as to what the policy terms meant to resolve the ambiguity. On the contrary, it said that "any ambiguity in an insurance policy must be construed in favor of coverage for the insured").



if the uninsured driver had been insured. If the position of State Farm were to be adopted, however, this purpose would be frustrated. If, for instance, the uninsured motorcycle driver had been insured for \$100,000, Miss Høglund could have collected that sum in full from that driver's insurer, along with the \$100,000 she collected from the other insured driver. The separate collections of \$100,000 from each of the two culpable drivers would have fully compensated her for her \$200,000 in damages. State Farm's position, however, is to insist that it receive a full setoff for the payment made on behalf of the insured driver. Such a result would violate the public policy behind the uninsured motorist statute that the injured party be placed in the same position as if the uninsured driver had been insured. Additionally, the insurance policies at issue were intended to provide coverage for damages caused by uninsured motorists. To allow a literal interpretation of the policy language would nullify the coverage intended by the policies. Further, to endorse State Farm's interpretation of the setoff provision would deny the policyholder substantial economic value in return for the payment of premiums. That is to say, the insured would be denied the very insurance protection against uninsured motorists for which he had paid premiums.<sup>70</sup>

In light of those circumstances, the setoff provision was ambiguous, and "[u]nder Illinois law, any ambiguity in an insurance policy must be construed in favor of coverage for the insured."<sup>71</sup> The court therefore resolved the "ambiguity in these setoff provisions in favor of coverage for the plaintiffs."<sup>72</sup> As in *Ehlco*, the court did not view insurance policy ambiguities as creating a fact issue. Its approach in *Høglund* and *Ehlco* stands in stark contrast to the one it took for the non-insurance contract in *Farm Credit Bank* discussed above, where it held that ambiguity mandated resolution by a factfinder.<sup>73</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See *supra* notes 17-20 and accompanying text.

## V. CONCLUSION

A careful analysis of its decisions shows that the Illinois Supreme Court employs a strict version of the insurance ambiguity rule. That strict version holds that once an ambiguity is found in insurance policy language, a court will resolve it in favor of the insured without first opening the question for submission of extrinsic evidence to demonstrate an interpretation. Under that approach, insurance policy interpretation is deemed exclusively a question of law without reserving contra proferentem as a rule of last resort. The Illinois Supreme Court holds: “Where competing reasonable interpretations of a policy exist, a court is not permitted to choose which interpretation it will follow. Rather, in such circumstances, the court must construe the policy in favor of the insured and against the insurer that drafted the policy.”<sup>74</sup> Courts should not overlook this Illinois Supreme Court authority when confronting an insurer’s offers of extrinsic evidence to resolve policy ambiguities.

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<sup>74</sup> *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 708 N.E.2d 1122, 1130 (Ill. 1999).