IN THE SUPREME COURT OF FLORIDA

Case No. SC12-323

WASHINGTON NATIONAL INSURANCE CORPORATION,

Appellant,

v.

SYDELLE RUDERMAN, ET AL.,

Appellees.

BRIEF OF *AMICUS CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF APPELLANT WASHINGTON NATIONAL INSURANCE CORPORATION

Proceedings to Review Question Certified from the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF AMICUS CURIAE

The Complex Insurance Claims Litigation Association ("CICLA") is a trade association of major property and casualty insurance companies.[1] CICLA members provide a substantial percentage of the liability coverage written in Florida. CICLA focuses on education and legal issues of concern to insurers. Through *amicus curiae* efforts, CICLA seeks to assist courts in resolving insurance policy interpretation and coverage questions of importance.

CICLA has participated as an *amicus curiae* in numerous cases throughout the country, including several cases before this Court.[2] For instance, CICLA was granted leave to appear in Perera v. United States Fidelity & Guaranty Co., No. SC08-1968 (Fla.), which presented important questions concerning the judicial interpretation of Section 624.155, Fla. Stat., and of the common law cause of action for insurer bad faith. As a trade association with a broad outlook on the insurance and public policy considerations before the Court, CICLA is uniquely positioned to address the key issues concerning the effect of a strict *contra proferentem* rule, particularly in the context of property and casualty insurance.

[1] This brief is filed on behalf of the following CICLA members: Chubb & Son – a Division of Federal Insurance Company; Liberty Mutual Insurance Company; TIG Insurance Company; and The Travelers Indemnity Company.

[2] See, e.g., Perera v. U.S. Fid. & Guar. Co., 35 So. 3d 893 (Fla. 2010); U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007); Macola v. GEICO., 953 So. 2d 451 (Fla. 2006); Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 913 So. 2d 528 (Fla. 2005); Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161 (Fla. 2003); Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135 (Fla. 1998); Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp., 636 So. 2d 700 (Fla. 1993).

QUESTION CERTIFIED

I. In this case, does the Policy's "Automatic Benefit Increase Percentage" apply to the dollar values of the "Lifetime Maximum Benefit Amount" and the "Per Occurrence Maximum Benefit"?

We understand answering this question might include answering the three following sub-questions:

A. Does an ambiguity exist about whether the Policy's "Automatic Benefit Increase Percentage" applies only to the "Home Health Care Daily Benefit" or whether it also applies to the "Lifetime Maximum Benefit Amount" and the "Per Occurrence Maximum Benefit"?

B. If an ambiguity exists in this insurance policy—as we understand that it does—should courts first attempt to resolve the ambiguity by examining available extrinsic evidence?

C. Applying the Florida law principles of policy construction, does the Policy's "Automatic Benefit Increase Percentage" apply to the Lifetime Maximum Benefit Amount" and to the "Per Occurrence Maximum Benefit" or does it apply only to the "Home Health Care Daily Benefit"?

In this *amicus curiae* brief, CICLA only addresses sub-question B.

STATEMENT OF ARGUMENT

A court's primary purpose in contract interpretation is to ascertain the parties' intent and give effect to that intention. With a clear and unambiguous contract, the contract itself is both the beginning and the end point for the court's analysis—the contract is given effect as written, and extrinsic evidence is both unnecessary and inadmissible.

If—and only if—a contract is ambiguous, the court may look to extrinsic evidence to ascertain the parties' intent. And only if extrinsic evidence does not

resolve the ambiguity does a court turn to the doctrine of *contra proferentem* as a tie-breaker to determine the meaning of an unclear term. The primary role of a court in contract construction is to ascertain the parties' intent. Because *contra proferentem* is of no use in doing so, *contra proferentem* properly is relegated to a rule of last resort.

An insurance policy is a contract. These basic rules of contract construction apply to insurance contracts in the same way they do to all other types of contracts. Courts must enforce clear insurance policy terms as written and must seek to ascertain the parties' intent with respect to any unclear term. "The rule that ambiguities in insurance contracts are to be construed in favor of the insured is not license for our raiding the deep pocket." State Farm Fire & Cas. Co. v. Oliveras, 441 So. 2d 175, 178 (Fla. 4th DCA 1983) (citation omitted).

Indeed, when properly applied, *contra proferentem* does not necessarily support construction of an ambiguous insurance contract term against the insurer. Many sophisticated commercial entities or individuals employ risk management professionals, brokers, and/or attorneys to negotiate insurance policies and obtain insurance terms on their behalf. In these situations, *contra proferentem*—literally, against the drafter—may require construction of an insurance contract provision against the policyholder if its advocates proffered the term at issue.

Florida courts should continue to apply settled contract interpretation principles to insurance contracts, just as in all other contracts. When confronted with ambiguous policy language, this requires courts to evaluate extrinsic evidence of what the contracting parties intended when they entered into the contract, and only if an ambiguity still remains, to resort to *contra proferentem* and construe the term against the drafter.

ARGUMENT

I. CONTRACT INTERPRETATION SHOULD BE GUIDED BY THE PARTIES' INTENT

A. Enforcing Parties' Intent is Fundamental to Private Contract Law.

The primary purpose and function of a court in interpreting a contract is to ascertain the parties' intent and give effect to that intention. 11 Richard A. Lord, WILLISTON ON CONTRACTS § 32.2 (4th ed. 1999) ("[T]he cardinal principle of contract interpretation is that the intention of the parties must prevail unless it is inconsistent with some established rule of law."). First and foremost, the parties' intent is determined using the language they set forth in their agreement. Id; see also Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So. 2d 467, 472 (Fla. 1993) ("[c]ourts are to give effect to the intent of the parties as expressed in the policy language"). These principles apply to insurance contracts just as they do to other types of contracts. See, e.g., Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979) ("we give true effect to the intentions of the

parties, which is the central concern of the law of contracts even in the realm of insurance where there are unique public policy considerations"); Stuyvesant Ins. Co. v. Butler, 314 So. 2d 567, 570 (Fla. 1975) ("contracts of insurance should be construed so as to give effect to the intent of the parties").

B. Unambiguous Contract Terms Should be Enforced as Written.

Where the provisions of an insurance contract are unambiguous, they must be given their plain and ordinary meaning. See, e.g., Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1138 (Fla. 1998) ("[t]he court . . . is not free to rewrite the terms of the insurance contract where the contract is not ambiguous"); Rigel v. Nat'l Cas. Co., 76 So. 2d 285, 286 (Fla. 1954) ("if the language is plain and unambiguous, there is no occasion for the court to construe it"). Courts cannot admit extrinsic evidence when an insurance policy is clear on its face. See, e.g., Deni, 711 So. 2d at 1139 (finding it "inappropriate" to use extrinsic evidence unless a policy is ambiguous); Dimmitt Chevrolet, Inc. v. Southeastern Fid. Ins. Corp., 636 So. 2d 700, 705 (Fla. 1993) (same); Heritage Ins. Co. v. Cilano, 433 So. 2d 1334, 1335 (Fla. 4th DCA 1983) ("When the terms of an insurance policy are clear and unambiguous the terms must be applied as written, the court not being free to reshape the agreement of the parties.").

Florida courts "recognize also that insurance contracts are complex instruments and that 'ambiguity is not invariably present when analysis is

necessary to interpret the policy.'" Travelers Ins. Co. v. C.J. Gayfer's & Co., 366 So. 2d 1199, 1201 (Fla. 1st DCA 1979) (quoting Blue Shield of Fla. Inc. v. Woodlief, 359 So. 2d 883, 884 (Fla. 1st DCA 1978)); accord Alpha Therapeutic Corp. v. St. Paul Fire & Marine Ins. Co., 890 F.2d 368, 370 (11th Cir. 1989) ("When determining whether a policy is ambiguous, we must bear in mind that insurance contracts are complex instruments. Consequently, 'the fact that analysis is required for one fully to comprehend them does not mean the contracts are ambiguous.'") (quoting Oliveras, 441 So. 2d at 178); Am. Motorists Ins. Co. v. Farrey's Wholesale Hardware Co., 507 So. 2d 642, 645 (Fla. 3d DCA 1987) (same). "[T]he mere fact that a provision in an insurance policy could be more clearly drafted does not necessarily mean that the provision is otherwise inconsistent, uncertain or ambiguous." State Farm Fire & Cas. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986).

In addition, it is well-established in Florida that "insurers have the right to limit their liability and to impose such conditions as they wish upon their obligations, . . . and the courts are without the right to add to or take away anything from their contracts." France v. Liberty Mut. Ins. Co., 380 So. 2d 1155, 1156 (Fla. 3d 1980). Through the use of exclusions, insurers limit the risks that are assumed. Thus, "the fact that coverage is described in a policy which does not apply to an insured's particular situation neither renders the policy ambiguous nor a nullity."

Dick Courteau's GMC Truck Co. v. Comancho-Colon, 498 So. 2d 1023, 1025 (Fla. 2d DCA 1986).

Consistent application of these well-settled rules is vital to commercial law. Contracting parties expect that courts, if called upon to resolve a dispute, will apply the contract's terms as written. Organizations and individuals conduct their business based on the understanding that they are free to contract in any manner, and that those contracts will be enforced as written. See, e.g., Bituminous Cas. Corp. v. Williams, 17 So. 2d 98, 101 (Fla. 1944) ("it is a matter of great public concern that freedom of contract be not lightly interfered with"). Thus, when an insurance agreement is drafted in clear and unambiguous language, courts must enforce that language as written.

C. If the Contract is Ambiguous, Courts Should Consult Extrinsic Evidence to Ascertain the Parties' Intent.

If the contract language is not clear and unambiguous, the court is unable to simply apply the terms as written. Instead, it must construe the contract. Longstanding contract law establishes that, when—and only when—faced with an ambiguity, a court looks to extrinsic evidence of the parties' intent to ascertain the meaning of the contract. See 11 Richard A. Lord, WILLISTON ON CONTRACTS § 30.7 (4th ed. 1999); see also First Capital Income & Growth Funds, Ltd.-Series XII v. Baumann, 616 So. 2d 163, 165 (Fla. 3d DCA 1993) (holding that parol evidence can be presented when the terms of an agreement are ambiguous); Gulf Cities Gas

Corp. v. Tangelo Park Serv. Co., 253 So. 2d 744, 748 (Fla. 4th DCA 1971) ("to ascertain the intent of the parties, courts may receive evidence extrinsic to the contract for the purpose of determining the intent of the parties at the time of the contract").

But admission of *some* extrinsic evidence does not open the floodgates to the admission of *all*. In particular, evidence that reflects one party's *unilateral* understanding will be inadmissible because it cannot aid the court in determining the parties' *mutual* intent. See, e.g., Gendzier v. Bielecki, 97 So. 2d 604, 609 (Fla. 1957) ("[T]he unilateral secret intent of a party to a written instrument is in and of itself immaterial to the actual creation of a contract."); accord Camden Fire Ins. Ass'n v. Daylight Grocery Co., 12 So. 2d 768, 770-71 (Fla. 1943) ("Whatever the undisclosed object or purpose of the parties may have been, we do not see how we can read into them any coverage [for the loss at issue]."). Similarly, consistent with the parol evidence rule, courts cannot admit extrinsic evidence to contradict, vary, or alter the meaning of a contract's terms. Friedman v. Virginia Metal Prods. Corp., 56 So. 2d 515, 517 (Fla. 1952) ("[P]arol testimony may be received, not to vary or change the terms of the contract, but to explain, clarify or elucidate the [ambiguous word] with reference to the subject matter of the contract, the relation of the parties, and the circumstances surrounding them, when they entered into the contract and for the purpose of properly interpreting, or construing, the contract.");

see also Lab. Corp. of Am. v. McKown, 829 So. 2d 311, 313 (Fla. 5th DCA 2002) ("When the terms of a written agreement are ambiguous, parol evidence is admissible to explain or clarify the ambiguous terms."). And of course, extrinsic evidence is excluded altogether if the term the evidence seeks to "clarify" is unambiguous on its face. See Dimmitt, 636 So. 2d at 705 ("Because we conclude that the policy language is unambiguous, we find it inappropriate and unnecessary to consider the arguments pertaining to the drafting history of the pollution exclusion clause.").

The general contract law rules calling for the limited use of extrinsic evidence to resolve an ambiguity are not abandoned simply because a contract happens to be an insurance policy. Rather, as it does in an ordinary contract dispute, the court examines extrinsic evidence to ascertain the parties' intent if it concludes that the policy language is ambiguous. See 2 Eric Mills Holmes, APPLEMAN ON INSURANCE § 5.5 (2d 1996) ("In interpreting the policy and language and assigning the appropriate construction, the court may resort to extrinsic evidence where the terms are not clear and unambiguous."); 1 Barry R. Ostrager & Thomas R. Newman, INSURANCE COVERAGE DISPUTES § 1.01[b] (15 ed. 2010) ("[I]f a court concludes that the policy language is ambiguous, it must look beyond the language of the policy to discern the intent of the parties at the time the contract was made."). Evaluating extrinsic evidence helps ensure that the

court does not "reach results contrary to the intentions of the parties." See Excelsior Ins. Co., 369 So. 2d at 942.

D. *Contra Proferentem* is a Rule of Last Resort.

Contra proferentem is of no probative value in ascertaining the parties' intent. Thus, it is properly relegated to a rule of last resort. See Richard A. Lord, WILLISTON ON CONTRACTS § 32.12 (4th ed. 1999) ("The rule of *contra proferentem* is generally said to be a rule of last resort and is applied only where other secondary rules of interpretation have failed to elucidate the contract's meaning.").

It is only proper to invoke *contra proferentem* "when consistent with the general rules of contract interpretation." Id. The general rules of contract interpretation call for ascertaining the parties' intent. Cf. Excelsior Ins. Co., 369 So. 2d at 942 (noting that the court "give[s] true effect to the intentions of the parties, which is the central concern of the law of contracts" and that *contra proferentem* cannot be invoked to "reach results contrary to the intentions of the parties"). The parties' intent is to be determined from the face of the contract. See Swindal, 622 So. 2d at 472 ("[c]ourts are to give effect to the intent of the parties as expressed in the policy language"). Only if the written terms are unclear on their face does a court resort to extrinsic evidence. See Dimmitt, 636 So. 2d at 705. And *contra proferentem* applies only if the extrinsic evidence is incapable of resolving any underlying ambiguity. See, e.g., Excelsior Ins. Co., 369 So. 2d at 942 (noting

that *contra proferentem* applies only "after resort to the ordinary rules of construction"); Stuyvesant Ins. Co., 314 So. 2d at 570 (applying *contra proferentem* against the insurer, which drafted the policy, only after analyzing extrinsic evidence).

The subjugated status of *contra proferentem* to other rules of contract construction is recognized in Florida, as elsewhere. "The construction against the drafter principle is a rule of last resort and is inapplicable when there is evidence of the parties' intent at the time they entered into the contract." DSL Internet Corp. v. Tigerdirect, Inc., 907 So. 2d 1203, 1205 (Fla. 3d DCA 2005); see also Hurt v. Leatherby Ins. Co., 380 So. 2d 432, 434 (Fla. 1980) (holding that, when faced with an ambiguity, "extrinsic evidence of the parties' intent" should be consulted before resorting to *contra proferentem*); Excelsior Ins. Co., 369 So. 2d at 942 (noting that *contra proferentem* only applies when genuine "ambiguity in meaning remains after resort to the ordinary rules of construction" and that it does not allow courts to "reach results contrary to the intentions of the parties"); Sch. Bd. of Broward Cty., Fla. v. Great Am. Ins. Co., 807 So. 2d 750, 752 (Fla. 4th DCA 2002) (describing *contra proferentem* as a "secondary rule of interpretation" and a "last resort" to be invoked after "all of the ordinary interpretative guides have been exhausted and there remain two or more reasonable interpretations of the language in question").

II. AUTOMATIC APPLICATION OF *CONTRA PROFERENTEM* IS CONTRARY TO FLORIDA LAW AND THE MAJORITY RULE

These basic rules of contract construction are neither controversial nor novel. Rather, they are the rules that have long been applied in courts throughout Florida and the rest of the country.

A. Florida Law Follows the Traditional Rules of Contract Construction.

Florida courts consistently have enforced the straight-forward terms of insurance contracts. See, e.g., Deni, 711 So. 2d at 1139; Dimmitt, 636 So. 2d at 705. Extrinsic evidence is considered only to ascertain the parties' intent when a court is faced with an ambiguous insurance policy. See, e.g., Williams v. Essex Ins. Co., 712 So. 2d 1232, 1232 (Fla. 1st DCA 1998) (noting that when an insurance policy is ambiguous, the court must determine the parties' contracting intent) (citations and quotations omitted). And an ambiguity is not automatically construed against the insurer.[3] See, e.g., Kiln PLC v. Advantage Gen. Ins. Co., Ltd., 80 So. 3d 429, (Fla. 4th DCA 2012) (holding that the trial court erred by

[3] As in Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000), this Court has stated that "[a]mbiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy." Although this statement may appear to suggest a pro-policyholder rule of construction, it simply reflects an application of *contra proferentem* in context. In other words, where the insurer is the drafter who prepared the policy, an unresolved ambiguity will be resolved against it. However, Florida law is not bound to the context and equity of a dispute. There is no basis to construe a policy against the insurer if an ambiguity is found where a large commercial policyholder negotiated and proffered a manuscripted insurance contract.

construing an ambiguity against the insurer and in favor of coverage instead of admitting extrinsic evidence to attempt to resolve the ambiguity).

In Deni, this Court acknowledged that extrinsic evidence of the parties' intent should be considered in the event—and only in the event—an insurance contract is ambiguous. Deni, 711 So. 2d at 1139 ("unless we conclude that the policy language is ambiguous, it would be inappropriate for us to consider the arguments pertaining to the drafting history"). Deni is consistent with traditional rules of contract construction and a long line of Florida Supreme Court cases applying those rules. See Dimmitt, 636 So. 2d at 705 ("Because we conclude that the policy language is unambiguous, we find it inappropriate and unnecessary to consider the arguments pertaining to the drafting history of the pollution exclusion clause."); Excelsior Ins. Co., 369 So. 2d 942 (noting that *contra proferentem* applies to an insurance policy only "after resort to the ordinary rules of construction").

The notion that there exists a pro-policyholder *contra proferentem* super-rule is not consistent with Florida law. Florida courts consistently hold that, in the event the language of a policy is unclear on its face, they do not automatically rule for the insured. Instead, they look to evidence of the contracting parties' intent to resolve any ambiguity. See, e.g., Friedman, 56 So. 2d at 517 ("Where either general language or particular words or phrases used in insurance contracts are

'ambiguous', that is, doubtful as to meaning, or, in the light of other facts, reasonably capable of having more than one meaning so that the one applicable to the contract in question cannot be ascertained without outside aid, extrinsic evidence may be introduced to explain the ambiguity."); Kiln PLC, 80 So. 3d 429, (holding that the trial court erred by construing an ambiguity against the insurer and in favor of coverage instead of admitting extrinsic evidence to attempt to resolve the ambiguity); Castillo v. State Farm Fla. Ins. Co., 971 So. 2d 820, 823 (Fla. 3d DCA 2007) ("[W]hen the terms of the contract are ambiguous [and] susceptible to different interpretations, parol evidence is admissible to explain, clarify or elucidate the ambiguous term.") (quotations omitted); Williams, 712 So. 2d 1232 ("[T]he parties are entitled to offer extrinsic evidence as to the intent of the insurer and the insured at the time the policy was purchased"); Mutual Fire, Marine & Inland Ins. Co. v. Fla. Testing & Eng'g Co., 511 So. 2d 360, 361-62 (Fla. 5th DCA 1987) ("if a written contract is ambiguous so that the intent of the parties cannot be understood from an inspection of the instrument, extrinsic or parol evidence . . . may be received in order to properly interpret the instrument.") (citations and quotations omitted); Reinman, Inc. v. Preferred Mut. Ins. Co., 513 So. 2d 788 (Fla. 3d DCA 1987) ("Where particular words or phrases used in insurance contracts are 'ambiguous,' that is, doubtful as to meaning or capable of having more than one meaning, extrinsic evidence may be introduced to explain

the ambiguity."). Plainly stated, the contra-insurer super-rule is unprecedented under existing Florida law.

B. A Majority of Courts Apply *Contra Proferentem* Only as a Last Resort.

When faced with an ambiguous insurance policy, courts across the country look to extrinsic evidence of the parties' intent before resorting to the doctrine of *contra proferentem*. See, e.g., Alexander Mfg., Inc. v. Ill. Union Ins. Co., 560 F.3d 984, 987 (9th Cir. 2009) (noting that *contra proferentem* applies only after "full contextual examination" fails to eliminate any ambiguity); In re Katrina Canal Breaches Litig., 495 F.3d 191, 207 (5th Cir. 2007) (noting that *contra proferentem* applies only after all other rules of contract interpretation have been applied); U. S. Fire Ins. Co. v. Gen. Reinsurance Corp., 949 F.2d 569, 573 (2d Cir. 1991) (noting that *contra proferentem* "is used only as a matter of last resort after all aids to construction have been employed but have failed to resolve the ambiguities") (citations omitted); State Auto Prop. & Cas. Ins. Co. v. Ark. Dep't of Envtl. Quality, 258 S.W. 3d 736 (Ark. 2007) (reversing a trial court's grant of summary judgment against an insurer based on *contra proferentem* and remanding for the court to consider extrinsic evidence to construe the ambiguity); Clendenin Bros., Inc. v. U.S. Fire. Ins. Co., 889 A.2d 387 (Md. 2006) (noting that the court examines extrinsic evidence to construe an ambiguity in an insurance policy before resorting to *contra proferentem*); South Ins. Co. v. Williams, 561 S.E.2d 730 (Va.

2002) (reversing trial court's grant of a declaratory judgment in favor of coverage to a policyholder after considering parol evidence); Travelers Ins. Co. v. Eljer Mfg., Inc., 757 N.E.2d 481, 496 (Ill. 2001) ("[b]ecause the words of the policy are unambiguous, it is unnecessary for this court to consider extrinsic evidence on the policy's purported meaning"); Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., 626 N.E.2d 878, 881 (Mass. 1994) ("Although there is a rule of construction that certain writings are to be construed against the author of the doubtful language, that rule must give way to the primary objective that a contract is to be construed to reflect the intention of the parties.") (citations omitted).

As these cases illustrate, *contra proferentem* may be applied only after examination of extrinsic evidence fails to resolve any underlying ambiguity. And extrinsic evidence is admissible only if the insurance policy cannot be interpreted by reference to the plain language of the contract.

C. Public Policy Favors Enforcing the Parties' Intent.

Insurers are not simply "deep pocket" guarantors against the consequences of all unfortunate events. Rather, insurance is a carefully defined risk-for-premium exchange, calculated by an exacting actuarial science that is essential to the integrity of the underwriting process.

Giving effect to the plain meaning of the policy language allows parties to rely on a court to implement their intentions as memorialized in the written

contract. This enhances predictability. Judicial application of a super *contra-proferentem* rule under which the insurer loses whenever ambiguity is found in insurance policy terms, instead of giving effect to the parties' intent, would ultimately result in excessive uncertainty over risk assessment.

The consequences of failing to give effect to the language of the contract are potentially far-reaching. Over time, imposing liability on insurers despite the actual contracting intent would invade and deplete insurer surplus, thereby resulting in a significant distortion of the entire insurance process. In the long run, the cost of these unforeseen liabilities would be shifted to all consumers of insurance—businesses and individuals alike. As the California Supreme Court has observed, judicially created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 711 (Cal. 1989).

In sum, fundamental policy considerations reinforce what Florida law already requires: that the terms of an insurance policy, like those of any other contract, be enforced according to the language contained in the policy. To preserve the settled expectations of insurers, policyholders and all persons doing business within this State, this Court should affirm the longstanding contract interpretation rules.

III. *CONTRA PROFERENTEM* MUST BE A DOCTRINE OF LAST RESORT

A. *Contra Proferentem* Means "Against the Drafter".

Many large and sophisticated organizations are major players in the insurance market, spending millions of dollars per year in insurance premiums. These entities, as well as sophisticated individuals, often employ risk management professionals, insurance brokers, and counsel to advise them. Sophisticated insureds often negotiate with insurers regarding policy terms, and they can and do draft policies or select the exact coverage options that best suit their needs.

Particularly in insurance disputes involving large commercial entities, or sophisticated individuals, there often will be evidence from parties' negotiations that is relevant to show the parties' intent. If such evidence exists—for example, showing that an insured and its insurer attached the same meaning to a particular provision later found by a court to be ambiguous—there would be no justification for excluding that evidence. See Excelsior Ins. Co., 369 So. 2d at 942 (*contra proferentem* only applies when genuine "ambiguity in meaning remains after resort to the ordinary rules of construction" and does not allow courts to "reach results contrary to the intentions of the parties"). While extrinsic evidence of the parties' intent in negotiating coverage terms may not exist in cases involving certain individual consumers and established policy forms, this is untrue with respect to large sophisticated commercial entities. Contract interpretation principles account

for these differences by applying neutral rules whose outcome is determined by the facts—not assumptions that prejudge the facts and may not be applicable in all settings. See, e.g., Kiln PLC, 80 So. 3d 429 (noting the existence of a factual dispute as to which party drafted the language of the policy and holding that the court erred by not admitting extrinsic evidence to try to resolve the ambiguity).

Cessante ratione legis, cessat et ipsa lex—"where the reason stops, there stops the rule." If the parties bargain for a particular contract provision, and they attach the same meaning to that bargained-for policy language, thereby rendering that provision unambiguous, the court should not disregard that mutual intent. By following the ordinary rules of contract construction—looking first at the language, and then to extrinsic evidence if necessary, and finally to *contra proferentem* only as a last resort—courts are most likely to effectuate the parties' contracting intent.

B. *Contra Proferentem* Should Be Applied Only in a Neutral Fashion and Only as a Last Resort.

Contra proferentem is a neutral principle. It does not play favorites. It applies "against the *drafter*," which is not always the same as "against the *insurer*." Thus, before applying *contra proferentem*, a court must necessarily look to the facts of the underlying case and determine which party in fact drafted the particular policy language at issue. See, e.g., Kiln PLC, 80 So. 3d 429, (holding that the trial court erred by construing an ambiguity against the insurer and in favor of coverage instead of admitting extrinsic evidence to attempt to resolve the ambiguity).

It would defy both law and logic for a court to construe language "against the drafter" before determining which party was, in fact, the drafter. And in the context of policyholder-drafted language, applying *contra proferentem* (in name) as a rule of contra-insurer (in effect) would actually be construing the ambiguous language *in favor of* the drafter. This indeed would be a notable departure from well understood contract principles.

This Court should apply the well-settled rules of ordinary contract construction. Those rules require courts to first look to the language of the policy to ascertain its meaning. Only if that policy is ambiguous will the court then examine extrinsic evidence to determine if the ambiguity can be resolved. If extrinsic evidence does not resolve the ambiguity, then the court will determine who drafted the language at issue and, as a tie-breaker, construe that language against the drafting party.

CONCLUSION

For the reasons set forth herein, *amicus curiae* Complex Insurance Litigation Claims Association respectfully urges this Court to make clear that only if ambiguity is found may a court admit extrinsic evidence to ascertain the contracting parties' intent and only if the ambiguity remains unresolved may a court resort to an even-handed *contra proferentem* rule.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Brief of *Amicus Curiae* Complex Insurance Claims Litigation Association complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
William D. Horgan

CERTIFICATE OF SERVICE

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