IRG INSURANCE RESEARCH GROUP
John K. DiMugno, Attorney-at-Law

**Insurance Research Group/John K. DiMugno, Attorney-at-Law**

3450 Palmer Dr., Suite 4-285
Cameron Park, CA 95682

**Phone:** 530-344-0239
**Fax:** 530-344-0189
**Email:** jd@dimugnolaw.com

# The Restatement, Law of Liability Insurance and the Elusiveness of Insurance Policy "Plain Meaning"

By John K. DiMugno

February 8, 2016

Outside the world of insurance policy interpretation, a court's consideration of extrinsic evidence to alter what appears to be the plain meaning of policy language would not create controversy. Contextual meaning is axiomatic in linguistics and ignoring the context in which words are used can lead to absurd results. Recall the Lite beer television commercials in which a customer walks up to a bar and asks for a Lite beer. In the context of a bar, the viewer assumes that everyone knows what the customer expects, but the patron is treated to virtually everything but a low calorie beer: flashlights, floodlights, dogs jumping through flaming hoops. The premise of the commercial is that an easily understood word shorn of its context can lead to confusion and misunderstanding. Context is critical because, as Oliver Wendell Holmes once said, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[1]

In the insurance world, however, courts have been sharply divided over the admissibility of evidence to displace the literal, plain meaning of a word. The admissibility of such evidence has been a major point of controversy in environmental coverage disputes between policyholders attempting to limit the pollution exclusion and insurers attempting to enforce its literal meaning. Policyholders have attempted to introduce evidence of various pollution exclusions' drafting and regulatory history to prove that the word "sudden" in the "sudden and accidental" exception to the limited pollution actually means accidental[2] or that the "absolute" or "total" pollution applies

---

1 *Towne v. Eisner*, 245 U.S. 418, 425, 38 S.Ct. 158, 159 (1918).

2 *Compare Heyman Assoc. No. 1 v. The Ins. Co. of the State of Pa.*, 653 A.2d 122 (Conn. 1995), and *National Union Fire Inurance Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (rejecting argument that so-called drafting history of the absolute pollution exclusion demonstrates a latent ambiguity where words of exclusion are plain on their face); *with Hoaglund v. State Farm Mut. Auto Insurance Co.*, 592 N.E.2d 1031 (Ill. Ct. App. 1992) (even clear policy language may potentially contain a latent ambiguity if it conflicts with the policyholder's reasonable

only to pollution claims arising out of industrial waste disposal or widespread environmental pollution.[3] Insurers have resisted such efforts, arguing that discovery and admissibility of broad "contextual" evidence adds to the cost and complexity of resolving insurance disputes.

**A *Rebuttable* Presumption in Favor of Plain Meaning**

The proposed Restatement, Law of Liability Insurance takes the policyholder side in the ongoing debate over the admissability of extrinsic evidence to prove the existence of ambiguity. Although § 3(1) adopts a presumption in favor of the enforceability of the "plain meaning" of insurance policy language, § 3(2) treats the presumption as rebuttable. Recognizing that insurance policy language which on its face appears to have a single plain meaning may contain a "latent" ambiguity, § 3(2) authorizes the use of extrinsic evidence to show the existence of such ambiguity. In effect, § 3(2) expands the "context" in which a policy's plain meaning is determined from the four corners of the insurance policy to the larger world in which the parties live.

**Relevant Extrinsic Evidence**

Comment (a) to § 3, however, limits the consequences of this broader contextual approach. Specifically, Comments (a) and (d) explain that the purpose of the extrinsic evidence is to prove the existence of an alternative, more reasonable plain meaning, not to establish the existence of an ambiguity which is then automatically construed against the drafter. The party seeking to displace the policy's facial plain meaning must persuade the court that a reasonable *person in the policyholder's position* would *clearly* give the term a different meaning in light of extrinsic evidence, and the language term is reasonably susceptible to this other meaning under the circumstances. Trade usage, the course of performance under the policy at issue, the course of dealing between the parties with regard to the policies, drafting history of the insurance policies, including documents filed with administrative agencies regarding the insurance policy or term in question, other versions of the relevant term on the market, other forms of insurance available on the market, expert testimony regarding the history, purpose, and function of policy terms in question, and sophistication and experience of the policyholder—but not the policyholder's subjective understanding—are relevant to the determination.

**Legal, Not Factual, Burden**

Comment (c) characterizes the rule as a "rebuttable presumption" in favor of facial plain meaning. But overcoming the presumption is not a factual burden because effect of extrinsic

---

expectations of coverage). *See also, Maryland Casualty Co. v. Reeder*, 221 Cal.App.3d 961, 270 Cal.Rptr. 719 (4th Dist.1990) (insurance industry is party to every insurance contract, making any extrinsic evidence from "the insurance industry" relevant to interpreting any particular policy).

[3] *E.g., Doerr v. Mobil Oil Corp.*, 774 So.2d 119 (La. 2000), *on reh'g,* 782 So. 2d 573 (La. 2001); *Am. States Insurance Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997); *Am. States Insurance Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Belt Painting Co. v. TIG Insurance Co.,* 763 N.Y.S.2d 790 (N.Y. Ct. App. 2003). *See also Richardson v. Nationwide Insurance Co.*, 826 A.2d 310, *vacated, reh'g en banc granted,* 832 A.2d 752 (D.C. 2003), *vacated on settlement,* 844 A.2d 344 (D.C. 2004).

evidence on plain meaning is question of law. Rather, the presumption describes the deference courts should give to facial plain meaning—a deference which yields only if the facial plain meaning is less reasonable than the alternative plain meaning established by "highly persuasive" extrinsic evidence.