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All Mixed Up About Contract: When Is Contract Interpretation A Legal Question And When Is It A Fact Question?

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ABSTRACT

Is contract interpretation a question of law or a question of fact? As basic as that question is to such routine matters as settling jury instructions or determining the standard of review, the answer is not clear. Sometimes courts treat contract interpretation as a fact issue about what parties intended their words to mean. Sometimes they treat it as a technical, legal task requiring a judge's expertise, much as a radiologist is needed to interpret an MRI. Often they follow one approach or the other while purporting to use "principles of contract interpretation" applicable to all contracts. And they do so without articulating why some contract interpretation issues are treated one way and others differently.

This Article argues that whether contract interpretation is a legal question or a fact question depends on the kind of contract or contract provision at issue. Interpretation of ordinary, negotiated contracts is a fact question about intent. Interpretation of adhesive contracts like insurance policies is a legal issue that, like statutory interpretation, is guided by canons of construction and case law. Interpretation of certain complex, recurring provisions (like indemnity clauses or rights of first refusal) may also be a legal issue, even when they are negotiated, when courts of a particular jurisdiction deem legal treatment justified by the need to uniformly interpret certain language. Not all contracts are or should be treated the same way.

The Article therefore attempts to fill a gap in contract interpretation doctrine. Courts have long treated different kinds of contracts differently, and there are good reasons for that. But the reasons should be explicit. The Article endeavors to distill and articulate the bases for treating some contract interpretation issues as legal and others as questions of fact.

INTRODUCTION

CONTRACT is a big genus with many species of promise-exchanges. It includes everything from "sure, I'll babysit the kids," to a handwritten buy-sell agreement, to an LLC operating agreement, to an insurance policy, to an invoice with boilerplate terms on the back, to a several-hundred page merger agreement. The law calls all these things "contract" despite their differences, and with that label comes a whole set of rules that govern how to interpret a contract when the parties disagree about its meaning.

As important as how to interpret contracts, however, is the question of who does the interpreting. To lawyers drafting contracts or litigating disputes, judges deciding what to submit to the jury, and appellate courts on

review, knowing whether the question is one of law or fact can be critical. Yet the answer is often unclear, largely because two conflicting traditions have evolved.

One tradition views contract interpretation as the process of determining what the contracting parties intended their words to mean. Because intent generally is a question of fact (think *mens rea* in criminal cases), it is the fact-finder's job to determine what the parties intended, frequently by looking to evidence other than the words themselves. Courts tend to follow this tradition and treat contract interpretation as a fact question when the issue involves an ordinary, negotiated contract specific to the parties.

The other tradition views contract interpretation as the specialized task of construing language, often by examining case law interpreting similar language. Thus, like the analogous task of statutory interpretation, it is a legal question for judges. Courts tend to follow this tradition when interpreting adhesive contracts like insurance policies, but also when interpreting certain technical, recurring provisions.

These traditions have an uneasy coexistence in the case law. Courts sometimes adhere to one, sometimes the other, and often cite to both. The most common way of reconciling them holds that interpretation of ambiguous contracts is a fact question while that of unambiguous contracts is a legal question, but that rule does not explain why some contracts are interpreted legally irrespective of ambiguity.

The thesis of this Article is that whether contract interpretation is a question of law or a question of fact depends on the nature of the contract or provision at issue. Interpretation of ordinary, negotiated contracts is a fact question concerning the parties' intent. Interpretation of insurance policies and other adhesive contracts is a legal question. Certain "law-guided" provisions (such as indemnity clauses) also are commonly interpreted legally in light of a body of case law.

This Article is both descriptive and prescriptive. It is descriptive because whether courts interpret a contract legally or factually does in fact depend on the kind of contract or provision at issue. It is prescriptive because it proposes a set of rules by which to make the differential treatment explicit. If courts are going to treat different kinds of contracts differently, there ought to be an articulated reason for doing so.

This Article is something of a sequel to my prior article, *All Mixed Up About Mixed Questions*.¹ That article addressed the law/fact distinction and the confounding category of “mixed questions” which includes questions that, like contract interpretation, do not neatly classify as law or fact. There, I raised the question of whether and when contract interpretation should be treated as a legal or a factual issue, but deferred the answer to another day.² This Article tries to answer the question.

I. DIFFERENT CONTRACTS, DIFFERENT RULES

A. Not All Contracts Are the Same

To prove the premise that some contracts are interpreted legally while others are interpreted by the finder of fact, this Section will first summarize the two contract interpretation traditions, and then discuss two hypothetical cases, one in which interpretation clearly falls within one tradition and a second in which it clearly falls within the other. I use hypotheticals here simply to illustrate why contract interpretation is sometimes legal and sometimes factual. Later in the Article, representative cases are used to show how courts in fact treat different kinds of contracts, and how they struggle to reconcile the two traditions.

B. Two Contract Interpretation Traditions

Under the “traditional” view of contract interpretation, “the interpretation of written instruments properly belongs to the Court, and not to the jury.”³ This quote comes from an 1840 Supreme Court opinion written by Justice Story, and other nineteenth-century opinions repeat the idea.⁴ As Farnsworth notes, the rule “may reflect a distrust of

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1. See Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101 (2005).
 2. *Id.* at 146–49.
 3. *Brown & Co. v. M'Gran*, 39 U.S. (14 Pet.) 479, 493 (1840).
 4. See, e.g., *Young v. Jeffreys*, 20 N.C. (3&4 Dev. & Bat.) 216, 220, 1839 WL 532, at *1 (N.C. 1839) (“Where a contract is wholly in writing and the intention of the framers is by law to be collected from the document itself . . . the ascertainment of the intention of the parties, as well as the effect of that intention, is a pure question of law . . .”); *Kean v. Davis*, 21 N.J.L. 683, 687–88, 1847 WL 100, at *4 (N.J. 1847) (“[T]he construction of a written contract is a question of law, to be settled by the court upon the terms of the instrument.”); *Collins v. Rush*, 7 Serg. & Rawle 147, 151, 1821 WL 1852, at *5 (Pa. 1821)

unsophisticated, undereducated, and at one time illiterate jurors,”⁵ and it is easy to see how such a rule developed during an era in which the literacy gap was wide between jurors and the businessmen who were writing contracts. Yet there was also a notion that deciphering language generally was a lawyerly function.⁶

The “modern” view holds that contract interpretation is a quest to determine what the parties intended, and that when there is a reasonable dispute about what was intended (i.e., the contract is ambiguous), extrinsic evidence may be needed to resolve the dispute. Under this view, contract interpretation is a jury question both because it involves discerning intent and because it involves weighing evidence. To again quote Farnsworth: “[S]ince interpretation turns on the meanings that the parties actually attached and reasonably ought to have attached to the language of their agreement, it is indisputably a matter of fact, not of law.”⁷

Despite their names, the modern view is not so modern and the traditional view is alive and well. There are cases from the nineteenth century holding that juries decide the meaning of a contract where it must be determined by looking at extrinsic evidence,⁸ and plenty of modern cases continue to rely on the traditional view. Today, the two approaches co-exist, courts sometimes relying on one and sometimes the other.

To illustrate, in a recent case involving a cattle-sharing agreement, the Minnesota Court of Appeals wrote: “When contract language is susceptible to more than one meaning, the interpretation of the contract becomes a

(“The construction of every written instrument is the exclusive province of the court . . .”).

5. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.14 at 338 (3d ed. 2004).
6. *See, e.g.*, *Dunnell v. Fiske*, 52 Mass. (11 Met.) 551, 553, 1846 WL 4058, at *3 (Mass. 1846) (stating, in a slander case, that “[t]he construction, meaning, force and effect of language, written or spoken, is matter of law.”).
7. FARNSWORTH, *supra* note 5, at 336–37. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (1981):
A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise [it] is to be determined as a question of law.
8. *See, e.g.*, *Jennings v. Sherwood*, 8 Conn. 122, 127, 1830 WL 23, at *1 (Conn. 1830) (“[W]here the meaning is to be judged of, by extrinsic circumstances, the construction is usually a question for the jury.”); *Halbert v. Halbert*, 21 Mo. 277, 284, 1855 WL 5306, at *4 (Mo. 1855) (“The interpretation of written contracts is for the court; but where the matter rests in words, and the intention of the parties is to be ascertained from what they have said and done, it is a question for a jury.”).

question of fact.”⁹ Just a few months later, in a case involving a management agreement, the Minnesota Supreme Court wrote: “Contract interpretation is a question of law which we review *de novo*.”¹⁰ Two cases from the same jurisdiction, in the same year, one quoting the traditional rule and the other quoting the modern rule. And Minnesota is hardly an outlier. Similar juxtapositions can be found in many jurisdictions.¹¹

The continued reliance on both rules is telling, for common law courts tend to abandon doctrine that is no longer viable or efficacious. The fact that courts continue to apply both doctrines suggests each rule is appropriate in some circumstances. Let’s now look at some of those circumstances.

C. The Modern Rule and Ordinary, Negotiated Contracts

The first hypothetical involves a business purchase contract whereby Jacob sells his catering business to Crystal for \$100,000. Not wanting to spend money on lawyers, they use a form purchase agreement they found on the Internet, which calls for an “Exhibit A” listing all property included in the sale. One of the items on Exhibit A is “a Ford Econoline catering van and all

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9. *Border State Bank of Greenbush v. Bagley Livestock Exch., Inc.*, 690 N.W.2d 326, 333 (Minn. App. Ct. 2004).
 10. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004).
 11. *See, e.g., Decoplage Condo. Ass’n, Inc. v. Deco Props. & Invs., Inc.*, 971 So. 2d 860, 862 (Fla. Dist. Ct. App. 2007) (holding that fact issue regarding the meaning of lease language precluded summary judgment); *Langford v. Paravant, Inc.*, 912 So. 2d 359, 360 (Fla. Dist. Ct. App. 2005) (“Contract interpretation is generally a question of law for the court, rather than a question of fact.”); *Myers v. Kayhoe*, 892 A.2d 520, 526 (Md. 2006) (“Under Maryland law, the interpretation of a contract, including the question of whether the language of a contract is ambiguous, is a question of law subject to *de novo* review.”); *Vest v. Kan. City Homes, L.L.C.*, 288 S.W.3d 304, 331 (Mo. Ct. App. 2009) (holding that question of fact as to the intent of the parties relating to the meaning of contract terms precluded summary judgment); *Spears v. Spears Fence, Inc.*, 875 N.Y.S.2d 166, 167 (N.Y. App. Div. 2009) (holding that fact issue regarding the intended meaning of contract provision precluded summary judgment); *Polner v. Monchik Realty Co.*, 803 N.Y.S.2d 370, 378 (N.Y. Sup. Ct. 2005) (stating that the interpretation of a contract is a question of law); *Burdette v. Estate of Burns*, 200 S.W.3d 358, 361 (Tex. App. Ct. 2006) (stating that the interpretation of a written contract is a question of law); *Dynamic Pub. & Distrib. L.L.C. v. Unitec Indus. Center Prop. Owners Ass’n, Inc.*, 167 S.W.3d 341, 345 (Tex. App. 2005) (stating that the interpretation of ambiguous contracts is a question of fact); *Nunez v. Am. Bldg. Maint. Co. West*, 190 P.3d 56, 58 (Wash. Ct. App. 2008) (“Interpretation of contract terms is a question of law.”); *Wm. Dickson Co. v. Pierce County*, 116 P.3d 409, 413 (Wash. Ct. App. 2005) (reversing summary judgment on contract issue because fact issue existed as to the meaning of disputed provision).

related equipment.” It’s not a great contract, but the annals of contract law are filled with not-great contracts.

On the day of closing, Jacob delivers the van to Crystal, fully loaded with catering equipment. “So where’s the trailer?” Crystal asks. Jacob responds that the trailer was not part of the deal, as he only agreed to include the van. Crystal points to Exhibit A, arguing that the trailer was part of “all related equipment” since Jacob usually loaded the trailer with catering supplies and towed it behind the van.

The ensuing lawsuit is a dispute about what “all related equipment” means. Each party’s interpretation is plausible, so the term is ambiguous and each can introduce extrinsic evidence to support his or her proffered meaning. Such evidence might include the parties’ testimony about their negotiations, witness testimony about the extent to which the trailer was used for the business, a balance sheet that listed the trailer as an asset of the business, the title of the trailer showing who owns it, or an Internet printout showing its value.

Because resolution of the dispute turns on what the parties intended “all related equipment” to mean, and requires weighing extrinsic evidence, this question of contract interpretation will be a fact issue in virtually every American court.

To further make the point, imagine the analysis if a court treated the issue as a legal question. By what legal standard could it decide what “all related equipment” means? Case law is unlikely to be helpful, because what someone else in some other circumstance intended “related equipment” to mean says nothing about what the term meant to Jacob and Crystal. Nor would looking up definitions of “related” or “equipment” in case law or dictionaries tell you what these parties understood the terms to mean. No method of legal analysis would be of much help in determining the meaning of this contract language, which only has meaning in the context of these parties’ specific agreement.

D. The Traditional Rule and Insurance Policies

The second hypothetical involves a run-of-the-mill insurance coverage dispute. Jennifer buys an automobile liability policy from Security Insurance that lists her as the named insured and her sedan as the insured vehicle. The policy also covers Jennifer when driving other automobiles. It states:

We will pay all sums an INSURED legally must pay as damages because of BODILY INJURY or PROPERTY

DAMAGE caused by an accident and resulting from the ownership, maintenance or use of an AUTO.

AUTO means any motor vehicle designed for travel on public roads.

Some years later, Jennifer buys a golf cart for tooling around the neighborhood. One day she crashes into a neighbor. The neighbor sues, and Jennifer seeks coverage from Security Insurance. Security Insurance denies coverage, claiming a golf cart is not an “auto” within the meaning of the policy.

Jennifer seeks a declaratory judgment that the policy covers the accident. She argues that the golf cart is “designed for travel on public roads,” noting that many people use such carts in neighborhoods. Security Insurance argues that golf carts are designed for golf courses, and the fact that Jennifer uses hers on neighborhood streets does not make it an “auto” as defined in the policy.

The dispute is similar to the one over Jacob’s trailer. Jennifer and Security Insurance disagree about what “auto” means. The term is ambiguous because each party’s interpretation is reasonable. Yet the litigation of that dispute will be much different from the one between Jacob and Crystal.

For one, there is unlikely to be extrinsic evidence about what the parties intended the term to mean. From Jennifer’s standpoint, she did not negotiate the terms of her policy, probably never read the policy, and might not have understood it had she read it. She bought insurance and later received a thick packet of legalese in the mail. Were it allowed, her testimony might go something like this:

Q. Jennifer, when you negotiated your insurance policy, what did you intend the term “auto” to mean?

A. What do you mean “negotiated”?

Q. Well, when you and the insurance company agreed upon the contract language. What did the language mean to you?

A. I didn’t agree on any language. I bought insurance.

Q. Did you engage in any negotiations with the company about the meaning of the term “auto”?

A. No. I bought the policy online. I just wanted to be fully covered.

Q. When you bought the policy, did you think the term “auto” included a golf cart?

A. I didn’t have a golf cart then.

Q. But did you read the provision we’re talking about today? What did you think it meant?

A. I’m not a lawyer and I don’t have time for all that mumbo-jumbo. Like I said, I just bought insurance so I would be fully covered.

Security Insurance’s evidence about the meaning of “auto” might be a little better, since it drafted the policy. An insurer can usually find someone to say what the company understands language to mean, but unless the witness was involved in the drafting process, he or she cannot say what the term was intended to mean at the time it was drafted. Moreover, if that understanding was not shared with Jennifer when she bought the policy, and no negotiations with her over contract language occurred, does it really matter what the company unilaterally thinks its policy language means?

To illustrate, imagine the testimony from a Security Insurance employee:

Q. You helped draft this policy language, right?

A. That’s right. The company has a specific process for approving policy language. Many people review the language, review case law, and provide input before final approval.

Q. And this particular policy language, which defined “auto,” what does that mean?

A. It means what it says: “any motor vehicle designed for travel on public roads.”

Q. Does that include golf carts that people drive around neighborhoods?

A. No, of course not. In fact, we talked about that when we were drafting the language. One of the reasons we wrote the policy the way we did was so that it wouldn't cover things like golf carts and ATV's.

Q. Was this ever discussed with Jennifer?

A. With who?

Q. Jennifer. The plaintiff.

A. Oh, that lady over there? No, I just met her. I believe she bought the policy online.

Q. If she says she understood the term "auto" to include golf carts, do you have any reason to dispute that?

A. She can think whatever she wants. We only cover what the policy says we cover.

Q. Well, what did she and Security Insurance negotiate when they entered into the insurance contract?

A. Negotiate? Counselor, we don't negotiate automobile policies. When people buy our policy, they buy the coverage that the policy provides.

This testimony suggests that the fact-based approach courts use for interpreting ordinary contracts is ill-suited for insurance policies. Because insurance policies are adhesive—offered to consumers on a “take-it-or-leave-it” basis without negotiation of terms¹²—any discussion of mutual intent is a non-sequitur.

12. See BLACK'S LAW DICTIONARY 366 (9th ed. 2009) (defining adhesion contract as “[a] standard-form contract prepared by one party, to be signed by another party in a weaker

More relevant will be case law interpreting similar policy language. There may be cases from this jurisdiction or others that have already decided what “auto” or “designed for travel on public roads” means and the company likely considered this case law when drafting the provision. Moreover, because insurance policies tend to be technical—not because insurers want them opaque, but because their business depends on the sticky task of defining the contours of risk—interpretation arguably should be done by law-trained judges.

Thus, the interpretation of insurance policies is almost always a legal issue even when the interpretation of ordinary contracts is a fact issue. And the difference in treatment is not based on ambiguity; Security Insurance’s policy is no less ambiguous than Jacob and Crystal’s contract. It is based on differences between those kinds of contracts.

E. The Difference Between Interpretation as a Legal Issue and Interpreting Unambiguous Language “As A Matter Of Law”

If the interpretation of insurance policies is a legal issue for the judge, is that any different from saying, as courts often do, that unambiguous contract language is interpreted “as a matter of law?”¹³ It is. To say that unambiguous contracts are interpreted as a matter of law is to say that contract interpretation is a fact issue that, like all fact issues, may be resolved by the court where the answer is so clear that reasonable minds could not differ. By contrast, courts treat the interpretation of insurance policies legally even when they are ambiguous.¹⁴

position, [usually] a consumer, who adheres to the contract with little choice about the terms.”).

13. *See, e.g.*, *All-Ways Logistics, Inc. v. USA Truck, Inc.*, 583 F.3d 511, 516 (8th Cir. 2009) (“It is a well-established tenet of Arkansas law that written contracts that are unambiguous are construed as a matter of law by the court.”); *Nault v. United States*, 517 F.3d 2, 4 (1st Cir. 2008) (“Interpretation of the terms of an unambiguous contract is a matter of law, subject to judicial resolution.”).

14. *See, e.g.*, *Powerine Oil Co. v. Superior Court*, 118 P.3d 589, 598 (Cal. 2005):
If an asserted ambiguity [in an insurance policy] is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured’s reasonable expectation of coverage.

Nunez v. Am. Bldg. Maint. Co. West, 190 P.3d 56, 58–59 (Wash. Ct. App. 2008) (“Interpretation of contract terms is a question of law Under the rules of contract construction, we resolve any ambiguity in the indemnity clause against the drafter.”).

In a fender-bender case, for example, the question of whether the defendant drove with reasonable care is a jury question. But if the defendant plowed into a parked plaintiff at 110 miles per hour, then the court may decide the issue as a matter of law on either a motion for summary judgment or for directed verdict.¹⁵ This is not because reasonable care is a legal issue. It is because reasonable care is a jury question that, in some cases, is so clear that it need not be submitted to the jury. The same is true of any fact issue. If the evidence is reasonably susceptible of only one inference, the court may decide the issue as a matter of law.¹⁶

This is exactly what happens when a court interprets an unambiguous contract as a matter of law. If a contract says “payment is due on November 2 by 5:00 p.m. Eastern Standard Time,” one has a hard time arguing that the parties intended payment to be due on November 17. The contract is so clear that no reasonable jury would disagree about its meaning, so the court can decide the issue as a matter of law.¹⁷

This is different from what courts do in insurance cases. They do not decide fact disputes as to which reasonable minds could not differ. They treat the interpretation of insurance policies, even ambiguous insurance policies, as a legal question in the same way they treat the interpretation of statutes as a legal question.¹⁸

15. FED. R. CIV. P. 50, 56. *Accord* Scott v. Harris, 550 U.S. 372, 380 (2007) (“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”).

16. *See, e.g.*, Broberg v. Guardian Life Ins. Co. of Am., 90 Cal. Rptr. 3d 225, 238 (Cal. Ct. App. 2009) (“[U]nder California law, whether reliance was reasonable is a question of fact for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion.”); Huffman v. Westmoreland Coal Co., 205 P.3d 501, 511 (Colo. Ct. App. 2009) (stating as to tort damages, that “[w]here the facts are undisputed and reasonable minds could draw but one inference from them, the court may rule on an issue as a matter of law.”).

17. *See, e.g.*, ASP Props. Group v. Fard, Inc., 35 Cal. Rptr. 3d 343, 355–56 (Cal. Ct. App. 2005):

Based on the language of the Lease and Amendment and the extrinsic evidence discussed *ante*, we conclude the word “improvement” in the Amendment is not, as a matter of law, reasonably susceptible to an interpretation that Tenant was required to replace the roofs. Accordingly, we conclude, as a matter of law, Tenant was not required to replace the roofs of the Premises pursuant to either the Lease or the Amendment.

18. *See, e.g.*, United Servs. Auto. Ass’n v. Dare, 830 N.E.2d 670, 681 (Ill. App. Ct. 2005) (“Since the term ‘maintenance’ could mean ‘upkeep,’ as it is generally understood, or could reasonably encompass a broader definition as suggested by USAA, it is subject to more than one interpretation and is ambiguous. Therefore, the provision should be

F. Different Kinds of Contracts Warrant Interpretation by Different Judicial Actors

The foregoing is meant only to prove the basic premise: interpretation of some contracts is a legal issue and interpretation of others is a fact issue. What remains is to look at the case law to discern the contours of that distinction, and then articulate the principles by which to decide whether interpretation of any particular contract should be deemed law or fact.

But first, a detour. Before discussing how to distinguish legally-interpreted contracts from factually-interpreted contracts, it is helpful to understand generally which questions are decided by juries and which by judges.

II. DISTINGUISHING JURY QUESTIONS FROM JUDGE QUESTIONS¹⁹

A. The Law-Fact Distinction: Pure Questions of Law and Questions of Historical Fact

In our judicial system, decision-making authority is divided between law-trained judges, and juries of ordinary citizens. In the broadest terms, juries decide “facts,” i.e., what happened in the past or what circumstances exist in the present. They also have a conduct-judging function, as when they decide whether a person exercised reasonable care. Judges are charged with making legal determinations and administering cases. This is the law-fact distinction: juries decide fact questions and judges decide legal questions. Its corollary is that, on appeal, fact determinations are reviewed deferentially and legal rulings are reviewed *de novo*; that is, with no deference.²⁰

Questions of law ask judges to determine the legal rules governing the dispute at hand. For example:

- What are the elements of intentional infliction of emotional distress?
- Does the crime of arson require a showing of specific intent?

resolved in favor of the insured.”); *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1218 (Or. 1996) (“[W]e conclude that the pollution exclusion is ambiguous. Accordingly, we construe the policy against the drafter.”).

19. This Section of the Article is for the most part a summary of *All Mixed Up About Mixed Questions*, *supra* note 1. If you have already read that article, by all means skip ahead.

20. Warner, *supra* note 1, at 104–05.

- Does a school voucher plan violate the Establishment Clause?

Legal rules come from many places: statutes, common law, constitutions, court rules, etc. Common law is of course judge-made, but most of the time judges are interpreting existing rules. The court examines the language of the rule (be it statutory, common law, or otherwise), uses any number of rules of construction, reviews case law interpreting the same or similar language, and determines what the language means.

Fact questions ask what version of events or circumstances is true. Facts involve the who, what, where, when, why, and how of the dispute. For example:

- Was the traffic light red when the defendant entered the intersection?
- Did the deceased sign his last will and testament?
- Who shot the victim?

Note the difference between these questions of fact and a question like “did the defendant exercise reasonable care,” which is often called a question of fact. The latter asks the jury not to determine some physical reality, but to make a judgment regarding the defendant’s conduct. It is a fact question only in the imprecise sense that it would be a question for the jury, but it is not the same thing as determining what happened.

For that reason, I use the term “historical fact” to refer to the who, what, where, when, why, and how questions.²¹ Some cases also call these questions of “basic fact.”²²

Most questions of historical fact involve physical reality, but not all. Courts sometimes must determine knowledge, intent, good faith, or other mental conditions. For example:

- Did the defendant intend to cause bodily harm?
- Did the plaintiff know the fraudfeasor’s statement was false?
- Was the lawsuit filed in good faith?

21. *See, e.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *superseded by statute*, 28 U.S.C. § 1658(a) (2006).

22. *See, e.g.*, *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981).

Though a person's mental state is not a fact in the same way that what happened at a given place and time is a fact, the law largely treats mental facts the same way it treats physical facts. Whatever philosophers and neuroscientists might say about whether thoughts have a physical existence, our legal system has a long tradition of asking juries to determine what a person knew, believed, or intended.²³

B. Mixed Questions

The nice thing about the law-fact distinction is that it gives us a clean, bright-line rule for deciding which issues go to the judge and which to the jury. Too bad the universe of judicial decisions is not so simple. It turns out that some issues combine elements of fact and law. Some, like contract interpretation, are sometimes factual and sometimes legal. Some are neither factual nor legal.

Recognizing that some decisions cannot neatly be classified as law or fact, courts created a middle category: "mixed questions of law and fact."²⁴ Labeling a question mixed, however, turns out to tell you nothing about who decides it. That category is, rather, a catch-all for issues that do not neatly classify as law or fact.²⁵ As Black's Law Dictionary has circularly defined it, "mixed question" is "a question depending for solution on questions of both law and fact, but is really a question of either law or fact to be decided by either judge or jury."²⁶

There are actually several different kinds of issues decided by judges and juries that are neither purely legal nor purely factual, and each is treated differently. There are questions of predictive fact that ask whether an event is likely to occur in the future; prescriptive determinations, in which a certain result (such as pain and suffering damages) is prescribed; questions of judicial administration, such as whether to grant an extension of time or whether the probative value of evidence substantially outweighs its potential for unfair prejudice; and questions of sufficiency review, as when a judge decides whether evidence is sufficient to permit the jury to make a particular

23. See Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1870 (1966); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace.").

24. Warner, *supra* note 1, at 107–12.

25. *Id.* at 128–41.

26. BLACK'S LAW DICTIONARY 1003 (6th ed. 1990).

finding.²⁷ There are also evaluative determinations and questions of definition application, two frequently encountered issue-types that are discussed more below.

So calling a question “mixed” does not tell you whether the question will be decided by the judge or the jury. Rather, assuming the question is neither one of historical fact nor purely legal, one has to determine what kind of issue it is, and then follow the rules that govern how issues of that kind are treated.²⁸

This is what we are trying to do with contract interpretation. It should come as no surprise that courts often call contract interpretation a mixed question,²⁹ because it cannot neatly be classified as law or fact.

C. Evaluative Determinations and Definition Application

Two kinds of “mixed” questions warrant a closer look because they can be easily confused with contract interpretation: evaluative determinations and questions of definition application. This is especially important in insurance cases in which the legal question of what a particular provision means is so closely related to the factual question of whether that provision applies on the facts.

When the jury in a tort case is asked to decide whether the defendant exercised reasonable care, courts often call this a fact issue.³⁰ But it is not factual in the same sense that a question of historical fact is. The question is not what the defendant did, though the jury may have to decide that too. It is not what physically happened in space and time. It is whether what the defendant did was reasonable. This inquiry calls on the jury to evaluate the defendant’s conduct according to a standard of reasonableness. It is an “evaluative determination.”³¹

In most negligence cases, the ultimate determination of reasonableness is intermingled with fact questions about what happened. We typically do not

27. Warner, *supra* note 1, at 112–28.

28. *Id.* at 128–41.

29. *See, e.g.*, *Otis Elevator Co. v. Midland Red Oak Realty, Inc.*, 483 F.3d 1095, 1101 (10th Cir. 2007); *Tyler v. Cuomo*, 236 F.3d 1124, 1134 (9th Cir. 2000); *McDonald Constr. Co. v. Bituminous Cas. Corp.*, 632 S.E.2d 420, 422 (Ga. Ct. App. 2006); *McDonald v. Mobil Coal Producing, Inc.*, 820 P.2d 986, 988 (Wyo. 1991).

30. *See, e.g.*, *Herrera v. Quality Pontiac*, 73 P.3d 181, 186 (N.M. 2003) (noting that generally, negligence is a question of fact for the jury); *Atkinson v. Scheer*, 508 S.E.2d 68, 71 (Va. 1998) (stating that negligence is ordinarily a question of fact for the jury).

31. Warner, *supra* note 1, at 119–21.

ask the jury in a red-car/blue-car case to make express findings regarding every historical fact, and then a separate finding as to whether, in light of those facts, the defendant exercised reasonable care. Instead, those cases tend to be submitted on a general verdict form, so there is no need to segregate findings of historical fact from the evaluative determination that flows from those findings. And even if the historical facts are undisputed, there may still be a jury question regarding that ultimate issue. This is so not because the evaluative determination is “fact.” It is because, as a matter of policy, courts have determined that the value judgment of what constitutes reasonable care should be made by juries.³²

Negligence is one example, but evaluative determinations are found everywhere in the law: reasonable reliance in fraud cases,³³ reasonable accommodations under the Americans with Disabilities Act,³⁴ fair use in copyright cases;³⁵ the list goes on.³⁶ Whenever a disputed issue requires the decisionmaker to make a value judgment (often based on community standards), the question is an evaluative determination.

Evaluative determinations tend to be case-specific and, for that reason, are usually questions for the finder of fact.³⁷ But some evaluative determinations are treated as questions of law. The most prominent example is probable cause in Fourth Amendment cases.³⁸ Determining probable cause requires a value judgment about whether a person of reasonable prudence, given the particular facts of that case, would be warranted in believing that contraband or evidence of a crime will be found.³⁹ Again, we often say that probable cause is a question of law,⁴⁰ but this is imprecise. It is an evaluative determination to be decided by the court.

32. *Id.* at 129–32.

33. *See* Precision Enter., Inc. v. Duffack Enter., Inc., 710 N.W.2d 348, 355 (Neb. Ct. App. 2006).

34. *See* Pandazides v. Va. Bd. of Educ., 13 F.3d 823, 833 (4th Cir. 1994).

35. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994).

36. *See also* Brethauer v. Gen. Motors Corp., 211 P.3d 1176, 1183 (Ariz. Ct. App. 2009) (stating that the “consumer expectation test” in product liability cases requires the finder of fact to engage in a risk/benefit analysis).

37. Warner, *supra* note 1, at 129–32.

38. *See* Ornelas v. United States, 517 U.S. 690, 699 (1996).

39. *See id.* at 696.

40. *See, e.g.,* United States v. Garcia-Zambrano, 530 F.3d 1249, 1254 (10th Cir. 2008) (“Whether a corrected affidavit supports a finding of probable cause is a question of law that we review de novo.”); Estate of Tucker *ex rel.* Tucker v. Interscope Records, Inc., 515 F.3d 1019, 1031 (9th Cir. 2008) (stating that probable cause in a malicious prosecution case is a question of law).

Similar to evaluative determinations are “questions of definition application,” in which a judge or jury is called upon to apply a particular legal definition or standard to a set of facts.⁴¹ Those standards and definitions can come from any number of places: statutes, rules, common law standards, even contracts. When the source of the standard is law, interpretation of it is a legal question. Determining whether that standard as interpreted applies to a particular set of facts is a question of definition application.⁴²

The Supreme Court’s interpretation of the term “tangible employment action” in Title VII cases offers an illustration. The Court has held:

When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII

. . . .

A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.⁴³

Because the underlying liability rule derives from an interpretation of Title VII, establishing that rule was a legal determination. So was the court’s definition of “tangible employment action.” In any given case, however, there may be a dispute about whether certain action constitutes a “significant change in employment status.”

This dispute could take three forms. If the parties dispute the underlying historical facts (i.e., what actually happened to the plaintiff), that would be a question of fact. If the court needs to further refine the definition of “significant change in employment status,” that would be a legal issue. But there might be no dispute about the facts, and it might be impossible to further refine the rule, so that the only issue is whether what happened to this

41. See Warner, *supra* note 1, at 121–24.

42. *Id.* at 121–24, 132–36.

43. Burlington Indus. v. Ellerth, 524 U.S. 742, 753–54, 761 (1998).

particular plaintiff constitutes a “significant change in employment status.” That would be a question of definition application, and typically (though not always) it would be decided by the finder of fact.⁴⁴

Note the thin line between interpreting a legal standard and applying it to particular facts. If a generalization can be made that will clarify the standard for all cases—for example, if the court held that certain action never or always constitutes tangible employment action—then a legal issue has been decided. But if the issue involves a case-specific inquiry about whether certain facts meet a legal standard, it is a question of definition application.⁴⁵ Thus, while the line between interpretation and definition application is thin, it is a necessary line to draw when (as in some contract interpretation cases) interpretation is a legal issue and application is a question for the trier of fact.

D. Where Does Contract Interpretation Fit In?

It is not uncommon to encounter evaluative determinations and/or questions of definition application in cases that also involve contract interpretation. For example, a real estate purchase contract might state: “The buyer has a reasonable amount of time to inspect the property.” If the parties dispute when the inspection took place, that is a question of historical fact. If the parties dispute the meaning of “inspect,” that is a question of contract interpretation. If the parties dispute whether the time given for inspection was “reasonable,” that is an evaluative determination.

The above discussion of legal questions, fact questions, and questions that courts call “mixed” serves two purposes. First, it helps distinguish when a case involves interpretation from when it involves other issues like definition application. This is important because confusion about whether contract interpretation is legal or factual sometimes stems from confusion between interpretation and other issues.

Second, it provides context for understanding whether and when contract interpretation consists of fact-finding or law-determining. To that issue we now turn.

44. See *Warner*, *supra* note 1, at 135. See also *Saffa v. Okla. Oncology, Inc.*, 2006 WL 12995, at *8 (N.D. Okla. 2006) (discussing but not deciding whether the jury or the judge determines whether there was a “tangible employment action”).

45. See *Warner*, *supra* note 1, at 132–34, for other examples.

III. WHAT IS CONTRACT INTERPRETATION?

A. Contract Interpretation as the Process of Ascertaining Agreed-To Rules

To talk about whether and when contract interpretation is legal or factual requires first understanding what contract interpretation is. What are courts doing when they interpret a contract?

A good place to start is the Restatement of Contracts, which defines the interpretation of a contract as “the ascertainment of its meaning.”⁴⁶ Since contracts are expressed in words (putting aside implied contracts), interpretation is the process by which we determine the meaning of the words the parties agreed to.

Lots of verbal expressions, however, have meaning without being contracts. Poetry has meaning. Chit-chat has meaning. Yet ascertaining the meaning of a poem or a conversation is quite different from ascertaining the meaning of a contract. When people agree to contract language, they are using language for a very specific purpose. They are using it to fix the rules that will govern them with respect to a certain transaction or set of circumstances.

To illustrate, take the simplest of contracts whereby Wendy and Jeff sign a piece of paper stating: “Wendy will mow Jeff’s lawn for \$30 next Saturday. Jeff will not water his lawn in the morning.” Wendy and Jeff do not use those words to express a spiritual or a social meaning. They use them to specify each person’s obligation to the other. By those words, they agree to be bound to the following rules:

- Wendy shall mow Jeff’s lawn next Saturday.
- Jeff shall not water his lawn next Saturday morning.
- If Wendy mows Jeff’s lawn next Saturday, Jeff shall pay Wendy \$30.

46. RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981). *See also* MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.30, at 326 (rev. ed. 1998) (defining interpretation as “the search for the parties’ intended meaning.”); RICHARD A. LORD, WILLISTON ON CONTRACTS § 30.1, at 2–3 (4th ed. 1999) (“Interpretation of a promise or agreement or a term in an agreement is the ascertaining of its meaning by determining the meaning of the words employed.”); Edmund W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 833 (1964) (defining interpretation as “the process of endeavoring to ascertain the meaning or meanings of symbolic expressions used by the parties to a contract”).

Note that these statements are of three types. One is a directive. It tells Wendy she has a legal obligation to do something, an obligation that is enforceable through the courts and, ultimately, the coercive power of the state. The second is a prohibition that tells Jeff what he may not do, again with an implied threat of consequences if the prohibition is violated. The third is an “if-then” statement that specifies Jeff’s conditional obligation in the event Wendy satisfies her obligation.

Agreed-to rules like these are similar to what you find in statutes and court rules. They tell people what they must do, what they may do, what they may not do, and what the consequences are if certain things are done or events occur. This is true for a contract as simple as the above example, and for the most complex corporate merger agreement, which may contain hundreds or thousands of rules that the parties agree will govern their relations with each other. By virtue of their agreement, legally enforceable rules are created.

The idea that contracts consist of agreed-to rules is behind the frequent reference to contract as “private law.”⁴⁷ Although the convention for establishing contract rules is different from that for establishing statutory law—the former requires mutual assent and the latter requires approval through a parliamentary process—statutes and contracts serve the same function of articulating rules. And just as the words used to articulate statutory rules sometimes require interpretation, so do contracts.

It is often said that contracts specify the parties’ rights and duties.⁴⁸ The words “right” and “duty” are just shorthand ways of saying that the parties are bound by certain rules. To say, for example, that Wendy has a “right” to payment from Jeff or that Jeff has a “duty” to pay Wendy means that Wendy

47. *See, e.g.*, *Morgan Serv., Inc. v. Local 323, Chicago & Cent. States Joint Bd., Amalgamated*, 724 F.2d 1217, 1224 (6th Cir. 1984) (“Collective bargaining agreements, like all contracts, are a species of private law.”); *Arrowhead Sch. Dist. No. 75, Park County v. Klyap*, 79 P.3d 250, 256 (Mont. 2003) (“Normally, in the course of contract interpretation by a court, the court simply gives effect to the agreement between the parties in order to enforce the private law of the contract.”); *Ellis v. Indus. Comm’n*, 64 P.2d 363, 373 (Utah 1937) (referring to contract as “a private law governing the conduct of persons engaged in a transaction supposedly for their mutual benefit which prevents misunderstandings”).

48. *See, e.g.*, *LDCircuit, L.L.C. v. Sprint Comm’n Co.*, 364 F. Supp. 2d 1246, 1262 (D. Kan. 2005) (“[A]dditional tort duties may not be imposed where the parties’ duties and rights are already specifically defined by contract.”); BLACK’S LAW DICTIONARY 869 (9th ed. 2009) (defining “instrument” as “[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate.”).

and Jeff have agreed that Jeff must make the payment or face certain consequences, such as a suit for damages.

People's articulation of agreed-to rules can be imperfect. In the above example, did the parties intend "next Saturday" to mean the Saturday coming up or the one after that? There is an ambiguity in the parties' expression that may require a court to decide what they agreed to. The process of making this decision is contract interpretation. Thus, to say that interpretation is the ascertainment of the meaning of contract language is to say that interpretation is the ascertainment of the rules to which the parties agreed.

Note that I use the expression "agreed-to rules" rather than "agreed upon rules." Parties often agree to be bound by rules that they have never read, much less agreed upon. This happens most frequently with form contracts; by signing the contract, a party *agrees to* be bound by its terms even if he or she never specifically *agrees upon* those terms. The terms may nonetheless have to be interpreted in the event of a dispute, but one cannot talk about what the parties "agreed upon."

B. Contract Interpretation Distinguished From Other Issues

In discussing contract interpretation, it is important to distinguish it from related issues that arise in contract cases.

One is contract formation. Contract formation asks whether the parties intended to be contractually bound, and may involve questions of historical fact involving offer, acceptance, or consideration.⁴⁹ Deciding whether parties bound themselves to agreed-to rules is different from deciding what those rules are, which is contract interpretation.

Another related issue is breach, which, in its simplest form, asks whether a contract provision has been complied with. Breach tends to be a compound question⁵⁰ made up of sub-questions of historical fact, evaluative determinations, definition application, and/or questions of contract interpretation. To illustrate, take the following modified lawn-mowing contract:

49. *See, e.g.,* *Crellin Tech., Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 7 (1st Cir. 1994) ("[T]he question of whether a contract has been formed between two parties is a question of fact to be determined by the factfinder."); *Inland Title Co. v. Comstock*, 779 P.2d 15, 16 (Idaho 1989) ("Formation of a contract is generally a question of fact for the trier of fact to resolve.").

50. *See* Warner, *supra* note 1, at 136–41.

Wendy will mow Jeff's lawn next Saturday in a reasonably good manner. Jeff will pay \$20, but if Wendy causes substantial damage to any of the surrounding shrubs, Jeff will only have to pay \$12.

Wendy mows Jeff's lawn and Jeff pays Wendy \$12. Wendy sues for breach. Jeff claims he did not breach the contract because Wendy caused substantial damage to some surrounding shrubs, and anyway she mowed the lawn late and not in a reasonably good manner. Whether Jeff breached the contract turns on the following:

- Does the term "next Saturday" mean the Saturday immediately following the signing of the contract or the Saturday after that? This is a question of contract interpretation.
- Did Wendy mow the lawn in a reasonably good manner? This is an evaluative determination.
- What damage did Wendy cause to the surrounding shrubs? This is a question of historical fact.
- Did that damage constitute "substantial damage"? This is a question of definition application.

Thus, while one part of the breach claim involves a question of contract interpretation, there are other issues as well.

Why does this matter? Why is it necessary to go through the tedious task of parsing a simple issue of breach? It is not necessary in each case. If, as in the above example, all the issues are jury questions, then the case can be submitted on a general verdict, and no one will ever know what the jury decided on each sub-issue.

But what if the contract interpretation issue is legal? Take, for example, an insurance bad faith case in which an insured claims the insurer breached a homeowner's policy by not providing coverage, and the insurer claims a policy exclusion precluded coverage. That dispute could involve a question of historical fact concerning what happened and a question of contract interpretation concerning the exclusion. The latter would likely be a legal question, so it is important to parse out the issue of interpretation.

A contract case might also involve whether a contract provision is enforceable. This is related to interpretation, but not the same thing. For example, the parties may have agreed to a liquidated damages provision. The interpretation of that provision—that is, what the parties' provision means—is one question, perhaps a question for the finder of fact. But liquidated

damages provisions must meet certain requirements to be enforceable, and whether the provision meets those requirements is a separate question of definition application that typically would be a question for the court.⁵¹

These examples are not exhaustive. They are meant only to show that when deciding whether a contract interpretation question is for the judge or the finder of fact, it may be necessary to distinguish it from other, related issues that arise in contract cases.

IV. WHEN DO COURTS TREAT CONTRACT INTERPRETATION LEGALLY AND WHEN FACTUALLY?

A. A Look at the Case Law

To this point, I have posited that contract interpretation is sometimes a legal issue and sometimes a factual issue depending on the nature of the contract (or contract provision) at issue. What follows are cases to illustrate the point. This is, of course, just a sampling, but the examples below are representative and they point to a reconciliation of the traditional rule and the modern rule that is both workable and comports with courts' intuition about when contract interpretation should be legal and when factual.

B. Contract Interpretation as Fact Finding—Ordinary, Negotiated Contracts

It is often said that the objective of contract interpretation is to determine what the parties intended.⁵² As will be discussed below, the subjective intent of the contracting parties is a dubious criterion by which to determine the

51. *See, e.g.*, *Great Plains Real Estate Dev., L.L.C. v. Union Cent. Life Ins. Co.*, 536 F.3d 939, 945 (8th Cir. 2008) (“The reasonableness of a liquidated damages provision is assessed as of the time the agreement is made . . . and is a question of law for the court.”); *Gershin v. Demming*, 685 N.E.2d 1125, 1128 (Ind. Ct. App. 1997) (“The question whether a liquidated damages clause is valid, or whether it constitutes a penalty, is a pure question of law for the court.”).

52. *See, e.g.*, *Hampton v. Ford Motor Co.*, 561 F.3d 709, 714 (7th Cir. 2009) (stating that the primary objective in construing a contract is to give effect to the parties' intent); *Koch Bus, Holdings, L.L.C. v. Amoco Pipeline Holding Co.*, 554 F.3d 1334, 1338 (11th Cir. 2009) (“[W]hen interpreting a contract, the role of a court is to effectuate the parties' intent.”); *In re Imperial Credit Indus., Inc.*, 527 F.3d 959, 966 (9th Cir. 2008) (stating that the court's goal in interpreting any contract is to give effect to the mutual intent of the parties).

meaning of one-way contracts like insurance policies and credit card agreements.⁵³ But for ordinary, negotiated contracts, intent is rightly seen as the Holy Grail of contract interpretation. Contracting parties choose their words for the purpose of articulating what they agreed to, so the meaning of those words must be judged by what the parties intended them to mean.⁵⁴ And because intent is generally a factual matter, determining the intent of contracting parties is typically a task for the finder of fact.

*Hoover, Inc. v. McCullough Industries, Inc.*⁵⁵ is illustrative. McCullough Industries, a supplier of road aggregates for a state highway project, contracted with Hoover to provide base stone. The contract, which was drafted by the parties without lawyers, specified the size of stone needed and required Hoover to remove “byproducts” as necessary to meet state specifications. During performance, a dispute arose over whether Hoover had to meet state specifications as to size only, or whether its obligation to remove byproducts included clay and mud fragments. The trial court submitted this contract interpretation issue to the jury, finding the contract ambiguous.⁵⁶ The appellate court affirmed, noting that if the contract is ambiguous, its meaning is for the jury to determine “by a consideration of the facts and circumstances surrounding its making.”⁵⁷

*Integrated Solutions International v. Central Transport International*⁵⁸ is another example. That case involved a contract under which a transportation company agreed to buy a quantity of “handheld units” each month from a computer distributor. In the seller’s lawsuit for breach, the parties disputed whether the term “handheld units” only meant handheld computers or included related items. On cross-motions for summary judgment, the court considered such things as the seller’s testimony about what “handheld units” means in the industry, the buyer’s testimony about what he intended the term to mean, other provisions of the contract, related documents, and evidence of the parties’ negotiations.⁵⁹ Considering this evidence, the court ruled that the

53. *But see* *Employers Ins. of Wausau, A Mutual Co. v. Tektronix, Inc.*, 156 P.3d 105, 116 (Or. Ct. App. 2007) (explaining that the goal of interpreting an insurance policy is to ascertain the intent of the parties).

54. *See* WILLISTON, *supra* note 46, § 30.2, at 16; CORBIN, *supra* note 46, § 24.5, at 15.

55. 380 F.2d 798 (5th Cir. 1967).

56. *Id.* at 799.

57. *Id.* at 801–02.

58. 2009 WL 579232 (M.D.N.C. 2009).

59. *Id.* at *1, *4.

term was ambiguous because a reasonable jury could interpret it either way. Thus, the meaning of “handheld units” was a fact issue for trial.⁶⁰

*Briggs v. Briggs*⁶¹ is also illustrative. At issue there was a lease under which the tenant was obligated to pay the landlord “25% of any and all net revenues generated” either by his business operations or by subleasing the property. A dispute arose concerning the meaning of the term “net revenues” and the trial court found for the landlord after a bench trial. Affirming, the appellate court found “no clear interpretation of the term within our body of law or within the stipulation itself,” and therefore concluded that interpretation of the term was a question of fact.⁶²

There are common threads among these cases. First, the contracts were negotiated, not adhesive. Second, the disputed provisions were specific to the parties, so case law involving similar provisions would have been unhelpful, and hearing evidence of what the parties intended that language to mean was necessary. Third, the provisions were reasonably susceptible of both parties’ proffered meanings. One can find countless cases that share these common threads in which the issue of contract interpretation is held to be a fact question.⁶³

To further illustrate, imagine if the courts in these cases had treated interpretation as a question of law. In *Integrated Solutions*, for example, the court could have reviewed the contract term “handheld units,” and reached its own legal conclusion about what “handheld units” means. But on what basis would it make that determination? There likely is no case law

60. *Id.* at *5.

61. 817 A.2d 112 (Conn. App. Ct. 2003).

62. *Id.* at 118–119.

63. *See, e.g.,* American Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 586–87 (3d Cir. 2009) (contract between clothing retailer and manufacturer was ambiguous; remand for jury trial required); Monsanto Co. v. Garst Seed Co., 241 S.W.3d 401, 411 (Mo. Ct. App. 2007) (reversing summary judgment where critical language in soybean license and seed services agreement was ambiguous); Driscoll Const. Co., Inc. v. State Dept. of Transp., 853 A.2d 270, 279 (N.J. Super. Ct. App. Div. 2004) (reversing summary judgment where road construction contract was ambiguous); Cent. Or. Indep. Health Servs., Inc. v. State, 156 P.3d 97, 104 (Or. Ct. App. 2007) (ambiguity in health care reimbursement contracts precluded summary judgment); Anglo-Dutch Petroleum Intern., Inc. v. Greenberg Peden, P.C., 267 S.W.3d 454, 476 (Tex. Ct. App. 2008) (trial court properly submitted interpretation of ambiguous attorney fee agreement to the jury); Dardas v. Fleming, Hovenkamp & Grayson, P.C., 194 S.W.3d 603, 612–13 (Tex. Ct. App. 2006) (reversing summary judgment where contract for sharing fees in class-action litigation was ambiguous); Comet Energy Servs., L.L.C. v. Powder River Oil & Gas Ventures, L.L.C., 185 P.3d 1259, 1264 (Wyo. 2008) (reversing summary judgment where term in assignment was ambiguous).

interpreting the term “handheld units” in similar contracts. And while the court could make its own determination based on the evidence of intent in the record, weighing evidence is what juries do, not appellate courts.

Perhaps *Briggs* offers a better opportunity for treating interpretation as a legal issue, since the term “net revenues” is common enough that one might find analogous case law. But case law would not tell you what these particular parties meant the term to mean. A court might have policy reasons for interpreting the term “net revenues” legally; if it thought, for example, that a uniform interpretation would aid contracting parties and prevent litigation. But if the goal is to discern the intent of contracting parties, then contract interpretation is a fact issue.

C. Contract Interpretation as Law-Determining—Insurance Policies

1. Courts Treat Insurance Policies Differently

Contrast these cases with cases interpreting insurance policies, which overwhelmingly treat interpretation as a legal issue. Some of them say so expressly,⁶⁴ and a few even acknowledge the difference in treatment.⁶⁵ Some cite the rules of interpretation for ordinary contracts, but then treat insurance policy interpretation as a legal issue.⁶⁶ Some strain to find language

64. *See, e.g.*, *New Fed Mortgage Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 543 F.3d 7, 11 (1st Cir. 2008) (“The interpretation of an insurance contract under Massachusetts law is a question of law.”); *Executive Risk Indem., Inc. v. CIGNA Corp.*, 976 A.2d 1170, 1172 (Pa. Super. Ct. 2009) (“[T]he interpretation of an insurance policy is a question of law for the court.”); *Campbell v. Tigor Title Ins. Co.*, 209 P.3d 859, 862 (Wash. 2009) (“Construction of an insurance contract is a question of law.”).

65. *Phila. Indem. Ins. Co. v. Hallmark Claims Serv.*, 2008 WL 5191910, at *4 (N.D. Tex. 2008) (“Unlike other contracts where ambiguous language creates a fact question, insurance policies are analyzed with a presumption in favor of coverage.”); *Aetna Life & Casualty Co. v. Bulaong*, 588 A.2d 138, 142 (Conn. 1991) (“Unlike certain other contracts . . . where . . . the intent of the parties and thus the meaning of the contract is a factual question subject to limited appellate review . . . construction of a contract of insurance presents a question of law for the court which this court reviews de novo.”) (citations omitted); *Bresee Homes, Inc. v. Farmers Ins. Exch.*, 206 P.3d 1091, 1095 (Or. Ct. App. 2009) (“[D]espite ordinary rules of contract interpretation, extrinsic evidence of the parties’ intent is not a part of the interpretation of an insurance policy. . .”).

66. *See, e.g.*, *Safeco Ins. Co. v. Fireman’s Fund Ins. Co.*, 55 Cal. Rptr. 3d 844, 850 (Cal. Ct. App. 2007) (declaring that insurance policy interpretation “follows the general rules of contract interpretation” and requires giving effect to the parties’ “mutual intention” but then interpreting the policy legally); *P.D. v. S.W.L.*, 993 So.2d 240, 243 (La. Ct. App.

unambiguous in order to interpret it legally rather than factually.⁶⁷ In these cases, the court's decision process is more like statutory interpretation than a fact-finding inquiry about intent. There are exceptions in which interpretation of a policy provision is treated as a fact question, but such cases are few and far between.⁶⁸

*Bresee Homes v. Farmers Insurance Exchange*⁶⁹ is illustrative. At issue there was whether a homebuilder's liability policy covered certain claims. The trial court granted summary judgment for the insurer, ruling that coverage was excluded under a "products-completed operations" exclusion.⁷⁰ Affirming, the court noted that insurance policy interpretation is a legal issue and upheld the trial court's refusal to consider extrinsic evidence.⁷¹ "Despite ordinary rules of contract interpretation," it reasoned, "extrinsic evidence of the parties' intent is not part of the interpretation of an insurance policy under Oregon law."⁷² Instead, the court reached its conclusion based on a review of the dispositive language, other related provisions in the policy, and citation to Webster's Dictionary to show the terms' ordinary meaning.⁷³

At issue in *West American Insurance Co. v. Prewitt*,⁷⁴ a federal district court case, was whether a homeowner's policy covered the insured's liability for damaging his friend's boat. The insured was steering the boat when it ran aground, and the insurer argued that coverage was excluded for property damage "to property rented to, occupied or used by or in the care of the insured." The court found no fact disputes; thus, the question of coverage turned on the meaning of the words "used by" and "in the care of" in the policy. The court first looked to the language's plain meaning, citing dictionary definitions, then reviewed cases interpreting similar provisions.⁷⁵

2008) (stating that general rules of contract interpretation apply to insurance policies, then interpreting exclusion legally).

67. See, e.g., *Ferguson v. Coregis Ins. Co.*, 527 F.3d 930, 933–34 (9th Cir. 2008).

68. See, e.g., *Christensen v. Metro. Life Ins. Co.*, 542 F. Supp. 2d 935, 942 (D. Minn. 2008) (holding that fact issues precluded summary judgment regarding meaning of ambiguous insurance policy); *Keller v. Safeco Ins. Co. of Am.*, 877 S.W.2d 90, 92 (Ark. 1994) (explaining that where aircraft insurance policy was ambiguous, question of intent of parties to insurance agreement should have been tried as a question of fact).

69. 206 P.3d 1091 (Or. Ct. App. 2009).

70. See *id.* at 1092.

71. *Id.* at 1093, 1095.

72. *Id.* at 1095 (quoting *Employers Ins. of Wausau v. Tektronix*, 156 P.3d 105, 117 (Or. Ct. App. 2007)).

73. *Id.* at 1093–94.

74. 401 F. Supp. 2d 781 (E.D. Ky. 2005).

75. *Id.* at 785, 787–89.

Concluding that the policy plainly excluded coverage, the court granted summary judgment for the insurer.⁷⁶

*Aerojet-General Corp. v. Commercial Union Insurance Co.*⁷⁷ offers an example of a court purporting to apply “ordinary rules of contractual interpretation,” but then using an interpretive process that is much different from that for ordinary contracts. The plaintiff in *Aerojet* settled environmental litigation and sought coverage for the settlement under various policies. The insurers denied coverage, arguing that the policies only obligated them to pay “damages,” not settlement payments. The trial court granted summary judgment for the insurers and the appellate court affirmed.⁷⁸

The court began by stating that interpretation of an insurance policy is a question of law. It further explained: “While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.”⁷⁹ Next, the court discussed what happens if insurance policy language is ambiguous. “If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured’s reasonable expectation of coverage.”⁸⁰ Thus, a contradiction. If the court were applying ordinary contract interpretation rules, it would submit the interpretation of ambiguous language to the jury, not construe it as a matter of law.

Indeed, the court’s resolution of the issue is utterly unlike ordinary contract interpretation. Rather than looking to evidence such as testimony about what the parties intended, the court looked to case law and the purpose of excess liability policies. “There can be no dispute,” the court concluded, “that the term ‘damages,’ as interpreted in *Powerine I* and used in liability insurance indemnity provisions, means only money ordered by a court to be paid.”⁸¹

These cases are typical. When interpreting insurance policies, courts do not look to testimony about intent or evidence of negotiations. They

76. *Id.* at 789.

77. 155 Cal. App. 4th 132 (Cal. Ct. App. 2007).

78. *Id.* at 805–06.

79. *Id.* at 809 (quoting *Powerine Oil Co. v. Superior Court*, 118 P.3d 589, 597–98 (Cal. 2005)).

80. *Id.* (quoting *Powerine Oil Co.*, 118 P.3d at 598).

81. *Id.* at 809–13.

interpret insurance policy provisions much the way they interpret statutes, in light of the language's plain meaning, its context and purpose, and case law.

2. *Ambiguity in Insurance Policies*

Perhaps the best evidence that courts treat insurance policies differently from ordinary, negotiated contracts is the way insurance cases deal with ambiguity. Under ordinary contract principles, if contract language is ambiguous the parties may introduce extrinsic evidence to aid in its interpretation, and resolving the ambiguity is a fact question.⁸² But this rarely happens in insurance cases. When an insurance policy provision is deemed ambiguous, courts resolve the ambiguity themselves, frequently by invoking the rule that construes insurance policy provisions against the insurer.⁸³ One recent case noted this difference in treatment: "Unlike other contracts where ambiguous language creates a fact question, insurance policies are analyzed with a presumption in favor of coverage."⁸⁴

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82. *See, e.g.*, *Lafarge N. Am., Inc. v. Discovery Group L.L.C.*, 574 F.3d 973, 981 (8th Cir. 2009) ("Because the contract is ambiguous, a question of fact arises as to the parties' intent, and extrinsic evidence may be introduced as proof of the parties' intent."); *Langford v. Paravant, Inc.*, 912 So.2d 359, 360–61 (Fla. Dist. Ct. App. 2005) ("[W]hen the content of an agreement is ambiguous and the parties present different interpretations, the issue of proper interpretation becomes one of fact, precluding summary judgment."); *Eagle Run Square II, L.L.C. v. Lamar's Donuts Int'l*, 740 N.W.2d 43, 48 (Neb. Ct. App. 2007) ("If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract."). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (1981).
83. *See, e.g.*, *United Servs. Auto. Ass'n v. Dare*, 830 N.E.2d 670, 681 (Ill. App. Ct. 2005) ("Since the term 'maintenance' could mean 'upkeep,' as it is generally understood, or could reasonably encompass a broader definition as suggested by USAA, it is subject to more than one interpretation and is ambiguous. Therefore, the provision should be resolved in favor of the insured."); *Haworth v. Jantzen*, 172 P.3d 193, 197 (Okla. 2006) ("When an insurance contract provision is ambiguous, words of inclusion will be liberally construed in favor [of] the insured, and words of exclusion will be strictly construed against the insurer."); *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1218 (Or. 1996) ("[W]e conclude that the pollution exclusion is ambiguous. Accordingly, we construe the policy against the drafter.").
84. *Phila. Indem. Ins. Co. v. Hallmark Claims Serv.*, 2008 WL 5191910, at *4 (N.D. Tex. 2008). Note that when an ambiguity exists in the negotiated portion of the insurance policy, as opposed to the adhesive portion, its interpretation may be a fact question. *See, e.g.*, *Show Car Speed Shop, Inc. v. U.S. Fidelity and Guar. Co.*, 596 N.Y.S.2d 608, 610 (N.Y. App. Div. 1993) ("Where resolution of an ambiguous description turns on questions of credibility and the choice between reasonable inferences to be drawn therefrom, determination of the intent of the parties is a question of fact for the trier of fact.").

*Haworth v. Jantzen*⁸⁵ is illustrative. At issue was whether a farm and ranch policy provided liability coverage for an accident the insured caused while driving his pickup, which was insured under a separate auto policy. The trial court held that the policy unambiguously excluded coverage.⁸⁶ The appellate court, however, found the applicable language to be “conflicting, confusing, and ambiguous.”⁸⁷ Emphasizing that the interpretation of an insurance policy is a legal question, the court described how such a provision must be interpreted:

When an insurance contract provision is ambiguous, words of inclusion will be liberally construed in favor of the insured, and words of exclusion will be strictly construed against the insurer. In construing an ambiguity or uncertainty against the insurer and in favor of the insured, Oklahoma looks to the objectively reasonable expectations of the insured to fashion a remedy.⁸⁸

The court did not consider extrinsic evidence, nor ask what the parties intended. Instead, it applied these principles and held that coverage was not excluded under the policy.⁸⁹

This is how some courts deal with ambiguity in insurance policies. Others, in an attempt to preserve the ordinary rule of ambiguity in insurance cases, strain to find provisions unambiguous. *Ferguson v. Coregis Insurance Co.*,⁹⁰ for example, involved a dispute over whether the liability limits under a school's policy were \$2 million or \$500,000. In several places, the policy stated the “general liability limit” as \$2 million, but an endorsement to the policy stated that the liability limits indicated in Idaho Code section 6-924 would apply, a reference to the \$500,000 minimum limits required by Idaho law. The district court ruled that the policy was unambiguous, and therefore granted summary judgment for the insurer.⁹¹

The Ninth Circuit ruled that if the provision were ambiguous, its meaning would be a question of fact. It then agreed with the district court that the

85. 172 P.3d 193 (Okla. 2006).

86. *Id.* at 194.

87. *Id.* at 197.

88. *Id.*

89. *Id.* at 198.

90. 527 F.3d 930 (9th Cir. 2008).

91. 2006 WL 2524118, at *4 (D. Idaho 2006).

provision was unambiguous, but contrary to the district court held that it unambiguously provided \$2 million in coverage rather than \$500,000.⁹²

If a district court judge and a Ninth Circuit panel reach opposite interpretations of the same policy language, can one honestly call it “unambiguous,” especially where, as in this case, there are good arguments for both interpretations? Although disagreement about a provision’s meaning, even among judges, does not necessarily make it ambiguous, courts appear far more inclined to find insurance policy language unambiguous than they do ordinary contract language.⁹³ They do so because they are trying to square rules of interpretation designed for ordinary contracts with an intuition that insurance policies should be interpreted by the court.

3. *Distinguishing Insurance Policy Interpretation from Other Issues*

That insurance policy interpretation is a legal issue, however, does not mean either that fact-finding has no place in coverage disputes, or that all such disputes can be resolved on summary judgment. Even when there is no dispute about what the policy means, there may be jury questions about its application. These could involve disputes of historical fact or definition application issues.

For example, in *Republic Insurance Co. v. Feilder*⁹⁴ the issue was whether the intentional act exclusion in a homeowner’s policy excluded coverage for an assault. The court first applied case law to explain that the exclusion applies only if the insured had a subjective, specific intent to injure the victim.⁹⁵ Thus, it interpreted the policy. It then held that whether the insured intended to injure the victim is a fact question, and therefore remanded the case for trial on that issue.⁹⁶ The dispute over a dispositive historical fact—in this instance, the mental fact of intent—precluded summary judgment even though policy interpretation was a legal issue.

92. 527 F.3d at 933–35.

93. *See, e.g.,* *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 678 A.2d 802, 807 n.6 (Pa. Super. Ct. 1996) (stating that inconsistent interpretation of similar policy language by courts constitutes some evidence of ambiguity, but court must first analyze language of policy to determine if it is clear and unambiguous).

94. 875 P.2d 187 (Ariz. Ct. App. 1994).

95. *Id.* at 190.

96. *Id.* at 191.

*Haydel v. State Farm*⁹⁷ offers another example. The insurer there denied coverage under a father's umbrella policy for the death of his son. The policy stated that it covered any relative living in the insured's household, and since the insured was divorced, a question arose whether the son lived in his household. Reversing summary judgment, the court ruled that whether a person lives in the insured's household is a fact question. "The actual facts supporting the physical aspect of where Jeremy lived," it wrote, "are necessary to make a determination regarding whether coverage exists under the policy herein."⁹⁸

The jury in *Haydel* would have to decide historical facts involving such things as whether the child had his own room and how often he stayed at his father's home. But it also would have to apply those facts to the term "lives in your household" to determine whether coverage applies, which is a question of definition application. The court in *Haydel* sets forth a number of criteria to be considered in making that determination, and perhaps these would be included in a jury instruction.⁹⁹ But ultimately the application of those historical facts to the policy language would be a jury question.

Another area where fact-finding intersects with insurance policy interpretation is in the emerging doctrine of reasonable expectations. That doctrine varies among jurisdictions, but its basic premise is that because insurance contracts are adhesive and rarely read or understood by consumers, their terms cannot violate a consumer's reasonable expectations.¹⁰⁰ Reasonable expectations cases fall generally into three categories.

First, there are cases in which a policy provision violates a particular consumer's reasonable expectations, typically because they contradict what a company told the consumer would be covered. For example, in the New Jersey case of *President v. Jenkins*,¹⁰¹ a doctor sought coverage under his malpractice policy for an incident the insurer said was not covered. The doctor testified regarding his conversations with the insurance agent, how he understood the paperwork he received from the insurer, and what he thought

97. 934 So. 2d 726 (La. Ct. App. 2006).

98. *Id.* at 730.

99. *Id.* at 729.

100. See generally LEE R. RUSS, 2 COUCH ON INSURANCE § 22.11 (3d ed. 2005); Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 (1990); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970). See also RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

101. 853 A.2d 247 (N.J. 2004).

the policy meant. The court held that a fact issue as to the insured's reasonable expectations precluded summary judgment: "If the fact finder determines that Dr. Jenkins's reasonable expectations were that his 'claims made' coverage would begin on or before January 1, 1998, the Zurich policy must provide coverage for plaintiffs' claim that arose on January 3 and 4, 1998."¹⁰²

In this kind of case, reasonable expectations is a jury question because it depends on the case-specific question of whether the insured had a reasonable expectation contrary to the policy language.¹⁰³ Note, however, that this is not insurance policy interpretation. The rule of this case permits the insured's specific expectations to trump the language of the policy.

A second kind of reasonable expectations case is one in which the court declares a particular policy provision void because it violates the reasonable expectations of consumers generally. In the Arizona case of *Philadelphia Indemnity Insurance Co. v. Barerra*,¹⁰⁴ for example, the court held a driving-under-the-influence exclusion in a liability policy void under the doctrine of reasonable expectations. Its ruling was not based on anything particular about the insured in that case. Rather, the court held that the exclusion was "contrary to the *ordinary* customer's reasonable expectations."¹⁰⁵

In cases such as this, the court makes a legal determination regarding the validity of policy language.¹⁰⁶ Its ruling depends not on what a particular consumer thought or was told, but on what the court perceives reasonable consumers would expect their policies to cover.

In the third kind of case, reasonable expectations is simply a rule of interpretation that, along with other such rules (e.g., ambiguous provisions are construed against the drafter, words are presumed to have their ordinary meaning, etc.), help the court determine the meaning of a particular provision.

102. *Id.* at 256–57.

103. *See also* *Bensalem Township v. Int'l Surplus Lines Ins. Co.*, 38 F.3d 1303, 1312 (3d Cir. 1994) (reversing dismissal of claim because insured might be able to prove a reasonable expectation of coverage despite policy language); *Gordinier v. Aetna Cas. & Sur. Co.*, 742 P.2d 277, 285 (Ariz. 1987) (reversing summary judgment because fact issue existed as to reasonable expectations).

104. 21 P.3d 395 (Ariz. 2001).

105. *Id.* at 404 (emphasis added).

106. *See also* *Haynes v. Farmers Ins. Exch.*, 89 P.3d 381, 392–93 (Cal. 2004) (holding that provision that defeated an insured's reasonable expectations held to be void without evidence of specific communications or representations between insured and insurer); *Jones v. Shelter Mut. Ins. Cos. v. Montgomery*, 738 N.W.2d 840, 846–47 (Neb. 2007) (holding that policy provision did not violate public policy or uninsured motorist statutes).

Thus, the rule is applied by the court in its process of interpreting the policy legally.¹⁰⁷

This brief discussion only scratches the surface of the still-evolving reasonable expectations doctrine, but it illustrates how easy it is to confuse issues of contract interpretation with related issues,¹⁰⁸ and therefore how important it is to distinguish them when asking which issues are legal and which are for the jury.

4. *Why Are Insurance Policies Treated Differently?*

The most obvious reason why insurance policies are treated differently is that they are adhesive.¹⁰⁹ As one court explained:

The rules for construction of ordinary contracts do not differ from those to be applied to insurance contracts. . . . The seemingly different rules spring from the fact that the ordinary contract is negotiated and thus in a sense prepared by both contracting parties; whereas the insurance contract is not negotiated and always prepared by the company.¹¹⁰

107. *See, e.g.*, *Foremost Signature Ins. Co.*, 266 S.W.3d 868, 871 (Mo. Ct. App. 2008) (“[W]e will interpret the policy language consistent with the reasonable expectations, objectives, and intent of the parties.”); *Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 869 A.2d 929, 934 (N.J. 2005) (explaining that courts endeavor to interpret insurance policies in accordance with the insured’s reasonable expectations).

108. Courts sometimes muddle the distinction between reasonable expectations as a fact-based doctrine and reasonable expectations as a principle of interpretation to be applied by the court. *See, e.g.*, *Averett v. Farmers Ins. Co. of Ariz.*, 869 P.2d 505, 508 (Ariz. 1994) (stating that a fact issue existed regarding whether “the average, reasonably informed policyholder would expect his or her family to be excluded from liability coverage under these circumstances”).

109. *See, e.g.*, *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996) (defining adhesion contract as a standardized form contract offered on essentially a “take it or leave it” basis without a reasonable opportunity to negotiate terms). *Accord* BLACK’S LAW DICTIONARY 366 (9th ed. 2009) (defining adhesion contract as “[a] standard-form contract prepared by one party, to be signed by another party in a weaker position, [usually] a consumer, who adheres to the contract with little choice about the terms”).

110. *Uni-Serv. Corp. v. Frede*, 271 N.Y.S.2d 478, 483 (N.Y. Civ. Ct. 1966) (citations omitted). *See also* *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 394 (Ariz. 1984) (“Artificial results derived from application of ordinary rules of contract construction to insurance policies have made courts struggle to find some method of reaching a sensible resolution within the conceptual bounds of treating standardized, formal contracts as if they were traditional ‘agreements,’ reached by bargaining between the parties.”).

The terms of insurance policies are not negotiated, and not even reasonably expected to be read or understood by the consumer. Insurance companies draft their policies with the purpose of covering certain losses and not covering others, and customers buy the whole package as a product rather than participating in contract negotiations. Thus, rules of interpretation that presume bargaining and assent to all terms do not fit well with insurance policy interpretation.

A related reason for treating insurance policies differently is that they are designed to apply in a standardized way to thousands of consumers, so there is an interest in uniformity of interpretation. This policy is found in Section 211(2) of the Restatement, which states that standardized agreements should be interpreted “wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.”¹¹¹ The best way to promote like treatment for similarly situated consumers is to treat interpretation as a legal issue, and treat published decisions on interpretation as precedent.

These unique characteristics of adhesive, mass contracts justify applying the traditional approach to them, even though such contracts did not exist when the traditional approach developed. Indeed, the use of the traditional approach for adhesive contracts seems to have emerged at a time when that approach otherwise is waning. But two other characteristics of insurance policies are consistent with the original purpose behind the traditional approach. These will become important when we discuss contract provisions, such as indemnity language, that are often interpreted legally even when they are not adhesive.

One is that insurance policies are technical contracts, the interpretation of which, it could be argued, should not be left in the hands of untrained lay people. If the traditional approach treated contract interpretation as a legal issue because uneducated jurors could not be trusted to construe legal language, and if jurors today are generally more educated than in the eighteenth and nineteenth centuries, it might nonetheless be true that some contracts are still too technical to entrust to juries.

Second, because insurance policy provisions tend to recur—many policies contain similar provisions—the interests of predictability and efficiency may justify giving certain language a consistent interpretation across contracts. As one commentator explains:

111. RESTATEMENT (SECOND) OF CONTRACTS § 211(2) (1981).

One might justify an exception [to interpreting contracts factually] for standard form contracts (SFks), especially insurance contracts, because these contracts are frequently the subject of multiple cases, and for contract language that appears in many contracts (e.g., “time is of the essence”). In each circumstance the interpretation of contract language in one case could influence the outcome of a subsequent case, and so interpretation could be considered general. But in the great number of contract cases in which the language to be interpreted is idiosyncratic to the contract at issue, at the level of principle the interpretation question should be considered one of fact.¹¹²

Providing a uniform interpretation of certain recurring language may in some circumstances contravene the intent of parties who wanted their language to mean something different from what the case law says it means. But the trade-off is that contracting parties—in particular, insurance companies and others who draft adhesive contracts—can use particular language in reliance on that language having the meaning ascribed to it by the case law.

Indeed, because insurance policies are interpreted legally in light of case law, rather than by juries on a case-by-case basis, insurance companies and consumers arguably have a reasonable expectation that they will continue to be treated that way. In this sense, the legal interpretation of insurance policies is a tautology: the policies are drafted a certain way because they will be interpreted legally, and interpreted legally because they are drafted a certain way. But sound policy reasons justify this result.

D. Contract Interpretation as Law-Determining—Other Adhesion Contracts

For the same reasons that insurance policies are interpreted legally, other adhesive contracts like credit card agreements are typically treated the same way.

112. William C. Whitford, *The Role Of The Jury (And The Fact/Law Distinction) In The Interpretation Of Written Contracts*, 2001 WIS. L. REV. 931, 934 (footnote omitted).

*Badie v. Bank of America*¹¹³ is illustrative. At issue there was the enforceability of an alternative dispute resolution clause the bank sought to add to its standard agreement with existing customers. The dispute, the court concluded, turned on the meaning of the “change of terms” provision in the original account agreements. Noting that the account agreements were adhesion contracts, the court held that their interpretation was a legal question, even if the provisions were ambiguous. “When ambiguities in a standardized contract, like the account agreement involved here, cannot be dispelled by application of the other rules of contract interpretation,” the court noted, “they are resolved against the drafter.”¹¹⁴

Though treating interpretation as a legal issue, the court still referred to its task as “ascertain[ing] the intent of the parties.”¹¹⁵ Yet it did not look to the subjective intent of the parties in that case. Rather, it applied the “canons of contract interpretation” to rule that “the parties did not intend that the change of terms provision should allow the Bank to add completely new terms such as an ADR [alternative dispute resolution] clause simply by sending out a notice.”¹¹⁶ In making that ruling, the court relied on both the words of the agreement and on case law regarding what it takes to waive one’s right to a jury trial.

*Caldwell v. KFC Corp.*¹¹⁷ illustrates this point in a dispute over the scope of an arbitration clause in a restaurant employment agreement. The court deemed the agreement to be a contract of adhesion and noted that such contracts are construed “according to the reasonable expectations of the adhering party.”¹¹⁸ Denying a motion to compel arbitration, the court held that the plaintiff/employee “would not have reasonably understood” that the agreement he signed would require him to arbitrate a future civil rights or retaliatory termination claim.¹¹⁹ Again, there was no discussion about actual

113. 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998).

114. *Id.* at 286.

115. *Id.* at 287.

116. *Id.* at 289. *See also In re Parker*, 269 B.R. 522, 530–31 (D. Vt. 2001) (finding lease to be contract of adhesion and interpreting it legally); *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 433 (N.C. Ct. App. 2004) (interpreting arbitration clause in credit card agreement legally); *Cf. Citibank (S.D.), N.A. v. Hauff*, 668 N.W.2d 528, 532–33 (S.D. 2003) (interpreting credit card legally, but considering testimony by representative of credit card company as evidence of the purpose of provision in credit card agreement).

117. 958 F. Supp. 962 (D.N.J. 1997).

118. *Id.* at 974.

119. *Id.* at 975.

intent. Rather, the question, which the court treated as a legal issue, turned on what the employee *would have* reasonably understood.

E. Contract Interpretation as Law-Determining—Indemnity Provisions

Courts also frequently interpret indemnity agreements legally, which is understandable given the similarities between indemnity and insurance.¹²⁰ But this cannot be justified on contract of adhesion grounds because many (if not most) indemnity agreements are negotiated and applicable only to the contracting parties. Rather, it is best understood as a manifestation of the traditional approach, justified by the complexity and recurring nature of indemnity provisions.

MT Builders, L.L.C. v. Fisher Roofing Inc.,¹²¹ a construction defect case in which a general contractor sought indemnity from a subcontractor, is illustrative. Affirming summary judgment for the general contractor, the court first noted that interpretation of the indemnity provision presented a legal question. Further, if the provision's meaning was "uncertain after consideration of the parties' intentions, as reflected by their language in view of surrounding circumstances, a secondary rule of construction requires the provision to be construed against the drafter."¹²²

The court then looked to the language of the provision, concluding that it was a "narrow form" of indemnification that only covers losses to the extent caused by the indemnitor or someone for whom the indemnitor is responsible. As authority for that ruling, the court did not rely on testimony about what the parties understood their language to mean or other such factual matters. It relied instead on a hornbook and case law construing identical language.¹²³

Another example, *Nunez v. American Building Maintenance Co. West*,¹²⁴ involved an indemnity provision in a janitorial service agreement. Despite law in the same jurisdiction holding that the interpretation of an ambiguous

120. *See, e.g.*, *Tateosian v. State*, 945 A.2d 833, 838 (Vt. 2007) ("[W]hile we hold that insurance law principles do not apply completely to noninsurance contractual indemnity relationships, they may be helpful to resolve individual issues.").

121. 197 P.3d 758 (Ariz. Ct. App. 2008).

122. *Id.* at 763.

123. *Id.* at 766–68.

124. 190 P.3d 56 (Wash. Ct. App. 2008).

contract is a jury question,¹²⁵ the court began its analysis by declaring that “[i]nterpretation of contract terms is a question of law” and “[u]nder the rules of contractual construction, we resolve any ambiguity in the indemnity clause against the drafter.”¹²⁶ The court then analyzed the indemnity provision at issue in light of a similar provision in another case and affirmed summary judgment.¹²⁷

The analysis in these cases is like that in insurance cases, and unlike the fact-based analysis for ordinary contracts. Why? Courts rarely say so, but there are two reasons that explain it, which we have already discussed in connection with insurance policies. First, the courts may have a sense that indemnity provisions are too technical for juries to meaningfully understand and interpret. This reasoning harkens back to the traditional rule.¹²⁸ While it may no longer be necessary (if it ever was) for judges to interpret all written contracts, there may still be good reason for them to interpret the Byzantine legalese of indemnity clauses.

A second reason is that predictability and efficiency are promoted and litigation is avoided when there is a body of law that says specific language has a specific legal effect. As one commentator noted: “A standardized interpretation of particular written words (e.g., ‘time is of the essence’) creates a ‘channel’ by which the parties can achieve the mutual goals, with little risk that intentions will be frustrated by judicial or jury error.”¹²⁹

To illustrate, take the rule in some states that a general indemnity provision—that is, one that does not address the effect of the indemnitee’s negligence—provides indemnity for a loss resulting in part from the indemnitee’s passive negligence but not its active negligence.¹³⁰ Without that rule, every time an indemnity provision failed to address the effect of the

125. *See, e.g.*, *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 46 P.3d 812, 819–20 (Wash. Ct. App. 2002) (“If the contract’s written words have two or more reasonable meanings (i.e., are ‘ambiguous’) when read in context, a court may not grant summary judgment or direct a verdict; instead, it must put the case to a trier of fact.”).

126. 190 P.3d at 58, 59.

127. *Id.* at 59–60. *See also* *Chester Upland Sch. Dist. v. Edward J. Meloney, Inc.*, 901 A.2d 1055, 1061–62 (Pa. Super. Ct. 2006) (interpreting indemnity contract legally and construing the provision against its drafter); *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 532 P.2d 97, 100 (Cal. 1975) (interpreting indemnity provision legally in light of case law).

128. *See, e.g.*, *Ulico Cas. Co. v. Atlantic Contracting & Material Co., Inc.*, 822 A.2d 1257, 1266 (Md. Ct. Spec. App. 2003) (“The interpretation of a written contract is ordinarily a question of law for the court and, therefore, is subject to de novo review by an appellate court.”) (quoting *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620, 629–30 (Md. 2001)).

129. Whitford, *supra* note 112, at 949.

130. *Rossmoor Sanitation*, 532 P.2d at 100.

indemnitee's negligence, the finder of fact would have to hear evidence regarding what those particular parties intended. With it, contracting parties know in advance how their language will be interpreted.

Some cases do treat the interpretation of indemnity provisions as a fact issue.¹³¹ But this means the effect of indemnity language depends on a jury's evaluation of extrinsic evidence in any particular case. Thus, a lawyer could lift indemnity language directly from the case law, use that exact language in different contracts, and those provisions could have different meanings in different lawsuits. Interpreting such provisions legally prevents this result.

F. Contract Interpretation as Law-Determining—Other Law-Guided Provisions

While indemnity clauses are probably the most common kind of non-adhesive provision subject to legal interpretation, a variety of others are frequently treated the same way. Examples include rights of first refusal,¹³² force majeure clauses,¹³³ a “waiver of subrogation” provision,¹³⁴ and a “notice and opportunity to cure” provision.¹³⁵ These provisions share the characteristics of being both technical and recurring. Cases interpreting them tend to compare the provision at issue to similar provisions in other cases, rather than the kind of evidence-based quest for intent one finds in other contract disputes.

Glick v. Chocorua Forestlands L.P.,¹³⁶ for example, involved the interpretation of a right of first refusal provision. Rather than focusing on what the parties to that particular provision intended, the court analyzed the contract language and context, and looked to case law interpreting similarly-worded provisions.¹³⁷ A different court approached a force majeure provision in an oil and gas lease the same way in *Moore v. Jet Stream Investments*.¹³⁸ Noting that the clause “will be interpreted based on the plain, ordinary, and generally accepted meaning of the language,” the court

131. See, e.g., *In re Blunt*, 183 B.R. 302, 305 (Bankr. M.D. Fla. 1995); *Woodruff v. Leighton Ave. Office Plaza, Ltd.*, 622 So.2d 304, 307 (Ala. 1993).

132. *Glick v. Chocorua Forestlands Ltd. P'Ship.*, 949 A.2d 693, 700–01 (N.H. 2008).

133. *Moore v. Jet Stream Invs., Ltd.*, 261 S.W.3d 412, 419–22 (Tex. App. 2008).

134. *Stop and Shop Supermarket Co. v. ABCO Refrigeration Supply Corp.*, 842 A.2d 1194, 1199 (Conn. Super. Ct. 2003).

135. *Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1166, 1172–74 (D. Haw. 2007).

136. 949 A.2d 693 (N.H. 2008).

137. *Id.* at 700–01.

138. 261 S.W.3d 412 (Tex. App. 2008)

interpreted the provision legally, supporting its interpretation with citations to other cases interpreting similar provisions.¹³⁹

I call provisions like these “law-guided” because their drafting and interpretation is guided by an existing body of law. The policy reasons for interpreting such provisions legally, though rarely articulated, are the same as those for indemnity provisions: complexity and predictability. One court’s explanation of its ruling in a subrogation case makes this point:

The majority of jurisdictions have interpreted this clause as a bar, finding the purpose of this waiver of subrogation provision was, in conjunction with the other contractual provisions, to allocate risks and costs among the parties to the contract. This construction promotes certainty as to the liability of the parties to these standard contracts, reduces litigation, avoids work interruptions and protects the contracting parties from loss by bringing all property damage claims under the owner’s all-risk builder’s policy.¹⁴⁰

The argument against this approach is that it places what courts *think* language should mean above what the parties to a particular contract *intended* it to mean. The trade-off, however, is predictability, and courts that interpret law-guided provisions legally are in large part doing so to promote that value.

Yet while it is fair to conclude that most courts treat the interpretation of insurance policies and indemnity clauses as a legal issue, there is no discernable pattern for law-guided provisions. Ultimately, each jurisdiction has to determine whether any such provision, when negotiated, should be treated the same way as ordinary contracts and interpreted by the jury when ambiguous, or whether policy reasons warrant treating their interpretation legally.

G. Different Kinds of Contracts Are Interpreted Differently

I do not represent the foregoing to be a survey of all cases or jurisdictions; far from it. But the cases cited are representative enough to

139. *Id.* at 420–21.

140. *Stop and Shop Supermarket Co. v. ABCO Refrigeration Supply Corp.*, 842 A.2d 1194, 1199 (Conn. Super. Ct. 2003).

suggest that the answer to the question “is contract interpretation a legal issue or a fact issue?” is “sometimes one, sometimes the other.”

The challenge is to articulate the principle by which to make this distinction. A rule that says “contract interpretation is a question of law” is overbroad because it does not account for the many cases in which the intended meaning of ordinary, negotiated contracts is a fact question. A rule that says “contract interpretation is a question of fact” is overbroad because it ignores the many contract provisions that are interpreted legally. There has to be a rule to tell us when contracts are interpreted legally and when factually.

The next Section takes a stab at articulating such a rule. It first discusses two approaches courts have used to distinguish when contracts are interpreted legally and when factually, and concludes that neither is adequate. It then proposes a rule that, consistent with the above discussion, makes the choice between legal interpretation and factual interpretation dependent on the nature of the contract or provision at issue.

V. RULES FOR DETERMINING WHETHER CONTRACT INTERPRETATION IS LAW OR FACT

A. Is Ambiguity the Deciding Factor?

As we have seen, one common way courts separate when contract interpretation is a legal question from when it is a fact question is to distinguish between ambiguous and unambiguous contracts. According to this approach, when a contract is ambiguous—when it is reasonably susceptible to more than one interpretation—its interpretation is a fact question. When it is unambiguous—when reasonable people would agree about what it means—its interpretation is a legal question.¹⁴¹

The ambiguity rule is closely related to the parol evidence rule, which holds that extrinsic evidence may be admitted to aid in the interpretation of ambiguous contract provisions.¹⁴² Extrinsic evidence could be anything from correspondence between the contracting parties, to testimony about customs and conduct, to a party’s recollection about what was discussed during negotiations, to simply one party’s testimony about what he or she understood certain language to mean. If a provision is ambiguous, such

141. See RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (1981); CORBIN, *supra* note 46, § 24.30, at 326–27; WILLISTON, *supra* note 46, § 30.6, at 77–85.

142. See CORBIN, *supra* note 46, § 579, at 126–30; WILLISTON, *supra* note 46, § 33.39, at 813–16.

evidence may be admitted and considered by the trier of fact to aid in determining what the provision means. If it is unambiguous, there is no need to admit parole evidence and no need to submit the issue to the trier of fact.

This rule of ambiguity explains a certain class of cases: those involving ordinary, negotiated contracts. But it does not account for the many cases in which contracts are interpreted legally irrespective of ambiguity. The only explanation for these cases is that the courts believe—whether they express it or not—that the nature of the contract or contract provision makes it ill-suited for fact-specific interpretation by a jury.

As discussed earlier, the ambiguity rule is best understood as a specific application of the summary judgment rule. In those cases in which contract interpretation is a fact question, the court can decide the question “as a matter of law” if the language and/or extrinsic evidence is so clear that a reasonable jury could only reach one conclusion regarding the contract’s meaning.

B. Interpretation Versus Construction

Another attempt to distinguish legal from factual treatment of contracts distinguishes between “interpretation” and “construction.”¹⁴³ According to this view, interpretation is the process of determining the meaning of words the parties agreed to and is a fact question; construction involves determining the legal effect or operation of those words and is a legal matter.¹⁴⁴ As Williston explains it:

The word “interpretation” is used with respect to the language chosen by the parties to manifest their intent; it is the process of applying the appropriate standards to words the parties have used in their agreement in order to determine the meaning of the words. “Construction,” on the other hand, involves the court determining, as a matter of law, not the sense of the words or symbols, but the legal meaning of the entire contract; the word is rightly used whenever the import of the writing is made to depend upon

143. See CORBIN, *supra* note 46, § 24.3, at 7–11; WILLISTON, *supra* note 46, § 30.1, at 7–10; PATTERSON, *supra* note 46, at 833–38. See, e.g., *Morton v. Hewitt*, 202 F. Supp. 2d 394, 396 (D.V.I. 2002); *Ram Constr. Co. v. Am. States Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984); *Marsh v. Rheinecker*, 641 N.E.2d 1256, 1257 (Ill. App. Ct. 1994); *Berg v. Hudesman*, 801 P.2d 222, 226 (Wash. 1990).

144. *Ram Constr.*, 749 F.2d at 1053.

a special sense imposed by law. In short, interpretation involves ascertaining the meaning of contractual words, while construction involves deciding their legal effect. Thus, interpretation of the contractual language is the first step towards proper contract construction—the process which occurs when a court determines the legal effect an agreement will have. As understood in this sense, “construction” is necessarily a question of law, while “interpretation” may be a question of law or fact depending on whether the language of the contract is ambiguous or otherwise requires resorting to extrinsic evidence.¹⁴⁵

This description of “construction” is a bit fuzzy, but it suggests the term encompasses various decisions a court may make regarding contract language *other* than deciding what the language means, which would be interpretation. For example, when a court determines whether a provision is unconscionable, a determination that is typically a legal question,¹⁴⁶ it is doing something other than interpreting the provision. It may have to interpret the provision first (it is hard to decide whether a provision is unconscionable without knowing what it means), but the subsequent determination of unconscionability is a different task one might characterize as “construction.”¹⁴⁷

Similarly, when the court is called upon to engage in “gap-filling” by supplying reasonable contract terms, some authorities call that construction.¹⁴⁸ For example, when the parties to a supply agreement disagreed over whether the buyer was obliged to order before the seller could determine the price, or whether the seller had to determine the price before the buyer could order, the court found the agreement silent on the issue and filled in the missing term, holding that the buyer had to go first.¹⁴⁹

If the term “construction” is restricted to these kinds of non-interpretation decisions, then there is a meaningful distinction between

145. WILLISTON, *supra* note 46, § 30.1, at 8–10.

146. *See, e.g.*, Mastroianni v. Fairfield County Paving, L.L.C., 942 A.2d 418, 423 (Conn. App. Ct. 2008); Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 60 (Ariz. 1995).

147. *See* Patterson, *supra* note 46, at 835.

148. *See id.* As the Restatement explains this doctrine: “When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.” RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981).

149. Family Snacks of N.C. v. Prepared Prods. Co., 295 F.3d 864, 869–70 (8th Cir. 2002).

interpretation and construction, albeit one that does not resolve the issue of when interpretation should be treated as legal or factual. Some courts, however, blur the distinction by calling it “construction” whenever the court interprets contract language legally.

For example, in *Burgeson v. Columbia Producers*,¹⁵⁰ parties to a farm lease disputed which was responsible for repairs to underground wells, pumps and pipelines. The contract made the lessee responsible for maintaining and repairing “all of the said premises, fences and irrigation equipment, and all other improvements.”¹⁵¹ Following a bench trial, the court found that the landlord was responsible for the repairs.¹⁵² On appeal, the appellate court deemed the issue one of “construction” subject to de novo review, rather than one of interpretation.¹⁵³ Having declared the issue legal, however, the court examined not just the language of the agreement, but all the extrinsic evidence admitted at trial, concluding that “[t]he wells, pumps, and buried mainline fit the definition of improvement and Columbia Producers is responsible for the maintenance.”¹⁵⁴

It is hard to understand how what the court did in *Burgeson* is anything but interpretation. It reviewed extrinsic evidence, reviewed the contract language and reached a conclusion regarding the meaning of the language. The court was not filling gaps; it was interpreting the contract.¹⁵⁵ But by labeling the issue “construction,” the court treated it legally.

Many courts use the term “construction” when deciding the meaning of insurance policy or indemnity language.¹⁵⁶ Used in this way, the distinction between interpretation and construction is a useful way of characterizing the difference between how juries decide the meaning of contracts—i.e., by considering extrinsic evidence and determining the parties’ subjective intent—

150. 803 P.2d 838 (Wash. Ct. App. 1991).

151. *Id.* at 839.

152. *Id.*

153. *Id.* at 840 (quoting ARTHUR CORBIN, CORBIN ON CONTRACTS § 534, at 11–12 (3d ed. 1960)).

154. *Id.*

155. *See also* Marsh v. Rheinecker, 641 N.E.2d 1256, 1258 (Ill. App. Ct. 1994).

156. *See, e.g.*, Jacobs Constructors, Inc. v. NPS Energy Servs., Inc., 264 F.3d 365, 371 (3d Cir. 2001) (“The construction of an indemnity contract is a question of law for the court to decide.”); Flaxman v. Gov’t Employees Ins. Co., 993 So.2d 597, 599 (Fla. Dist. Ct. App. 2008) (“The construction of an insurance policy is a question of law for the court and is subject to de novo review.”); Am. Family Mut. Ins. Co. v. Stagg, 912 N.E.2d 1283, 1287 (Ill. App. Ct. 2009) (“[T]he construction of an insurance policy is a question of law.”); Gen. Cas. Co. of Wis. v. Outdoor Concepts, 667 N.W.2d 441, 443 (Minn. Ct. App. 2003) (“Construction of an insurance policy involves a question of law.”).

and the way judges decide the meaning of contracts—i.e., by looking to case law and considering how a reasonable person would understand the language.

But this still begs the question of how we decide which contracts are construed by courts and which ones are interpreted by finders of fact. The distinction between construction and interpretation does not answer this question. Whether “construction” refers to the judicial process of deciding what contract language means, or tasks other than deciding what contract language means, a rule is still needed to distinguish when the court determines a contract’s meaning and when the jury does.

C. Who Interprets a Contract Depends on the Nature of the Contract or Provision at Issue

The correct rule should be clear by now. The interpretation of ordinary, negotiated contracts is a question for the trier of fact, the interpretation of adhesion contracts is a legal question for the court, and the interpretation of certain law-guided provisions is also a legal question. Thus, who interprets a contract depends on the nature of the contract or provision at issue.

Under this rule, there are lots of easy cases. Insurance policies and credit card agreements are always interpreted legally because they are adhesive. Ordinary contract provisions unique to the parties are interpreted factually, unless the language is unambiguous, in which case summary judgment or judgment as a matter of law would be appropriate.

Law-guided provisions that are not adhesive present harder cases. If a particular jurisdiction declares that “the interpretation of an indemnity provision is a legal question that we review *de novo*,” it has declared such provisions to be law-guided and therefore always interpreted legally irrespective of ambiguity. But if there is no such ruling as to a particular provision—a right of first refusal, for example—then the court has a decision to make. Does it want to subject such provisions to the modern approach and submit their interpretation to juries? Or does it believe considerations of predictability or competence justify an exception to the modern rule for such provisions?¹⁵⁷

157. This raises the possibility that parties might contractually specify whether their provisions are to be interpreted legally or factually. For example, contracting parties concerned about the unpredictability of juries might include the following: “This contract and all its provisions have been drafted by and reviewed by counsel for both parties, who have reviewed certain case law in preparing this contract. The provisions of this contract are

Undoubtedly, some jurisdictions are more generous than others in referring contract interpretation to juries. It is also conceivable that some courts would find the modern approach appropriate for even law-guided provisions and adhesion contracts. But if a court is going to interpret some contracts legally and others factually, and it is committed to principled decisionmaking, it should be able to articulate a reasoned basis for the difference in treatment.

CONCLUSION

This Article does not mean to propose a change in the law; the approach to contract interpretation proposed is consistent with how most courts treat the issue. Courts do in fact treat insurance policies, adhesion contracts, and sometimes law-guided provisions differently than they do ordinary, negotiated contracts. It is not too much to ask that the reasons for doing so be transparent.

law-guided and it is the intention of the parties that this contract will be interpreted by a court of law and not by a jury.”