STATE BAR LITIGATION SECTION REPORT
THE ADVOCATE

RESPONSE ARTICLE

THE FOLLOWING IS RESPONSE by Lyndon Bittle to an article we published in the Summer 2015 issue on Statutory Interpretation.

MOTION PRACTICE

INTERPRETING INSURANCE POLICIES IN TEXAS: IT'S NOT THAT HARD

BY LYNDON F. BITTLE

NESTLED AMONG SEVERAL ARTICLES ON statutory interpretation in the Summer 2015 issue of *The Advocate* is an engaging article by R. Brent Cooper: "Principles for Interpreting Insurance Policies." As described by Mr. Cooper, the "article examines the principles adopted by Texas and, more importantly, the order in which the rules should be applied to properly construe and interpret an insurance policy." A noble undertaking, but flawed results. Mr. Cooper departs in several respects from the rules of construction actually applied by the Texas Supreme Court, recently reiterated in *RSUI Indemnity. Co. v. The Lynd Co.*[1] And he proposes additional rules that have not been—and should not be—adopted in Texas.

Almost every case or article discussing policy construction begins with some version of the adage, "An insurance policy is a contract, generally governed by the same rules of construction as all other contracts."[2] Although "generally" is sometimes omitted, it is an important qualification. The consequence of finding ambiguity distinguishes insurance policies from other contracts in Texas.[3] In most contract cases, ambiguity creates a fact issue for the trier of fact, and extrinsic evidence may be admitted to determine the parties' intent.[4] But if a court finds ambiguity in an insurance policy, it must adopt the reasonable construction most favorable to the insured, *i.e.*, the construction favoring coverage.[5]

Accordingly, for an insurer to avoid coverage it must show its reading of the policy is the only reasonable construction, *i.e.*, the policy unambiguously bars coverage. In contrast, the policyholder need only offer a reasonable interpretation providing coverage; it does not have to show the insurer's interpretation is unreasonable.[6] As the Court summarized in *Lynd*, "Our task . . . is to determine whether Lynd's construction of the RSUI policy is reasonable. If it is, we must enforce that construction, even if RSUI's construction is also reasonable."[7]

Here's the rub—what "rules" should a court apply to determine whether the insured has proffered a reasonable interpretation of the policy?

Mr. Cooper proposes an answer that sharply limits the circumstances in which deference to the insured is appropriate. He divides the process of insurance policy construction into five distinct steps, which he posits must be followed in sequence: (1) Plain Meaning Rule; (2) Ambiguity Rule; (3) Application of the Rules of Construction; (4) Extrinsic Evidence; and (5) Contra Proferentem. According to Cooper, no deference can be given to the insured's interpretation of the policy until the first four steps—including resort to virtually unlimited extrinsic evidence—have been completed and have not resolved the meaning of the relevant provisions. He goes on to present several criticisms of or exceptions to the familiar rule that ambiguous provisions are construed in favor of the insured, and proffers a "Sophisticated Insured Rule." Although much of Cooper's review of Texas law is noncontroversial, I have identified a few significant flaws in his analysis.

1. In real life, Cooper's Steps 1-3 are intertwined and are rarely applied in sequential order.

No one questions Cooper's starting point: policy interpretation begins with the terms of the policy, applying basic rules of construction. As the Court explained in *Lynd*,

> Unless the policy dictates otherwise, we give words and phrases their ordinary and generally accepted meaning, reading them in context and in light of the rules of grammar and common usage. . . . We strive to give effect to all of the words and provisions so that none is rendered meaningless. . . . "No one phrase, sentence, or section . . . should be isolated from its setting and considered apart from the other provisions."[8]

This is a familiar refrain. But it does not make the search for "plain meaning" a separate step, independent of determining whether there are two or more reasonable interpretations. Nor does it mean the determination of ambiguity can be made before fully applying the rules of construction. Indeed, "a contract is ambiguous only if, after applying the rules of construction, it remains 'subject to two or more reasonable interpretations.'"[9] Likewise, the "plain meaning" of a contract

provision is, by definition, the only reasonable meaning—*i.e.*, the only one that survives scrutiny under applicable rules of interpretation. There can be two or more "reasonable" meanings, but there can only be one "plain" meaning.

This is not to say that everyone, or even all judges, will agree on the "plain meaning" of policy language.[10] Two recent split decisions in the Texas Supreme Court illustrate the difficulty. Writing for the Court in *Lynd*, Justice Boyd painstakingly applied the rules of construction to the policy language, determined that both parties presented reasonable interpretations, and resolved the ambiguity in favor of the insured.[11] Chief Justice Hecht's dissent in *Lynd* did not question the rules of construction articulated by the majority. Rather, the dissent would have held the insured's interpretation unreasonable because it was "unrealistic" and led to "nonsensical consequences."[12]

A few weeks after deciding *Lynd*, Chief Justice Hecht and Justice Boyd again found themselves on opposite sides of a sharp divide in *McGinnes Industrial*.[13] Chief Justice Hecht, writing this time for the Court, held the word "'suit' in the CGL policies at issue must also include CERCLA enforcement proceedings by the EPA."[14] This conclusion was derived from the historical circumstances of the policies' inception and subsequent changes to federal environmental laws, bolstered by the observation that "the Insurers' interpretation of 'suit' in these standard-form policies has been rejected by thirteen out of sixteen state high courts to have considered the issue."[15] Justice Boyd wrote a scathing dissent, complaining the Court "flatly abandons the rules [of construction] and openly superimposes a meaning onto the term 'suit' that the Court concedes to be outside the term's ordinary meaning, unsupported by the context, and indisputably beyond what the contracting parties actually contemplated."[16] The dissent concluded the insured's position was not reasonable. One observation arises from the conflicting opinions in these cases: the rules of construction do not necessarily favor either side, unless they reveal an ambiguity.

Sometimes, the choice between competing interpretations is easier. If one interpretation ascribes absurd or untenable meanings to certain terms, it can be rejected forthwith as not passing the "smell test."[17] Those cases do not require resort to elaborate rules of construction, and they shed little light on the more complicated disputes. Once a purported "plain meaning" has been confronted with an alternative plausible meaning or challenged as violating one or more rules of construction, the court must undertake the process of discerning whether either or both of the proposed meanings are reasonable.[18] And there is no logical basis for dividing the rules of construction into "before" and "after" the initial determination of ambiguity is made; most of the principles identified under Cooper's Step 3 are intertwined with principles listed under Step 1. For example, rules distinguishing "specific" and "general" terms, or prioritizing endorsements and exceptions, are extensions of the broader requirements to read the entire policy and consider terms in context. Moreover, the "rules" are sometimes in tension, if not direct conflict, with each other, like *ejusdem generis* (general words restricted by preceding "particular enumerations") or *noscitur a sociis* (meaning determined by associated terms) and "no redundancy" (giving each word its own meaning). And, while rules of grammar and punctuation are sometimes controlling, the Court in *Deepwater Horizon* held it would "not construe the absence of a comma to produce an unreasonable construction."[19]

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Not all rules are applicable to every situation, of course. The court need only consider the rules on which one or both parties rely. The process of construction is complete when the court determines whether there is more than one reasonable interpretation of the disputed policy language.

2. What types of extrinsic evidence may be considered, and when?

Cooper insists the full range of extrinsic evidence *must* be considered *after* applying all rules of construction and *before* any deference is given to the insured. According to Cooper, "Evidence of the intent of the parties may be found in the documents leading up to the issuance of the policy, which would include the underwriting file, the broker's file, as well as the insured's file."[20] While the case law is hardly a model of clarity on this issue, I respectfully submit Cooper has it wrong. When and to the extent facts or materials extrinsic to the policy may be considered, they should be viewed in the context of the pertinent rules of construction.

Lynd and other recent cases make one thing clear: Resort to extrinsic evidence is not ***always*** necessary before con-

cluding the insured's interpretation is reasonable and must be adopted; courts routinely construe policies and make this determination without resort to extrinsic evidence.[21] Moreover, the Court has cautioned against reliance on such evidence to find the parties' intent, because "deriving intent from extrinsic evidence raises a fact question for jurors, not judges."[22] I doubt many insurance companies want their coverage positions weighed by juries. Since insurance policies are almost always construed by courts as a matter of law, the role of extrinsic evidence must be quite limited.

There are Texas cases that allow reliance on some types of extrinsic evidence in construing an insurance policy under certain circumstances.[23] In *CBI*, the Court noted, "Extrinsic evidence may . . . be admissible to give the words of a contract a meaning consistent with that to which they are reasonably susceptible, *i.e.*, to 'interpret' contractual terms."[24] As an example, the Court suggested extrinsic "trade usage" evidence might be considered in appropriate situations.[25] Likewise, reading a policy "in light of surrounding circumstances" may justify looking beyond the four corners of the policy.[26] But how far beyond?

One obstacle to delineating the role of extrinsic evidence is that the line between "interpreting the text" and relying on "external evidence" is often blurred. For example, to determine the meaning of a word or phrase, the court may consider definitions contained in the policy (which obviously control),[27] the "ordinary and generally accepted meaning" of the words,[28] definitions found in standard English or legal dictionaries,[29] meanings accepted in other cases,[30] or special meanings or "trade usage" in a particular field or industry—which may be provided by technical dictionaries, treatises, or expert testimony.[31] At what point on this spectrum does the consideration involve "extrinsic" evidence?

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The First District Court of Appeals in *Mescalero Energy* considered this entire spectrum to find ambiguity in the term "formation" as used in a Texas oil field "blowout policy."[32] Coverage turned on whether a "blowout" occurred "between two or more separate formations," as required by a policy endorsement.[33] The insurer denied coverage, insisting the "Austin Chalk" was a single formation. The trial court granted summary judgment for the insurer based on a definition of "formation" in a "commonly cited oil and gas dictionary," the Texas Supreme Court's quoting that definition in an unrelated case, and an expert's affidavit identifying the cited dictionary definition as "the one most generally accepted in the industry."[34] On appeal, the issue was whether an affidavit by the policyholder's expert was sufficient "to raise a fact issue as to a second reasonable definition" and thus render the term ambiguous.[35] The court noted:

> Texas courts often resort to the use of external references such as dictionaries to determine an insurance policy term's plain, ordinary, and generally accepted meaning. . . . In particular, a specialized industry or trade term may require extrinsic evidence of the commonly understood meaning of the term within a particular industry.[36]

The court relied on federal cases outside Texas construing non-insurance contracts to find "[m]any courts have used expert definitions to determine the meaning of specialized terms before deciding whether an instrument is ambiguous."[37] Ultimately, the court held the expert's opinion, "supported by his unimpeached qualifications" but no "independent industry sources," was sufficient to establish a reasonable definition of "formation."[38] Summary judgment for the insurer was reversed, and the case was remanded to the trial court.[39]

The murky line between "context" information and "extrinsic" evidence is revealed in the Texas Supreme Court's multiple opinions in *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*[40] A builder's risk policy for an offshore drilling platform construction project was negotiated in London by "lining through several provisions" in a long form with multiple options.[41] A few weeks after the policy became effective, the drilling platform became unstable and needed repair, but the work was delayed by severe storms. The insured kept repair vessels standing by to facilitate resuming repairs as soon as the weather improved. The insurer paid the cost of repair, but denied coverage for the "weather stand-by charges." One of the lined-through provisions would have explicitly provided coverage for the stand-by charges, and the insurer argued deletion of that provision established the parties' intention not to cover such charges. The trial court, however, disregarded the deleted provisions as extrinsic evidence and held the agreed terms of the policy unambiguously covered stand-by charges.

On an interlocutory appeal, the court of appeals disagreed. It held the policy's coverage of "costs necessarily incurred . . . in repair" of covered property did not encompass stand-by

charges, which the evidence indicated are "justified only in limited circumstances."[42] The appellate court bolstered its conclusion with the deleted provision on stand-by charges, holding "deletions remaining within an insurance policy can be considered in construing an unambiguous insurance policy."[43] Presumably, the court would also have considered the deleted terms if it found the policy was ambiguous.

The Texas Supreme Court, divided 5-1-3, affirmed. The majority opinion authored by Justice Hecht considered the negotiation process, including the lined-through terms, as part of the "surrounding circumstances" important to understanding the parties' intent. "The manner in which the insurance policy in this case was negotiated in the London market is crucial to understanding its terms. . . . To see the deletions as irrelevant blinks reality."[44] Indeed, the Court held, "deletions in a printed form agreement must be considered in construing the other provisions"—without regard to any ambiguity.[45] In that case, "the effect of the deletion . . . was to remove weather stand-by charges from the costs for which the policy provided indemnity."[46]

Justice Johnson concurred, but did not join the majority's view of policy construction. He agreed with the court of appeals that "the policy is unambiguous regardless of the presence of the stricken language," and did not cover stand-by charges.[47] Nevertheless, Justice Johnson deemed the deleted language "an objective reflection of the setting surrounding the creation of the policy, [which] assists in giving context to how the policy terms were reached."[48]

Three dissenting justices, in an opinion authored by then-Chief Justice Jefferson, took a sharply different approach, agreeing instead with the trial court. They considered the deleted provision analogous to prior drafts and other evidence of the negotiating process, *i.e.*, extrinsic evidence that "cannot be considered in interpreting the contract."[49] According to the dissent, the "circumstances that a court may consider are limited to the facts constituting the context of the contract's execution, not extrinsic evidence of the negotiations among the parties."[50] Reading the entire policy "without reference to the deleted paragraph," the dissent concluded "coverage for standby charges is otherwise established by the contract's language."[51]

Evidence of the loss for which coverage is sought is, of course, always "extrinsic" to the policy itself. Often, the difficulty arises not so much in defining the pertinent terms of the policy, but in determining whether the specific loss fits within that definition. In this context, extrinsic evidence is often offered to identify or resolve "latent" ambiguity, which is an ambiguity that is not evident on the face of the policy (*i.e.*, not a "patent" ambiguity), but arises when the policy terms are applied to specific circumstances.[52] Indeed, by definition, a "latent ambiguity arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter."[53]

The *Murphy* case cited in *CBI* does not involve an insurance policy, but explains the role of extrinsic evidence in identifying and resolving latent ambiguity:

> [E]ven though a written contract be unambiguous on its face, parol evidence is admissible for the purpose of applying the contract to the subject with which it deals; and if by reason of some collateral matter an ambiguity then appears, proof of the facts and circumstances under which the agreement was made is admissible, in order that the language used in the contract may be read in the light thereof for the purpose of ascertaining the true intention of the parties as expressed in the agreement.[54]

In the insurance context, latent ambiguity is sometimes invoked in applying pollution exclusions to particular substances or situations. The Court in *CBI* held that the pollution exclusions at issue were neither patently nor latently ambiguous; hydrofluoric acid "is clearly a pollutant for which coverage is precluded."[55] The Court therefore held "evidence concerning industry-wide discussions of the exclusion at issue," which the insured said showed "the parties shared a mutual, but unstated, intent" to cover "accidental" releases, could not be considered and was not an appropriate subject for discovery.[56] While "latent ambiguity" remains an abstract possibility, the cases uniformly reject such arguments in pollution-exclusion and other coverage cases.[57] The one outlier I have found is the *Kelley* case, in which the Texas Supreme Court remanded to resolve a latent ambiguity—"whether two documents amount to a single or separate policies."[58] The Court distinguished that question from "interpreting a particular exclusion or provision within an insurance policy," where the court would "adopt the [reasonable] interpretation that favors the insured."[59]

Resort to extrinsic evidence is particularly disfavored in determining the duty to defend. Texas courts follow the "eight corners" rule, under which an insurer's duty to defend is determined solely by reference to the third-party plaintiff's live pleading, considered in light of the policy provisions, without regard to the truth of those allegations.[60] Facts

outside the pleadings, even if easily ascertained, are generally not material to the determination.[61] And to the extent there may be exceptions to the eight-corners rule, they generally involve the identity of the insured or other facts relevant to applying the policy, not the meaning of policy terms.[62] Where a policy incorporates another contract, such as an indemnification agreement between the insured and a putative additional insured, the referenced contract is not really extrinsic evidence; it is an integral component of the policy.[63] Anyone for a "twelve-corners" rule?

3. What's all this talk about intent?

Despite the common refrain that the purpose of construction is to discern the "intent of the parties," one type of extrinsic evidence is almost universally rejected in construing insurance policies—the parties' subjective versions of what they "intended" at the time.[64] The court's true task is to determine objective intent "as expressed in the document."[65] As the Court explained in *Fiess*, courts construe policies according to what they say, "not what . . . insurers thought [they] said."[66] Likewise in *Gilbert*, the Court insisted, "The parties' intent is governed by what they said in the insurance contract, not by what one side or the other alleges they intended to say but did not."[67] And as the Dallas Court of Appeals put it in 1968, "it must be emphasized that it is not the intention which the parties may have had, but failed to express in the instrument, but it is the intention which by said instrument they did express."[68] More recently, the *Lynd* Court held it "need not attempt to imagine what the parties intended, and instead need only construe the 'parties' intent as expressed by the words they chose to effectuate their agreement."[69] It would be a rare case indeed where the court would base policy interpretation on evidence from files maintained by the underwriter, broker, or insured.

Divining the policyholder's intent (beyond a desire for the broadest possible coverage) is particularly problematic, as the insured rarely has a role in selecting specific language. Indeed, it is not uncommon for an insured—even a large, "sophisticated" company—to be bound to the terms of a policy and all its endorsements before it has even seen the documents. In *Houston Exploration*, for example, the Court construed the disputed terms of a Lloyds policy without considering the insureds' "insist[ence] that they knew nothing of the actual terms of the policy . . . until after [the] litigation commenced."[70] Texas courts have declined to adopt the "reasonable expectations" doctrine used in other jurisdictions, focusing instead on "reasonable interpretations" of the policy.[71] In other words, the goal of policy construction is not to find either party's subjective intent, but to determine the meaning and legal effect of the terms used in the agreement.

Cooper suggests courts should construe state-approved (or mandated) forms according to the "intent of the Department of Insurance," based on "the Department of Insurance drafting history, regulatory history, and relevant actions of the State Board of Insurance."[72] Because of the TDI's role in promulgating forms for auto, home, and other consumer policies, Cooper suggests courts should give no deference to a policyholder's interpretation of such policies. Notwithstanding occasional references to the "intent of the Department," the Texas Supreme Court insists "the policy language [of such forms] is interpreted according to the ordinary, everyday meaning of its words to the general public."[73] Construing the state-prescribed terms of a windstorm policy in 1954, the Texas Supreme Court held "a true search for what the courts usually speak of as the intent of the parties will not be an inquiry as to what the words of the contract meant to this particular insurer or insured."[74] Rather, the goal is to determine the meaning of the words, including choices made by the purchaser. In other words, such policies are construed under the same rules governing other policies. The subjective intent of the TDI (however that might be discerned) is no more determinative than the subjective intent of the parties.

The process of policy interpretation is not noticeably changed by the state's involvement in drafting the policy terms. In *Balandran*, after determining the insured's interpretation of a standard homeowners policy was reasonable, the Court observed the policy was "even more reasonable when we consider the circumstances surrounding promulgation of this policy form."[75] Specifically, the Court reviewed the process by which an advisory committee appointed by the Board of Insurance redrafted the standard Texas policies.[76] (It's not clear whether the Court viewed such records as extrinsic evidence or secondary authority.) In 2004, the Court in *Sturrock* agreed with the TDI's argument in an amicus brief that the position the insurer was making in that case "would severely limit an insured's no-fault coverage in a manner that would contravene its purpose and lead to absurd results."[77] Two years later, the Court in *Fiess* declined to consider the TDI's interpretation of a standard form policy.[78] In 2014, the Court in *Greene*—after finding the TDI-approved "insuring agreement [unambiguously] specified the risk Farmers accepted and Greene purchased"—held "the general public policy underlying the anti-technicality statute is outweighed here by the specific public policy in TDI's prescribing the HO-A form for insurers to use in Texas."[79] In any event, the rule that ambiguity is resolved in favor of coverage remains applicable even where the State drafts the policy. In *Utica*,

for example, the Court adopted the insured's reasonable interpretation of an exclusionary clause contained in "a policy form prescribed by the State Board of Insurance."[80]

4. Deference to the insured's reasonable interpretation applies to all insurance policies.

As discussed above, if the interpretation urged by the insured passes the reasonableness test after application of the pertinent rules, it is adopted. Period. Cooper refers to this principle as "contra proferentem"—construing against the drafter—and proclaims: "This archaic rule has no place in Texas jurisprudence today because insurers no longer draft insurance policies and therefore insureds are not in a powerless position when negotiating with insurers for coverage."[81]

The insurer's control over the policy language has traditionally been, and remains, a compelling basis for expecting the insurer to state its intention in unambiguous terms.[82] Hence, the familiar refrain that if insurers wish to limit their liability in specific circumstances, "they must use language that unambiguously confirms that they are doing so."[83] The Court in *Lynd*, after reviewing the "numerous and varied decisions [that] demonstrate an urgent need for clarity in this arena," insisted that "only RSUI, and other insurers who use the same or similar endorsements, can provide the clarity needed to resolve these issues by significantly revising the endorsement to say what the insurers really want it to mean."[84]

The public policy grounds for deferring to the insured, however, go beyond the traditional common law doctrine that contracts are construed against the drafter. The doctrine of contra proferentem in the insurance context has also been called more broadly the "ambiguity rule."[85] By whatever name, deference to the insured's reasonable interpretation of ambiguous language is "justified by the special relationship between insurers and insureds," which also gives rise to a duty of good faith and fair dealing in claims handling.[86] In Texas, a duty of good faith and fair dealing arises only from certain special relationships, and insurance is one of the few contexts where such a relationship exists as a matter of law.[87] While that duty does not arise until the policy is issued, it exists at the time the insurer is deciding how to respond to a particular loss.

By whatever name, deference to the insured's reasonable interpretation of ambiguous language is "justified by the special relationship between insurers and insureds," which also gives rise to a duty of good faith and fair dealing in claims handling.

Moreover, the "ambiguity rule" is an equitable and efficient means of resolving ambiguity by assigning responsibility for ensuring clarity to the insurer, which ultimately controls its own policy language and issues policies to policyholders across the country. By using such an approach, policy construction remains a question of law, and courts avoid expensive, time-consuming attempts to discover "evidence" by which a trier of fact would be asked to discern the original intent of corporate entities at the time the policy was issued.

Even for state-approved policies, insurance companies are hardly passive participants in this process. For example, in *Balandran*, the Court noted that a State Farm representative had chaired the committee charged with revising the policy form and had assured the Board "the revisions were 'accomplished in line with [the Board's] charge of making sure that there is no restriction in coverage available to any insured under an existing homeowner policy in Texas.'"[88] In any event, Cooper overstates the TDI's control over policy forms, even for the most heavily regulated consumer coverages—life, health, property and casualty, and title insurance. The Insurance Code imposes certain rules, and the TDI issues regulations and approves "standard form" policies and endorsements for some coverage lines.[89] But for many coverages, insurers can choose to use the standard forms or their own forms, subject to approval for compliance with statutory requirements.[90] Significantly, many of the statutory requirements and procedures do not apply to forms used for "large risks" (defined by property value, gross revenues, or premium amount).[91] The determinative question remains: What do the words of the policy mean when applied to specific circumstances?

5. Do we need a "Sophisticated Insured" rule?

Cooper, following the lead of a few commentators, urges courts to suspend any deference to the insured's interpretation if it is proffered by a "sophisticated" insured, generally meaning another big company. He cites no Texas court that has adopted this position.[92] The Texas Supreme Court declined to answer a question on this issue certified by the Fifth Circuit in the recent *Deepwater Horizon* case.[93] Historically, Texas courts apply the rules of construction outlined above even where the insured is a sophisticated business entity represented by counsel.[94]

One federal court, in dicta, made an "Erie guess" that Texas courts would not defer to the insured's reasonable interpretation of an ambiguous policy where the insured contributed to the negotiating and drafting of the policy, or where the policy was prepared by a broker acting for the insured. [95] In *Vought Aircraft*, the court acknowledged Texas courts have not adopted the "sophisticated insured" exception, but reasoned that Texas courts have predicated the traditional rule of construction on an insured's unequal bargaining power, the special relationship between the insured and the insurer, and the general principle that contracts are construed against the drafting party.[96] The court determined these concerns are mollified where an insured "drafts the policy, or at least play[s] a role in drafting it," since such insureds "are not presented a policy that contains non-negotiable terms; rather, they can bargain for coverage."[97] Further, these insureds "are able to interpret the policy on their own, lessening the likelihood that the insurer will take advantage of them."[98] Given these considerations, the court opined that "Texas courts would apply the [sophisticated insured] exception where the facts warrant."[99] The court implied that whether the "sophisticated insured exception" applies does not depend on the insured's size or corporate status, but rather rests on the insured's role in drafting the policy.[100]

In the end, the *Vought Aircraft* court determined it could not decide at the summary judgment stage whether the traditional rule of interpretation would apply and reserved ruling on that issue.[101] The court's "Erie guess" was therefore dicta. No Texas case has cited *Vought Aircraft*, and neither the Texas Supreme Court nor any other Texas court has directly addressed the question of the existence and scope of the "sophisticated insured exception."

The arguments offered in support of such an exception are not persuasive. Actual negotiation of the terms of an entire policy is rare, even where the parties discuss one or more "manuscript" endorsements. Indeed, as noted above, complete policies are seldom delivered to the policyholder before the effective date. Even where a "sophisticated" insured has bargained for inclusion of one endorsement rather than another, it does so with the expectation that it correctly understands the scope and effect of the language used. If that understanding is a reasonable one, there is no reason a court should not adopt that meaning as it would when construing any other policy. Moreover, many coverage disputes involve additional insureds, who presumably had no role in negotiating policy language, except perhaps contracting with the named insured for a particular additional-insured endorsement.[102] And as discussed above, Texas courts are reluctant to consider the parties' subjective intentions; the controlling principle is the meaning of the words of the policy as issued.

Finally, construing policy terms based on the identity or "sophistication" of one of the parties undermines a rule of construction Cooper doesn't mention—the goal of uniform construction of the same terms across jurisdictions.[103] While the Court does not always adopt the majority position,[104] it has "repeatedly stressed the importance of uniformity when identical insurance provisions will necessarily be interpreted in various jurisdictions."[105] Achieving "uniformity and predictability"[106] is forever out of reach if the courts must look behind the text to consider the relative "sophistication" of insurer and insured. Complex insurance-coverage cases would become even more complicated, requiring additional discovery and reliance on extrinsic evidence wholly unrelated to the objective meaning of the policy's terms. Whatever benefit might be obtained by adopting a "sophisticated insured" exception is not worth the price.

Bottom line.
In short, correctly interpreting insurance policies is not so hard: Determine, using the rules of construction applicable to the disputed policy, whether the insured has articulated a reasonable interpretation that provides coverage. If so, apply that interpretation.

Lyndon Bittle is a trial and appellate partner at Carrington, Coleman, Sloman & Blumenthal in Dallas, Texas. He heads the firm's insurance coverage team, has been named a Texas Super Lawyer in Insurance since 2012, and is a former chair of the Insurance Coverage Litigation Committee of the ABA's Tort Trial and Insurance Section. He is also Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. ★

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1 No. 13-0080, 2015 Tex. LEXIS 442 (Tex. May 8, 2015), *aff'g* 399 S.W.3d 197 (Tex. App.—San Antonio 2012).

2 *Lynd*, 2015 Tex. LEXIS 442 at *6.

3 *State Farm Fire & Cas. Co. v. Vaughan*, 968 S.W.2d 931, 933 (Tex. 1998).

4 *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983).

5 *Lynd*, 2015 Tex. LEXIS 442 at *8; *JAW The Pointe, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597, 2015 Tex. LEXIS 343 at *12 (Tex. 2015); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006); *Nat'l Union Fire Ins. Co. v. Hudson Energy Co., Inc.*, 811 S.W.2d 552, 555 (Tex. 1991); *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 380 (Tex. 2012).

6 *Lynd*, 2015 Tex. LEXIS 442 at *8-9, 42; *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998); *U.S. Fire Ins. Co. v.*

Scottsdale Ins. Co., 264 S.W.3d 160, 167 (Tex. App.—Dallas 2008, no pet.).

[7] *Lynd*, 2015 Tex. LEXIS 442 at *9.

[8] *Lynd*, 2015 Tex. LEXIS 442 at *7 (quoting *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994), other citations omitted).

[9] *Lynd*, 2015 Tex. LEXIS 442 at *9 (quoting *Balandran v. Safeco Ins. Co.*, 972 S.W.2d 738, 741 (Tex. 1998)); *see also Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951) "[A] contract is ambiguous only when the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning."). *But see Progressive Cnty. Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 552 (Tex. 2003) ("The policy is not ambiguous . . . . But even were the policy ambiguous, Sink's interpretation is unreasonable.").

[10] *See Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458-59 (Tex. 1997); *id*. at 461 (Spector, J., dissenting) ("The majority's conclusion that the policy language at issue here is not ambiguous defies common sense: the two lower courts in this case and the courts of several other states have discerned a lack of clarity that escapes the majority.").

[11] 2015 Tex. LEXIS 442 at *68.

[12] 2015 Tex. LEXIS 442 at *75.

[13] *McGinnes Indus. Maint. Corp. v. Phoenix Ins. Co.*, No. 14-0465, 2015 Tex. LEXIS 624 (Tex. June 26, 2015).

[14] *Id*. at *13.

[15] *Id*. at *18-19. The oft-stated goal of uniform construction is discussed at the end of this article.

[16] *Id*. at *26.

[17] A recent example, in the court's view, is *3109 Props, L.L.C. v. Truck Ins. Exch.*, No. 03-13-00350-CV, 2015 Tex. App. LEXIS 6146, *8 (Tex. App.—Austin June 18, 2015) ("It is nonsensical to ignore the declarations specific to the policy being construed when attempting to discern what property that policy covers.").

[18] *See, e.g., Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010) ("Gilbert . . . argues that the policy's plain language is not as plain as it might seem.").

[19] No. 13-0670, 2015 Tex. LEXIS 141 at *34 (Tex. Feb. 13, 2015).

[20] Cooper, *Principles for Interpreting Insurance Policies*, The Advocate Summer 2015, at 37 (no authority cited).

[21] *See, e.g.*, *Lynd*, 2015 Tex. LEXIS 442 at *42; *Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 202 (Tex. 2004); *Balandran*, 972 S.W.2d at 742; *Gastar Expl. Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577, 584 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

[22] *Fiess*, 202 S.W.3d at 748.

[23] *Balandran*, 972 S.W.2d at 741; *CBI*, 907 S.W.2d at 520.

[24] 907 S.W.3d at 521. *CBI* is often quoted to justify reliance on extrinsic evidence to resolve ambiguity: "Only where a contract is first determined to be ambiguous may the courts consider the parties' interpretation . . . and admit extraneous evidence to determine the true meaning of the instrument." *Id*. at 520 (citations omitted) The Court cited two non-insurance cases for that statement, and found the policy at issue unambiguous, so the opinion gives little guidance on what types of "extraneous evidence" might be considered to interpret an ambiguous policy.

[25] *Id*. at 521 n.6. In one case, the Fifth Circuit held evidence of "trade usage" was *required* before *any* meaning could be ascribed to the term "membrane roofing" as used in an exclusion. *B. Hall Constr., Inc. v. Evanston Ins. Co.*, 273 F. App'x 310, 312-13 (5th Cir. 2008).

[26] *See, e.g.*, *McGinnes Indus.*, 2015 Tex. LEXIS 624 at *13-14; *Balandran*, 972 S.W.3d at 741.

[27] *Lynd*, 2015 Tex. LEXIS 442 at 18-19; *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 766 (Tex. 2014); *Gastar Expl.*, 412 S.W.3d at 583.

[28] *Lynd*, 2015 Tex. LEXIS 442 at *7; *Deepwater Horizon*, 2015 Tex. LEXIS 141 at *28; *Greene*, 446 S.W.3d at 766 (state-prescribed policy form "interpreted according to the ordinary, everyday meaning of its words to the general public").

[29] *See, e.g.*, *Gilbert*, 327 S.W.3d at 127; *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8-9 (Tex. 2007).

[30] *See, e.g.*, *McGinnes Indus.*, 2015 Tex. LEXIS 624 at *19; *Gilbert*, 327 S.W.3d at 129-32; *Fiess*, 202 S.W.3d at 748-50.

[31] *CBI*, 907 S.W.2d at 521 & n.6; *Messalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc.*, 56 S.W.3d 313, 319-25 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

[32] *See Mescalero Energy*, 56 S.W.3d at 319-25.

[33] *Id*. at 316.

[34] *Id*. at 318.

[35] *Id*. at 322.

[36] *Id*. at 320.

[37] *Id*. at 323.

[38] *Id*. at 325.

[39] There is no indication the insured had requested summary judgment.

[40] 352 S.W.3d 462 (Tex. 2011).

[41] *Id*. at 465-66.

[42] *Id*. at 468.

[43] *Id*. at 469 (citing *Gibson v. Turner*, 294 S.W.2d 781 (Tex. 1956); *Westchester Fire Ins. Co. v. Stewart & Stevenson Servics., Inc.*, 31 S.W.3d 654 (Tex. Civ. App.—Houston [1st Dist.] 2000, pet denied)).

[44] *Id*. at 470.

[45] *Id*. at 471 (citing *Houston Pipi Line Co. v. Dwyer*, 374 S.W.2d 662 (Tex. 1964); *Gibson v. Turner*, 294 S.W.2d 781 (Tex. 1956); 11 Richard A. Lord, WILLISTON ON CONTRACTS, § 32.13(4th ed. 1999)).

[46] *Id*. at 472.

[47] *Id*. at 473.

[48] *Id*.

[49] *Id*. at 474.

[50] *Id*. (citing 11 WILLISTON ON CONTRACTS, § 32.7, § 33.42 (4th ed. 1999)).

[51] *Id*. At 476

[52] *See, e.g.*, *CBI*, 907 S.W.2d at 520 (distinguishing patent and latent ambiguity).

[53] *CBI*, 907 S.W.2d at 520 (citing *Murphy v. Dilworth*, 151 S.W.2d 1004 (Tex. 1941).

[54] *Murphy*, 151 S.W.2d at 1005.

[55] 907 S.W.2d at 521.

[56] *Id*.

[57] *See Methodist Hosp. v. Zurich Am. Ins. Co.*, 329 S.W.3d 510, 522 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Lone Star Heat Treating Co. v. Liberty Mut. Fire Ins. Co.*, 233 S.W.3d 524, 529 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *Zaiontz v. Trinity Univ. Ins. Co.*, 87 S.W.3d 565, 571 (Tex. App.—San Antonio 2002, pet. denied); *Gulf Metals Indus., Inc. v. Chicago Ins. Co.*, 993 S.W.2d 800, 804-05 (Tex. App.—Austin 1999, pet. denied); *Mescalero Energy*, 56 S.W.3d at 319-20.

[58] *Progressive Cnty. Mut. Ins. Co. .v. Kelley*, 284 S.W.3d 805, 808-09 (Tex. 2009) (per curiam).

[59] *Id.* at 808.

[60] *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006); *GuideOne Specialty Mut. Ins. Co. v. Missionary Church of Disciples of Jesus Christ*, 687 F.3d 676, 684 (5th Cir. 2012).

[61] *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002); *GuideOne Elite*, 197 S.W.3d at 308-09 .

[62] *See, e.g.*, *GuideOne Elite*, 197 S.W.3d at 308-09; *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 596-97 (5th Cir. 2011); *Weingarten Realty Mgmt. Co. v. Liberty Mut. Ins. Co.*, 343 S.W.3d 859, 869 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

[63] *See Deepwater Horizon*, 2015 Tex. LEXIS 141 at *15-16; *Urrutia v. Decker*, 992 S.W.2d 440, 442 (Tex. 1999).

[64] *See, e.g.*, *Gilbert*, 327 S.W.3d at 127 ("The parties' intent is governed by what they said in the insurance contract, not by what one side or the other alleges they intended to say but did not."); *CU Lloyd's v. Hatfield*, 126 S.W.3d 679, 682 (Tex. App. —Houston [14th Dist.] 2004, pet. denied) ("In determining the intent of the parties, we examine only the language of the insurance policy to see what is actually stated, rather than other evidence of what was allegedly meant.").

[65] *Lynd*, 2015 Tex. LEXIS 442 at *6; *see also Greene*, 446 S.W.3d at 766; *Utica*, 141 S.W.3d at 202; *CBI*, 907 S.W.2d at 520.

[66] 202 S.W.3d at 745.

[67] 327 S.W.3d at 127.

[68] *Republic Nat'l Bk. v. Nat'l Bankers Life Ins. Co.*, 427 S.W.2d 76, 79-80 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.), *quoted in Hulcher Servs., Inc. v. Great Am. Ins. Co.*, No. 4:14-CV-231, 2015 U.S. Dist. LEXIS 82292, *9 (E.D. Tex. June 25, 2015).

[69] 2015 Tex. LEXIS 442 at *60 (quoting *Deepwater Horizon*, No. 13-0670, 2015 Tex. LEXIS 141 at *27-28).

[70] *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 467 n.13 (Tex. 2011).

[71] *See Tex. Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 878 (Tex. 1999); *CU Lloyd's v. Hatfield*, 126 S.W.3d 679, 684 n.6 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d 203, 213-14 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). *Compare Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985) ("reasonable expectations of the insured" may trump policy language in some circumstances).

[72] *Cooper* at 37, 39 & n.10 (citing *Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551-52 (Tex. 2003).

[73] *Greene*, 446 S.W.3d at 766; *Fiess*, 202 S.W.3d at 746.

[74] *U.S. Ins. Co. v. Boyer*, 269 S.W.2d 340, 341 (Tex. 1954).

[75] 972 S.W.2d at 741.

[76] *Id.* at 741-42.

[77] *Tex. Farm Bureau Mut. Ins. Co. v. Sturrock*, 146 S.W.3d 123, 129 (Tex. 2004).

[78] 202 S.W.3d at 747-48.

[79] 446 S.W.3d at 769-70.

[80] *Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 202 (Tex. 2004).

[81] *Cooper* at 38.

[82] *See Lynd*, 2015 Tex. LEXIS 442 at *8; *Balandran*, 972 S.W.2d at 741 n.1.

[83] *Lynd*, 2015 Tex. LEXIS 442 at *52.

[84] 2015 Tex. LEXIS 442 at *66-67; *see also Hudson Energy*, 811 S.W.2d at 555 ("If National Union wanted to exclude simultaneous piloting from the scope of coverage, then it was incumbent upon it to expressly and clearly state the exclusion in the policy."); *Glover v. Nat'l Ins. Underwriters*, 545 S.W.2d 755, 764 (Tex. 1977).

[85] *Deepwater Horizon*, 2015 Tex. LEXIS 141 at *2-3.

[86] *Lynd*, 2015 Tex. LEXIS 442 at *8 (quoting *Balandran*, 927 S.W.2d at 741 n.1, and *Arnold v. Nat'l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987)).

[87] *Compare Arnold*, 725 S.W.2d at 167 *with English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983); *see also Willis v. Donnelly*, 199 S.W.3d 262, 278 (Tex. 2006).

[88] 927 S.W.2d at 742.

[89] *See generally* TEX. INS. CODE Chapter 2301, "Policy Forms." *See also Utica*, 141 S.W.3d at 202 (noting that Insurance Code authorized Commissioner to "promulgate standard [business liability] insurance policy forms . . . that may be used, at the discretion of the insurer").

[90] TEX. INS. CODE § 2301.008.

[91] TEX. INS. CODE § 2301.004.

[92] *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 127 (5th Cir. 1976) (cited in Cooper n.87), applied Missouri law to a maritime insurance policy.

[93] 2015 Tex. LEXIS 141 at *41.

[94] *See, e.g., Tex. Indust., Inc. v. Factory Mut. Ins. Co.*, 486 F.3d 844, 848 (5th Cir. 2007); *In re Enron Corp. Securities, Derivative & "ERISA" Lit.*, 391 F.Supp.2d 541, 569 (S.D. Tex. 2005); *TIG Ins. Co. v. N. Am. Van Lines, Inc.*, 170 S.W.3d 264, 268 (Tex. App.—Dallas 2005, no pet.); *Pioneer Chlor Alkali Co. v. Royal Indem. Co.*, 879 S.W.2d 920, 929 (Tex. App.—Houston [14th Dist.] 1994, no writ).

[95] *See Vought Aircraft Indus., Inc. v. Falvey Cargo Underwriting, Ltd.*, 729 F.Supp.2d 814, 823 (N.D. Tex. 2010). The court relied entirely on non-Texas cases in articulating this doctrine.

[96] *Id.* at 824-25 (citing *Balandran*, 972 S.W.2d at 741, n. 1); *see also Arnold v. Nat'l County Mut. Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987).

[97] *Id.* at 825

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 826.

[102] In *Deepwater Horizon*, BP was an additional insured; aligned against it were the named insured and the insurer. 2015 Tex. LEXIS 141 at *4. Many cases are disputes between insurers; ambiguous provisions in those cases are likewise construed in favor of coverage. *See, e.g.*, *Utica*, 141 S.W.3d at 202.

[103] *See McGinnes Indus.*, 2015 Tex. LEXIS 624 at * 20 & n.38 (citing *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 496-97 (Tex. 2008) and *CBI*, 907 S.W.2d at 522); *Lynd*, 2015 Tex. LEXIS 442 at *19, 62; *JAW The Pointe*, 460 S.W.3d 597, 2015 Tex. LEXIS 343 at *11 n.5; *Fiess*, 202 S.W.3d at 752; *Trinity Univ. Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 (Tex. 1997).

[104] *See, e.g.*, *Lynd*, 2015 Tex. LEXIS 442 at *63; *Gilbert*, 327 S.W.3d at 129-30; *McGinnes Indus.*, 2015 Tex. LEXIS 624 at *47 (Boyd, J., dissenting).

[105] *Nokia*, 268 S.W.3d at 496-97; *see also Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 5 (Tex. 2007).

[106] *JAW The Pointe*, 460 S.W.3d 597, 2015 Tex. LEXIS 343 at *11 n.5.