On Reconsideration

ILLEGITIMATE RULES OF CONSTRUCTION

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Why do courts interpret 21st-century contracts using 19th- and early 20th-century maxims, based on obsolete assumptions about how people use language? Of course, not all the old maxims are bad. It's certainly hard to quarrel with "Contracts should be construed according to the parties' intent" or "Contracts should not be interpreted to produce an absurd result."

But some maxims were never legitimate and should be retired. Some rest on faulty logic. Some mistakenly assume that everyone who speaks the same language always uses it in the same way. Others, if once valid, have outlived their usefulness because we don't speak and write as our forebears did.

Consider the maxim that a word used in one part of a contract should be given the same meaning throughout. That might be true for defined terms—words to which the drafter assigns specific meanings. Not only a convenience for the drafter, defined terms also help the reader. No one need quarrel about what was meant, no matter how often and where the defined term appears.

But what about undefined words and phrases, which are most of what's in a contract? Can we safely assume that the parties intended those words to have the same meaning everywhere they appear, as the maxim assumes? No, not safely. Just as drafters may use synonyms interchangeably, they may also use the same word to mean different things at different places in the same document.

Most words have more than one meaning and different shades of meaning. Consider the word "year." Sometimes, it refers to the 12-month period beginning January 1 and ending December 31. But it could also mean any 12-month period, or a fiscal year, or an academic year, which may not be 12 months but only 9. If a contract uses the word "year" to describe when an option expires and later uses it to say when an accounting is due, does it necessarily mean the same thing in both places?

If, at the time of the contract, the parties intended the word to refer to different 12-month periods, but one party later claims, disingenuously, that the word was meant to refer to the same 12-month period, why would it be fair to use the maxim at all? How would that rule help determine the parties' mutual intent? It wouldn't. In this example, it would do the opposite.

Those who favor the maxim might argue that it's not really an aid in contract interpretation. Rather, it's a default rule, a device to help courts resolve disputes when other rules are inconclusive, or a rule of last resort when the pertinent evidence is conflicting and equally balanced, or a rule of efficiency that sends a message to contract drafters about how to draft more precisely.

Even so, the maxim is not realistic. It assumes that contract drafters always use the same word in the same way. That's not how most people write. They typically don't scroll through their drafts, looking for all the spots where the same word is used so that they can change it when it's

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supposed to mean something different.

The maxim is also not fair. When parties mutually intend the word to carry different meanings in different places, the rule will always produce the wrong outcome. Sure, there's no guarantee that if the rule were abandoned, most of the time a judge or jury would get it right. But, without the maxim, the party with the stronger evidence and arguments on the point would likely prevail.

The Maxim on Contractual Ambiguities

How about the three-part rule, used in most states, that (1) contractual ambiguities are resolved by the trier of fact; (2) absent ambiguity, the interpretation of a contract is a question of law for the court; and (3) a provision is not ambiguous simply because the parties offer conflicting interpretations? What a monster of a paradox. An ambiguity, by definition, is two meanings occupying the same words. If the parties offer conflicting interpretations, do we have an ambiguity or don't we? And who should pick the right interpretation—a jury or the judge?

Courts seem to have fashioned an answer: If each interpretation is reasonable, the contract is ambiguous. But if a reasonable person reading the document as a whole and in realistic context would readily determine a single meaning, it is unambiguous. While easy to state, it's not so easy to apply.

We know this from cases in which appellate courts agreed with the trial judge that a contract was unambiguous but held that the judge's interpretation was wrong. And from cases in which appellate courts held that the judge erroneously found a contract ambiguous or, the opposite, that the judge erroneously found a contract unambiguous. Apparently, whether an interpretation is right—or even reasonable—is not so easy to say, leading judges to interpret contracts that should have been interpreted by juries, or vice versa.

Could it be that a trial judge's or appellate panel's view on ambiguity is colored by how each is attracted to a particular interpretation? Perhaps the more they like an interpretation, the likelier they are to find no ambiguity and reject any interpretation different from the one they favor, even when other judges might see the contract differently. If this bias—a fondness for one interpretation over another—is indeed at work, it would lead to more judges keeping the interpretation role to themselves when they should be ceding it to juries.

At times, appellate courts agree with a judge that a contract is unambiguous and also agree with the judge's interpretation, but that can still raise the question of why neither saw any merit in the rejected interpretation. In one such case, a hotel contracted to make a block of rooms available to an institutional customer and agreed that additional rooms "may be blocked at the group rate subject to availability." When the institutional customer tried to block, at the group rate, additional rooms that had not yet been reserved by other customers, the hotel refused, asserting that the clause entitled the customer to block additional rooms at the group rate only in the discretion of the hotel's management.

The judge held that this clause unambiguously meant what the hotel said it meant and that "subject to availability" did not mean, as the customer contended, that additional rooms could be blocked if they were not yet reserved by others. The appellate court agreed with the judge, even while acknowledging that, from the bare language, "it might well be difficult to know which of the two proffered readings to adopt" and that other parts of the agreement were "abstractly helpful" to the customer.

Neither court was compelled to rule that way. Each easily could have found the language unambiguous in the customer's favor. Or if reluctant to do that, they might have found it ambiguous and let the jury decide the question.

Update the Rules

Here is a simple solution: Replace the three-part rule on resolving contractual ambiguities with an updated, more honest rule about who decides what a contract means: The meaning of a contract is a question of law for the court, even if it depends on some judicial fact-finding.

That's the rule, for example, for interpreting patents when claim construction is at issue. If contract interpretation has also become so complex that many judges, in practice, won't let juries handle that, then doesn't it make sense to revise the rule to conform to the practice and make the practice universal?

Of course, that won't guarantee that a trial or appellate judge will get it right. The hotel case seems at least questionable. But juries, too, can get it wrong. And because there's no way to squeeze interpretive error out of the system completely, assigning contract interpretation to judges as questions of law would at least make the process more efficient.

Consider yet another rule to throw on the chopping block: A contract should not be interpreted to render any part superfluous. That rule bears no resemblance to how contracts are drafted. By and large, lawyers like to leave nothing to chance. So, for good or ill, they overdraft their contracts, larding them up with all manner of redundancies, expressing the same point in different parts but not always using the same words.

A ready example is the most common contract that litigators draft—the general release. Usually, it has the magic words "remise, release, and discharge," three synonyms, when just the word "release" would do. Then follows a laundry list of what's released, not necessarily in this order: "debts, demands, covenants, contracts, agreements, promises, obligations, rights, claims, suits, actions, causes of action, liabilities, . . ."—and the list goes on.

Could that laundry list be shortened to just two words—agreements and

claims—without sacrificing anything? Almost certainly. And if they appeared in a document titled "General Release," would any court hold that those words didn't release a "contract" or a "cause of action"? Almost certainly not.

Still, lawyers and laypeople are plagued with insecurity in drafting, using many words, phrases, clauses, sentences, and passages (just as in this sentence) to refer to the same thing. Courts should recognize this. Rather than try to find a separate meaning in every word, and rather than assume that the drafter would express a particular point only once, courts should not read unintended meanings into contracts simply to give every word separate significance. Courts should see drafters for what they are—humans who mistakenly express the same thing in different ways in the same document to leave nothing to chance.

Trying to Cover Everything Can Backfire

Unfortunately, when drafters write with belts and suspenders, they never can be sure whether a court will give the belt a separate meaning from the suspender, give them the same meaning, or do its own creative surgery on the document. In one case, a federal circuit court had to interpret a clause in which one party promised to indemnify the other

> from and against all costs, demands, expenses and other liabilities of any kind or nature whatsoever in connection with, in whole or in part, directly or indirectly, the presence, suspected presence, release, suspected release, or threat of release of any Hazardous Material on or around the Property, including the cost required to take necessary precautions to protect against the release of any Hazardous Materials in, on, or under the Property, the air, any ground water, waterway or body of water, any public domain or any surrounding areas to the Property.

At issue was whether the indemnitee had the right to recover the cost of certain environmental testing to determine the extent of a known contaminant at the property. Although the clause's broad language up to the word "including" should have resolved the question in the affirmative, the court construed the part of the clause beginning with "including" as words of limitation that narrowed the indemnity obligation. Why? Two reasons.

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First, the court cited wooden canons of construction—that "a subsequent specification impliedly limits the meaning of a preceding generalization" and that specific terms are given greater weight than general ones. Maybe those rules fit when the specification begins with "such as," but they hardly fit when the specification begins with "including."

Second—and this is the real eyebrow-raising part—the court, apparently following the maxim that words are interpreted in light of industry custom and practice, gave weight to the absence of "language parties often use to introduce a list of nonexclusive examples," such as "including without limitation." That construction runs against what some writing experts teach: "without limitation" is redundant, subsumed in the word "including," and to be avoided in good legal writing.

The court thus narrowed the broad indemnity language to cover only what was in the "including" clause, while ignoring that the word "including" is meant to sweep the words that follow it into the broader parent clause. That construction led the court to rule that the expense wasn't indemnifiable because the testing merely confirmed the presence of contaminants but not at a hazardous level. The testing thus turned out not to be a necessary precaution and, for that reason, fell outside the "including" clause and was therefore not indemnifiable.

Decisions like those are what happens when courts resort to outmoded canons of construction. In the indemnity case, the clause's author intended the indemnity obligation to attach to all costs of any kind, directly or indirectly incurred in connection with the suspected presence of contaminants. That's what the words say. The author also intended the "including" clause as adding to the indemnity obligation, not restricting it. That's what the term "including" means.

Had the indemnitor not wanted to assume such a broad obligation, it could have negotiated for a narrower one. But by ignoring the obvious meaning of the words and following inappropriate interpretive canons, the court gave the indemnitor something the indemnitor failed to achieve during contract negotiations—a get-out-of-indemnity-free card.

And that is the problem with rules of construction that have no legitimate connection to how people write their contracts or what they must have intended. We're conditioned to give those rules far more importance than they merit. When that happens, we lose sight of which rules promote a true understanding of intent and which ones mislead us. If courts would take an inventory of the deadwood, perhaps they would throw out the rules that can no longer be considered legitimate and leave us with the ones that produce better outcomes. ■