The Contract Interpretation Two-Step: Step One, Ambiguity Determination and Step Two, the Battle of the Two Reasonable Meanings

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This article clarifies the two-step approach used by the courts to analyze contract interpretation issues and introduces the concept of the 'Battle of the Two Reasonable Meanings'. The academic debate, which centers around whether the textualist approach (plain meaning and four corners of the document approach) or contextualist approach (use of outside evidence) is better, is a false dichotomy, both approaches are used, albeit in different steps (textualist at Step 1 and contextualist at Step 2) in the contract interpretation analysis.

Keywords: contract interpretation, scope

INTRODUCTION

Contract interpretation issues continue to be some of the most complex types of issues resolved by courts and often the cases appear to be confusing[1] and inconsistent[2]. Lifshitz and Finkelsteinn state "contract interpretation is among the most frequently litigated civil issues, and is the largest cause of litigation between business entities."[3]

Most words and phrases are, to some extent, ambiguous and any word or phrase might have different meanings to different people. "Most words are ambiguous: a single word form can refer to more than one different concept… This form of ambiguity is of often referred to as "lexical ambiguity."[4] For this reason, the law of contract ambiguity, a subset of contract interpretation law, has been adopted. Contract interpretation law is the law used whenever the parties disagree concerning what the contract says or requires. Contract ambiguity is a subset of contract interpretation law and is needed when the contract has two or more reasonable meanings. The courts have many rules at their disposal when deciding which of the two reasonable meanings will prevail in the litigation.

This Article recommends against giving a party a nonbargained-for benefit merely because the contract is ambiguous; the law should not allow this. Allowing a party to receive a nonbargained-for benefit because of contract ambiguity reduces the value of a contract. Since ambiguity is present in all language interactions preventing one party from obtaining a nonbargained-for benefit because of ambiguity promotes the formation of contracts, a socially recognized goal.

Contract interpretation law promotes the interests of society and contracting parties. Ambiguity determination is superior to enforcement of imperfect contracts according to Shavell.[5] The law providing for the interpretation of ambiguous contracts improves on an otherwise imperfect contract and thus produces a better contract. This interpreted contract, rather than the original imperfect contract, now governs the parties' joint enterprise at least on the disputed issue.[6]

Cases involving contract interpretation issues can arise for many reasons – some bona fide and some spurious, many someplace in between. The closer the case is to spurious end of the spectrum, the more likely the textualist or plain meaning approach can be used to resolve the issue. As the interpretation issue approaches bona fide, the contextualist approach must be used.

This Article clarifies the approach of the law – textualist or contextualist – depends on whether the text is ambiguous or not. In other words, the textualist vs. contextualist debate is a false dichotomy. The law uses a two-step approach, first textualist then contextualist.[7]

This Article argues it should be recognized the textualist approach is only the first step in a contract interpretation problem - Step One. Step One is a determination of whether or not the contract is ambiguous. If the contract is *not* ambiguous[8] then the issue is resolved at this level. In other words, if the textualist or plain meaning step, resolves the contract interpretation issue, the analysis ends. If not, it must continue to Step Two, resolving the ambiguity.

This Article suggests a closer review of the actual approach taken by the courts, in this Article referred to as the 'Contract Interpretation Two Step', is an effective strategy and does not depend on a textualism vs. contextualism argument. The academic discussion should not be about textualism vs. contextualism but about the effectiveness of specific laws[9] used in in Step Two which is called the 'Battle of the Two Reasonable Meanings'. Step Two is used only if there is no plain meaning, but instead two reasonable meanings. Step Two is the contextualist approach must be adopted to resolve the issue.

Part 1 of this article reviews the academic approach to contract interpretation issues. Part 2 reviews the economic principles involved and gives an overview of the rational person as defined by economics. Part 3 reviews the law of gifts, another area of the law where nonbargained-for promises are not enforced by the law. Part 4 reviews the legal approach to contract interpretation issues and introduces the concept of the 'Contract Interpretation Two Step.' The two steps are first, ambiguity determination primarily using the plain meaning rule and then, if no plain meaning exists instead two reasonable meanings exist, several rules are employed to determine which of the two reasonable meanings prevails.

PART 1: ACADEMIC APPROACH TO CONTRACT INTERPRETATION ISSUES: TEXTUALISM VS. CONTEXTUALISM

At the foundation of the academic debate regarding contract interpretation are two seemingly antagonistic views: textualist (also called "formalist"[10]) and the contextualist[11] (also called "substantive"[12]) The textualist approach relies upon the plain meaning of the words and the contextualist approach uses other legal doctrines to aid in the interpretation of the contract. The debate is presented as a dichotomy but is a false dichotomy.

Schwartz and Scott are of the opinion, at least with regard to business contracts, the textualist approach is the one most desired by firms and the contextualist approach is ill-advised and many of the contract interpretation rules adopted by courts should be eliminated.[13] The contextualist interpretive principles are reflected in the Uniform Commercial Code and the Restatement of Contracts (Second)[14] and include the concept of good faith and other concepts.[15]

The problem with the textualist approach is it can only be used when the text, that is the linguistic meaning of the words, is *not* the issue and the contract is *not* ambiguous. If this approach is used with ambiguous contracts, then the linguistic meaning of the words is the issue and therefore the linguistic meaning of the words cannot be used to resolve the issue - the logical fallacy of begging the question would be committed.[16]

Schwartz and Scott[17] are of the opinion courts are divided over whether to apply one theory or the other. However, this approach presents a false dichotomy and a review of cases reveals the courts take different approaches are taken depending on the fact pattern of the case, not because courts are divided. True individual judges or courts may gravitate to a certain view (textualist vs. contextualist) but this is true for every dispute involving every legal issue. This Article presents an alternative approach to this dichotomy, one reflecting more closely what the courts are doing. A review of contract interpretation law is presented in Part 3, *infra*, and this approach, by the courts, can be seen.

Many academics have chimed in on the Schwartz and Scott analysis. Bowers argues Schwartz and Scott misconceive firms' preference for contract doctrine and underestimate the damage interpretational errors can do to contracting parties.[18] Bayern argues Schwartz and Scott seriously misstate the costs and benefits of formalism.[19]

Lifshitz and Finkelstein[20] recommend the textualist approach (corresponding to the law's "plain meaning" rule) should be used with some exceptions. They suggest what they call an "authorial-linguistic" approach to contract interpretation. Their approach concludes that the linguistic meaning of the words should limit the interpretation of the contract and rejects the use of equitable values, although they have a few limiting exceptions. This approach more closely corresponds to what is actually happening in the law as explained in Part 4, *infra*.

Whether the textualist or contextualist approach is better was addressed by Silverstein[21] and neither was found to be better using his data collection approach. Katz argues the traditional scholarly approach (using the terms formal vs. substantive) fails because of a lack of information about the likely consequences of the different approaches. He suggests different parties to different contracts may prefer or ought to be delegated the power to choose one approach over another. Based on a review of cases, Katz claims formalism is relatively more important to experienced commercial actors, and substantive interpretation better suited to transactions involving consumers and other amateurs. Katz suggests further study of (1) contracts where formalism is more suited and (2) other types of contracts where substantive interpretation may be more suited. Katz also provides a basic framework within which such a systematic analysis could take place.[22]

Macneil, the originator of relational contract theory (transactions by actors in ongoing relationships differ from transaction in one-off relationships) outlined ten common contract norms he believes exist and all contracts fall somewhere along what he calls a "relational spectrum" regarding these norms.[23] Once such norm is good faith. In relational contract theory, greater attention is paid to the desirability of fairness and cooperation to overcome lying and undesirable actions,[24] short-term self-interest may need to be subordinated to long-term self-interest.[25]

Cimino[26] suggests relational contract theory provides insight into modern commercial contracting and has equipped economic analysts to work with both the economic and social aspects of contracting. Current work in the area of law and economics and the study of incomplete contracting have started to incorporate some of the concepts of behavioral economics, for example, accepting bounded rationality. Researchers can begin to detail the social and relational aspects of exchange by incorporating relational contract theory. While legal scholars have largely ignored or discounted the importance of relational contract theory, business research, combining relational context with institutional economic or organizational analysis, might well lead the field toward an understanding of the economics of contractors' relational expectations. An increased understanding, Cimino suggests, over time, may help courts better isolate opportunistic conduct, help business people secure more predictable results from litigation, and better synchronize contract law with commercial practices. It may, over time, help us better understand what it means to contract. This Article presents one such opportunistic conduct – a party attempts to obtain a nonbargained-for benefit from the contract because of an ambiguity – and recommends the courts not condone this.

Researches are attempting to empirically confirm the presence of relational behaviors in modern contracting, and they have begun to discover the sort of data which might make it possible to better account for the economic effects of relational contracting behavior in both legal theory and contract law doctrine. Business social sciences literature, including marketing and management literature, has economically operationalized relational concepts. Cimino's article[27] also outlines some of the possibilities and challenges of operationalizing relational contract behaviors in law. Mainstream contract law scholarship has thus far failed to take the relational contract theory critique of contract law seriously but the research suggests it has significant meaning to parties entering into contracts and relationally-minded economists.

For an extremely out of the box solution to the problem see Ben-Shahar and Strahilevitz article[28] suggesting much of the contract interpretation problem be solved by the general public through what they

call the "survey interpretation method". According to this method disputes are resolved through large surveys of representative respondents and choosing the meaning the majority supports. This is an unlikely eventuality however. Some contract interpretation issues do present issues of fact, which are decided by a jury.[29]

PART 2: BENEFIT MAXIMIZER AKA THE RATIONAL PERSON[30]

Fundamental concepts of microeconomics tell us most humans are rational[31] or refer to the rational person who will attempt to maximize benefits received in any given situation. No reason exists to expect contract interpretation is an exception. The participants in a contract, if rational, will attempt to maximize the benefits received from the contract whether or not the benefits have been bargained for.[32] The human drive toward maximization is limited in many ways: law, ethics, and religion to name a few.

Laws limit maximization behavior (rational behavior) by changing the stakes in a legal dispute. Although a legal dispute can be used as way of obtaining a benefit, albeit not always the most efficient method, it is a common method as revealed by the number of lawsuits filed every day.[33] This is an example of bounded rationality. That is, many people do not fully comprehend the costs in time, effort and resources needed to engage in effective litigation, that is their choice to start a lawsuit may be 'bounded rational' or 'rationally bounded' (appear rational to the party) but is actually irrational because the costs are not adequately understood and taken into consideration by the party.

The importance of the law in affecting behavior may seem obvious to lawyers but it was not always so and is still the subject of analysis. Schlag quotes Coase as saying "What I wanted to do was to improve our analysis of the working of the economic system. Law came into the article because, in a regime of positive transaction costs, the character of the law becomes one of the main factors determining the performance of the economy."[34]

Before Coase, the neoclassical model of economics treated legal regimes as an unproblematic background for the operation of decentralized competitive markets. And thus the identity and character of basic legal regimes were placed beyond examination. Contributions were limited to a small number of discrete problems where the neoclassical economic model of markets failed - either because the model's basic conditions (e.g., decentralized markets, divisibility of goods) were violated or because the model otherwise did not apply. Economic analysis played a role in dealing with anti-competitive practices such as monopolization, price-fixing, and the like. Viewed in terms of legal subject matter, economic analysis played its greatest role in antitrust law. Some neoclassical economics work was done in tax law, corporate law, public utility regulation, and patent law.[35]

Enter Coase and his work on the problems of social cost.[36] From this work has come transaction cost economics. However, the conclusion is not about transaction costs but three crucial matters: The mistakes of the Pigouvian approach (dealing with government tax to reduce the social costs of externalities), the fallacies of blackboard economics, (economic theory at the time was too simplistic and compared a non-existent actual to an unattainable ideal.) It also failed to take into account the legal implications of transactions. Coase insists it is necessary to specify legal rights in order to know what results the parties will reach in any market exchange. In Coase's view without an initial delimitation of legal rights, economic analysis cannot even get started, let alone finish.[37]

Schlag laments the failure of economists and lawyers to take Coase's actual concepts of social cost to a higher level and recommends doing so.[38] In his paper he suggests alternative treatments for transaction cost analysis and suggest it is important but not as important as the attention it is getting.[39]

People file lawsuits because they believe they will receive a benefit outweighing the costs. Laws can create incentives (or decrease the incentive) for future lawsuit filing behavior. For example, if the law is 'a party to a contract is not entitled to a nonbargained-for benefit merely because a contract is ambiguous' (one the premises of this Article), it is less likely future parties will attempt to receive a nonbargained-for benefit because a contract is ambiguous via litigation.

An example of the law preventing a nonbargained-for advantage, although not based on the analysis in this Article, can be seen in the case of *Appeals of -- B. J. Larvin, General Contractor, Inc.*[40] In this case

the government and the contractor entered into a contract for the demolition of an old commissary and construction of a new one. The contractor had the salvage rights[41] to the old commissary. At the time the contract was entered into the old commissary was still in operation and contained large quantities of goods being sold to military personnel and their families. The government was supposed to turn over the old commissary to the contractor on a specific date, apparently 7/1, but on this date the old commissary was still in operation and the delay in turning over the old commissary was due to the fault of the government. The contractor was able to do other work on the contract during this time and was not delayed in the performance of the entire contract.

The contractor (or the contractor's lawyer) apparently saw a nonbargainged for benefit there for the plucking because of the wording of the contract (contractor to have salvage and old commissary to be turned over to contractor on 7/1) and the government's delays. The contractor (or the contractor's lawyer) believed the law would determine the contractor was entitled to the goods or the value of the goods in the old commissary as of 7/1. However, the contractor's claim was rejected and the court did not give the contractor the nonbargained-for benefit consisting of the value of the goods in the old commissary on 7/1. The court said, "But we can find no language in the [contract] before us that can be reasonably construed to mean that [the government], in the event of a failure timely to deliver the building, agreed to vest in the [contractor] the title to all the merchandise in the building. Such a penalty for late delivery is so bizarre that there would have to be a very clear and express provision to that effect to permit recovery as [contractor] asserts." Without saying so, the court was preventing the contractor from obtaining a nonbargained-for benefit, a benefit not contemplated by the parties at the time the contract was entered into.

This does lead to the question of 'why is it important to limit the contract to the bargained-for benefits?' The simple answer is to promote and facilitate reliance on contracts[42] because contracts make a society and the parties to a contract more efficient – limited resources can be more efficiently (limited waste) allocated to benefit the parties to the contract and the economy in which the parties to the contract are operating.[43] If parties to contract realize they are entitled only to the bargained-for benefits they will be less likely to file lawsuits to get nonbargained-for benefits thus saving judicial system resources and also the resources of the party to the contract.

Economic analysis of contract interpretation law goes beyond the basics described above. Shavaell concludes some method of interpretation of contracts is always socially desirable. Interpretation is superior to literal enforcement of contracts as written because at the least, interpretation fills gaps which allows some parties to reduce the number of terms in their contracts.[44]

Eggleston[45] claims recent work in the law and economics of contracts suggests contracts ought to be highly complex and fine-tuned. Courts seem to be more willing to aggressively interpret incomplete contracts than complete contracts. Thus, completeness matters. However, she notes, in practice many contracts are relatively simple. She suggests this divergence between theory and practice suggests the assumptions underlying the economic models of contracts should be revised. She raises a question: Should courts enforce complex contracts more strictly than they enforce simple contracts? This concept has not been recognized in the law. The question of why contracts are less complex does raise the question of transaction costs,[46] the costs needed to make a contract complete and complex.

Kostritsky[47] discusses, in relation to the new production innovation economy[48], the incentives for adopting long-term agreements ("LTA") with its information sharing protocols. Those information sharing protocols help parties navigate uncertainty and promote informal enforcement of the contract. Despite the advantages, preliminary empirical data suggesting parties continue to use alternatives to the LTA. To explain the use and non-use of LTA's in the supply chain, this Article suggests a bargaining lens approach; this approach considers the individual interests of the parties, the particular context, the durable problems faced by parties, and the transaction cost minimization of contractual hazard theory. Each party in the supply chain will seek to solve problems of opportunism under conditions of uncertainty and will adopt a particular type of contract (LTA or alternative) only if the benefits of achieving the parties' goals through that contract form outweigh the costs. Firms constantly seek a way to minimize costs while maximizing contractual benefits. This search underlies the deliberate choice of some suppliers to opt into

or out of an LTA because they do not see the new benefits of the LTA to be greater than the net benefit of an alternative.

This bargaining lens theory will also provide guidance on whether and how the law should formally sanction parties. Using the bargaining lens dynamic to understand the parties' individual interests and their joint desire to minimize transaction costs to maximize value, can illuminate differences in agreements on such matters as the structure for resolving disputes. The LTA provisions for information sharing protocols may alleviate the problem of asymmetric information, reduce some of the risks of the unreliability of the supplier and reduce uncertainty about competence. They may also promote innovation and promote informal enforcement of contracts. However, there are other ways parties may wish to organize their contracts other than through an LTA with formal information sharing protocols but without a quantity term. Parties using alternative arrangements can still resort to informal enforcement mechanisms, even without an LTA. Their ability to sanction using informal reputational controls will work best if there are ongoing relations or if the buyer and seller are part of an extensive network. A network may be effective even if a close relationship between the parties does not exist.[49]

Transaction costs impede a party from making efficient decisions; if, for example, entering into a contract had zero transaction costs, the parties could develop a complete contract. The transaction costs preventing this can be divided into three broad categories.[50] The first is associated with searching and information gathering. Next are bargaining costs and finally, policing and enforcement costs.

All of these transaction costs play an important role in negotiating contracts, both in the construction industry and collective bargaining situations, and for parties on both sides of the negotiation. For example, the parties have many points to negotiate and the future interactions may be complicated or unforeseen. If the relationship is to last years, the cost of attempting to cover every conceivable future occurrence and include it in the contract is very high. It is desirable to trade off accuracy and completeness against contract writing and adjudication costs.[51]

The transaction costs to eliminate all ambiguities in a contract, particularly a complex contract, are huge and therefore ambiguities will remain in the contract. In addition, using ambiguous words such as ‘good faith’ and ‘reasonable’ lower the transactions costs associated with bargaining costs. Transaction costs associated with policing and enforcement may increase, particularly with a difficult opposing party.

PART 3: THE LAW OF GIFTS: NONBARGAINED-FOR BENEFIT

Fundamental black letter law holds the law will not enforce a promise to make a gift,[52] which by definition, is the receipt by one party of something of value by a giver who receives nothing in exchange. In comparison, the law will enforce a promise to exchange something of value between two parties, also called a contract. Posner says the reasons for this is gift-giving is not as socially valuable as a commercial exchange. Also, if the law were to enforce a promise to make a gift, it would actually reduce the value of gift giving to society because much gift-giving involves nonlegal relationships which derive a great deal of their value for the very reason they are voluntary and cannot be coerced.[53] Baron explains the difference is related to the different purposes of gifts vs. contracts. Gifts are benevolent, but contracts are formed because of self-interest. By definition a gift is a transfer without consideration.[54]

Consideration is said to settle the question of ‘which contracts should the law enforce?’ and the answer is ‘contracts supported by consideration’. This concept should not be subverted because a contract is ambiguous. Just as the law of gifts will not enforce a promise to make a gift because no consideration exists, so to the law should not award a party a windfall or nonbargained-for benefit if the contract is ambiguous because no consideration exists.

For consideration to exist four events must happen: Party A must give something of value[55] to Party B, Party A must get something of value from Party B, Party B must give something of value to Party A and finally, Party B must get something of value from Party A. If these four things happen, a contract is formed. If these four things do not happen, no contract is formed. Each party gets something of value, and each party gives up something of value. It is the goal of contract law to enforce the ‘something of value’ each side has agreed to receive, and each side has promised to give up. “By placing promise at the center

of contractual obligation, consideration theory privileges a conception of contracting individuals as knowing and willful, as taking on obligations in measured, calculable increments, exchanging their obligations for precise values."[56] This view, consideration is necessary for the law to enforce a promise, is basic to U.S. common law.[57] If a party to a contract receives a nonbargained-for benefit, no consideration exists for that exchange, and the rule requiring consideration is broken. The law should not give a party a nonbargained-for benefit merely because the contract is ambiguous.

PART 4: LEGAL APPROACH TO CONTRACT INTERPRETATION ISSUES: CONTRACT INTERPRETATION TWO STEP

A: Step 1 – Is the Bargained for Benefit Ambiguous?

Contract interpretation issues, sometimes referred to as issues of scope, require the determination of the meaning of a disputed word or phrase, whether the dispute is good, bad, or somewhere in between. When the cases are looked at carefully, and the conflicting interpretations of the litigants are clearly articulated, a pattern emerges: the courts are applying a two-step approach to these difficult issues.[58] "One of the most basic rules of contract interpretation is that courts are not to look outside the four corners of a contract unless the language of the contract is ambiguous."[59] This implies a two step approach. The first step is to determine if the benefit sought in the litigation is one that has been bargained for. See Table 1, Common Rules Used by the Courts to Determine the Bargained for Benefit. If the bargained for benefit which is the subject of the litigation is not clear, that is the contract is ambiguous, the court moves to the Step Two – Battle of the Two Reasonable Meanings.

TABLE 1
COMMON RULES BY THE COURTS TO DETERMINE IF THE BARGAINED FOR BENEFITS IS AMBIGUOUS

Step 1: Bargained for Benefit Determination	
Actual agreement of the parties	The actual agreement (bargained for benefits) of the parties at the time they entered into the contract controls and if the written words of the contract do not reflect this, the written words are irrelevant.[60]
Contract Ambiguity	A contract is ambiguous if it is capable of having two or more reasonable meanings.[61]
Plain or Ordinary Meaning	The plain or ordinary meaning of words prevails over convoluted or unusual meanings.[62]
Complete, Integrated Contracts	Parol evidence can be used by the court to determine if a contract is a complete, integrated, and/or final contract and if the contract is final,[63] complete,[64] or integrated,[65] and not ambiguous, the parol evidence cannot be used to modify the contract. It is enforced as written.

The primary purpose of the interpretation of the contract is to determine the actual agreement of the parties at the time the contract was entered into, in other words the actual bargained for benefits to be exchanged (consideration) irrespective of whatever words are written down on some piece of paper labeled 'contract'. Judges may toss out the written words of a contract. "The purpose of interpreting a contract is, of course, to accomplish the intentions of the parties at the time they entered into the contract. The words written down on a piece of paper are not necessarily the agreement of the parties; they may just be words on a piece of paper."[66] Parties should not be surprised when judges toss out the written words of a contract if they do not reflect the actual bargained for benefits.

For a simple example of this rule see *Nucla Sanitation District v. Rippy*.[67] In that case, the owner sent the contractor, the low bidder on a sewer construction project, a written contract for signature. The contractor signed and returned the contract but with a letter attached saying that his acceptance was conditional on an extension of the time for completion. The owner removed the letter and returned a signed copy of only the 'contract' to the contractor and claimed a binding contract existed with the original completion time. Since there was no intent on the part of the contractor to enter into the contract returned by the owner, no contract was formed and was thrown out. The contractor had made a counteroffer only even though the plain meaning of the signed 'contract' would have otherwise obligated the contractor. This is an example of the statement: "But paper and ink possess no magic power to cause statements of fact to be true when they are actually untrue."[68]

The plain meaning of the words[69] is still the primary rule used to determine the actual agreement of the parties. However, fixating on the plain meaning ignores not only situations such as the *Nucla* case, but also the science of linguistics. This science recognizes that language which is often ambiguous.[70] "Most words are ambiguous: a single word form can refer to more than one different concept… This form of ambiguity is of often referred to as 'lexical ambiguity.'"[71] One of the purposes of the law is to limit lexical ambiguity in the law and much of legal analysis is spent in specifying and defining words used in laws and contracts.

Certainly, words written down on paper are helpful in many ways but parties to contracts tend to be more enamored of the written words in their contracts than the law. This is especially true in cases where the party is of the opinion that the ambiguous wording can give it a nonbargained-for advantage.

An example of this attempt to gain a nonbargained-for advantage can be seen in the case of *Teamsters Industrial Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc*. In that case the union sued the car manufacturer for contributions to pensions for probationary employees. The ambiguity arose because the contract defined "new employees" "probationary employees" (as another name for "new employees") and "regular employees" (employees who have worked for longer than 60 days and are then covered by the union contract). However, a section in the contract on pension contributions only referred to "employees" and the union filed suit seeking contributions to the pension plan for both regular and probationary employees some years later. The union saw a nonbargained-for advantage it could capitalize on because of the wording of the contract.

The appeal court agreed that the contract was ambiguous – that is the term "employees" could mean "regular employees" only or "regular and new employees". The court determined that although this would normally raise an issue of fact as to the intent of the parties at the time the contract was entered into, the evidence was overwhelming that neither party to the contract expected the employer to make contributions to the pension fund for probationary employees. The course of dealing[72] rule was used to determine the ambiguity in favor of the employer and stating that the contract required contributions only for "regular employees". That is the term "employees" as used in the disputed clause meant "regular employees". For five years the union was aware that the employer did not contribute for probationary employees, never raised the issue at collective bargaining negotiations, or at any time before filing the lawsuit. The pension fund itself never demanded contributions on behalf of probationary employees.[73] Therefore, the parties course of dealing or own treatment of the disputed term was "employees means "regular employees" only".

This is not to say the plain meaning rule is dead. Courts will use the plain meaning[74] rule to determine if the contract is ambiguous. If no lexical ambiguity exists then the plain meaning of the words applies. "[W]where a court finds that the terms of a contract are clear and unambiguous, the task of judicial construction is at an end and the contract terms must then be applied as written and the parties bound by them."[75]

The plain meaning rule is alive and well and able to dispose of many lawsuits where a party attempts to gain a nonbargained-for advantage at a relatively early stage and for a relatively low cost. Many plain meaning cases go into the unreported category,[76] that is cannot be cited a precedent. For an example see the case of *Ladner Testing Laboratories, Inc., v. United States Fidelity & Guaranty Company*[77]. In that case Ladner, a subcontractor, entered into a contract with the general contractor for the subcontractor to

do all of the testing on a certain highway project. The actual words of the contract were "ALL TESTING, FIELD AND LAB WORK EXCLUDING CONCRETE TESTING FOR NINTY-FIVE THOUSAND DOLLARS ($ 95,000.00)." The subcontract contained details on the types of testing and scheduling of the testing. At the end of the project Ladner, the subcontractor, requested and additional $40,000 for testing not related to concrete testing. The contractor refused to pay. Ladner sued. The court said, "Giving the term 'all' its usual, natural, and ordinary meaning as we are obligated to do under Tennessee law, we are compelled to rule in [the contractor's] favor [and dismiss Ladner's claim]. The word 'all' means 'all'. The phrase 'all the testing for $95,000' means the subcontractor will do all the testing for $95,000." The subcontractor is not entitled to an additional sum for testing.

The majority of courts follow some form of the plain meaning rule, which holds that a court will only rely on extrinsic evidence, such as parol evidence, to interpret a contract if the court has determined the language of the contract is ambiguous. What causes confusion with academic analysis at this point is the willingness of the court to view parol evidence to determine the bargained for exchanges but then ignore it. Many authors[78] go from a simplified version of the parol evidence rule (parol evidence will not be used to vary the terms of a complete, integrated, contract) to the mistaken assumption that parol evidence cannot be viewed by the court. This is incorrect, courts will likely review parol evidence presented to it in a contract interpretation case but will have no problem ignoring it if it is not appropriate.[79] A famous case holding that parol evidence could be admitted is Pacific Gas & E.Co. v. G.W. Thomas Drayage etc. Co where the court said, "A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained."[80]

One must always remember that "…the parol evidence rule fits none of the words in its name. It is not limited to parol (oral) testimony, does not involve the law of evidence and, given its many exceptions and varying phraseology, is not even really one rule."[81] The consideration of parol evidence by the court does not somehow mean the plain meaning rule is not or cannot be used. Again, a false dichotomy is presented: parol evidence or plain meaning rule. The reality is both can and do exist in the same case.[82]

In *Still v. Cunningham*[83] the court said extrinsic evidence may always be received by the judge on the interpretation of contract terms. Not all state courts would agree with the statement, but courts routinely review parol evidence and then decide how to treat it. Parol evidence is seldom ignored by the judge.

An example of the court's willingness to hear, but then ignore, parol evidence can be seen in the case of *Alaska Diversified Contractors, Inc., v. Lower Kuskokwim School District*.[84] Alaska Diversified entered into a contract with a school district to construct several schools. The date on the contract required completion by 8/31/1980 but Alaska Diversified testified that during a pre-bid conference the school district said it was acceptable for Alaska Diversified to complete construction up to eleven months later and that this was the purpose behind a contract provision which imposed only nominal liquidated damages for the first eleven months after the August 31, 1980 completion date. During the construction the school district pushed the contractor to finish by 8/31/1980 and the contractor sued for acceleration damages. The court refused to allow the parol evidence of the conversation at the pre-bid conference to modify the terms of the contract; the completion date was 8/31/1980 as clearly stated in the contract. No parol evidence was admissible to vary the express term of the contract. The court however did hear the parol evidence.

The plain meaning rule continues to be the subject of academic analysis.[85] Goh[86], in a discussion of the approaches taken by the highest courts in Australia, Canada, New Zealand and Singapore, that the supposed return to a textual analysis is more apparent than real. The proper debate to be had is not the choice between a textual or contextual analysis, but rather the extent to which the plain meaning rule should be applied.[87]

Mawakana[88] takes an interdisciplinary approach and argues for an expanded usage of extrinsic evidence in contract interpretation. This argument is based on a Federal Circuit decision, *Coast Federal Bank, FSB v. United States*[89] which the author believed portended a revival of the plain meaning rule. The view that the plain meaning rule is paramount is also expressed by Stubbs.[90]

For an overview of the plain meaning rule in insurance litigation see Geistfeld's article.[91] Insurance contract interpretation is an area where the rule of contra proferentem (ambiguities are resolved against the drafter of the document) is often used when the contract has been determined to be ambiguous.

For a unique approach to contract interpretation see the Ben-Shahar and Strahilevitz article.[92] This article recommends using surveys and experiments to solve contract interpretation problems.

B: Step 2: The Battle of the Two Reasonable Meanings

If the bargained for benefit (consideration) that is the subject of the litigation cannot be determined because the contract is ambiguous, the law moves to Step Two – Battle of the Two Reasonable Meanings. By definition, a contract is considered legally ambiguous if two *reasonable* meanings of the actual words or phrases used in the contract exist.[93] Note the word 'reasonable'. "[C]ontracts are not necessarily rendered ambiguous by the mere fact that the parties disagree as to the meaning of their provisions…That the parties disagree with a specification, or that a contractor's interpretation thereof is *conceivable*, does not necessarily render that specification ambiguous…A contract is ambiguous if it is susceptible of two different and reasonable interpretations, each of which is found to be consistent with the contract language…"[94] In other words, it is only of two *reasonable* meanings of the words exist is a contract ambiguous.

Several rules have been adopted to aid the court with this difficult decision and it is usually a process of weighing the facts using several different rules. A summary of 'Common Rules Used to Resolve the Battle of the Two Reasonable Meanings' can be found in Table 2.

TABLE 2
COMMON RULES USED TO RESOLVE THE BATTLE OF THE TWO REASONABLE MEANINGS AND SUGGESTED ADDED RULE

Step Two: Battle of the Two Reasonable Meanings	
Nonbargained-for benefit	Rule suggested by the Article: A party is not entitled to a nonbargained-for benefit.
Parol evidence rule	Parol evidence can be used to clarify the meaning of an ambiguous contract. It cannot be used to vary the meaning of an unambiguous contract.[95]
Incomplete agreements	Incomplete written agreements may be supplemented with parol evidence to prove provisions of the contract not included in the writings.[96]
Course of dealing, conduct of the parties, or past practice	The conduct of contracting parties is a strong indication of what the writing means.[97]
Fraud, mistake, illegality, unconscionable	Parol evidence of fraud, mistake[98], or illegality is always admissible even if the contract is complete and integrated or unambiguous. Such contracts may be void or voidable.[99]
Patent ambiguity rule	A patent (obvious) ambiguity is resolved in favor of the party who drafted the contract. If both parties drafted the contract, this rule is inapplicable.[100]
Custom and usage	Custom and usage in the trade can be used to clarify the meaning of a term.[101]
Implied terms	Terms not expressly stated in the contract but needed to fulfill the purpose of the contract are implied in the contract.[102]
Whole agreement	Contracts must be read as a whole, that is provisions cannot be taken out of context.[103]
Order of precedence	Absent a contrary term in the contract, special conditions prevail over general conditions: handwritten terms prevail over typewritten provisions; typewritten provisions prevail over preprinted terms; words prevail over figures.[104]
Latent ambiguity aka aka contra proferentum	A latent or hidden ambiguity is resolved in favor of the party who did not draft the document. If both parties drafted the document, this rule is inapplicable.[105]

Courts may apply several of the above rules when coming to a decision in deciding which of two reasonable meanings prevails. An example of this process can be seen in the case of *WDC West Carthage Associates v. U.S.*[106] In that case, WDC managed four off-base military housing contracts for the Army. Under the contracts, it was required to maintain the housing and replace carpeting and appliances as needed for a certain fee. The applicable provision read:

Damages Caused by Occupants: Damages to a housing unit or to other improvements within the project which are beyond normal wear and tear and are caused by the Government or an occupant, his dependents, or invited guests, which are not corrected by Government or occupant, shall be repaired by the Developer. The cost of such repairs shall be billed to the Government…

When the carpeting in a unit was damaged beyond normal wear and tear by the occupant, WDC would submit an invoice to the Army for the cost to replace the carpet and the Army paid the entire cost to replace the carpet.

However, after a new officer, who managed the contract for the Army arrived, carpeting in one of the units was damaged beyond ordinary wear and tear, was replaced by WDC, and an invoice for the total cost to replace the carpeting was submitted to the Army. The officer only paid WDC the replacement cost of the carpet minus the depreciated value of the carpet at the time of the extraordinary wear and tear.

The Army based its claims on this clause even though no list had been developed regarding payment to the contractor for carpeting that had been damaged beyond normal wear and tear:

The Developer shall, with the approval of the Government, establish a list of cleaning and repair costs for dwelling unit components which will establish the normal maximum amounts to be charged in the event of damage to property and equipment installed within a living unit over and above normal wear and tear.

The court held the Army had to pay the entire replacement cost because: (1) using the ordinary meaning rule, the lease provision plainly stated the government would replace the carpeting or reimburse WDC the full costs of repairs and no mention of depreciation was included in the clause, (2) using the conduct of the parties rule, the parties' past conduct demonstrated that WDC's argument was consistent with the parties' understanding when it signed this contract, (3) using the whole agreement rule, the Army's argument was weak because, if accepted, it would create a latent ambiguity by placing the two lease provisions in conflict and the contract could not be read as a whole, (4) the rule of *contra proferentum* requires the court to construe the lease against the government because the government drafted the lease.

CONCLUSION

Contract interpretation issues can be expected to remain a complex area of the law. Although the academic argument centers on the textualist vs. contextualist approach, a review of contract cases reveals courts follow a two-step approach when interpreting contracts and this approach contains elements of both the textualist and the contextualist approach; the textualist vs. contextualist approach is a false dichotomy.

The two-step approach used by the court can be labeled, 'Step One – Ambiguity Determination' and the issue at this point in the legal analysis is: is the contract ambiguous (capable of two reasonable meanings)? At this step the primary law used is the plain meaning rule. However, if an actual reasonable lexical ambiguity exists, the plain meaning rule is useless because the logical fallacy of begging the question will be exist – that is the plain meaning of the words cannot be used to determine the plain meaning of the words. At this point in the legal analysis 'Step Two – The Battle of the Two Reasonable Meanings' comes into play. The court must use various rules to determine which of the two reasonable meanings will prevail. This Article suggests an additional rule be used at Step Two: a party is not entitled to a nonbargained-for benefit merely because the contract is ambiguous.

ENDNOTES

1. In one complex construction insurance case the court said "It is uncertain whether this tangled dispute, with its idiosyncratic documentation, has a "right" answer in any meaningful sense, and given the litigation expenses, it is a mystery why it was not settled. Still, it must now be decided." *Reed & Reed, Inc. v. Weeks Marine, Inc.*, 431 F.3d 384 (1st Cir. 2005).
2. Seth William Goren, Looking for Law in All the Wrong Places: Problems in Applying the Implied Covenant of Good Faith Performance, 37 U.S.F. L. REV. 257 (2002) analyzing Pennsylvania law.
3. Shahar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 Am. Bus. L.J. 519 (2017) (quoting Alan Schwartz & Robert E. Scott, Contract Interpretation Redux, 119 YALE L.J. 926, 926 (2010)).
4. Jennifer Rodd, *Lexical Ambiguity in*, THE OXFORD HANDBOOK OF PSYCHOLINGUISTICS 96-117 (Shirley-Ann Rueschemeyer & M. Gareth Gaskell, eds., 2nd ed. 2018).
5. Steven Shavell, *On the Writing and the Interpretation of Contracts*, 22 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 289, 289 (2006).
6. *Id.*
7. *See infra* Part 4.
8. One might ask: why does a litigant file a contract interpretation lawsuit if the contract is not ambiguous? This is explained *infra* Part 2 and the simple answer is the same as many lawsuits where one wonders why the plaintiff ever filed the lawsuit: the plaintiff believes it will receive a benefit from the litigation. The plaintiff's behavior is boundedly rational but turns out to be incorrect.
9. For a possible hierarchy of the rules used to interpret contracts see Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1710 (1997).
10. James W. Bowers, Murphy's Law and The Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott, 57 RUTGERS L. REV. 587, 588 (2005).
11. Cathy Hwang & Matthew Jennejohn, Deal Structure, 113 Nw. U.L. Rev. 279, 280 (2017); Ronald J. Gilson, Charles F. Sabel, & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 Cornell L. Rev. 23 (2014); Juliet P. Kostritsky, *Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule For Interpretation*, 96 KY. L.J. 43, 43 (2007-2008).
12. "A more "substantive" approach to contract interpretation, in contrast, would attempt to come to a more all-things-considered understanding, based on all of the materials reasonably available." Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 498 (2004).
13. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L. J 541 (2003).
14. Restatement of the Law (Second) Contracts, The American Law Institute (1981),
15. *See infra* Part 2.
16. Bo Bennett, Logically Fallacious: The Ultimate Collection of Over 300 Logical Fallacies, Amazon Digital Services LLC (2013).
17. Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 926 (2010).
18. James W. Bowers, *Murphy's Law and The Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott*, 57 Rutgers L. Rev. 587, 588 (2005) argues that Schwartz and Scott misconceive firms' preference for contract doctrine and underestimate the damage interpretational errors can do to contracting parties. Shawn J. Bayern, *Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law*, 97 CALIF. L. REV. 943, 946 (2009) argues that Schwartz and Scott seriously misstate the costs and benefits of formalism.
19. Shawn J. Bayern, Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law, 97 CALIF. L. REV. 943, 946 (2009).
20. Shahar, *supra* note 3, at 568.
21. Joshua M. Silverstein, Using the West Key Number System as a Data Collection and Coding Device for Empirical Legal Scholarship: Demonstrating the Method via a Study of Contract Interpretation, 34 J.L. & COM. 203, 254 (2016)
22. Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 538 (2004).
23. Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 341 n.1 (1983).

24. See e.g. Julian Conrads, Bernd Irlenbusch, Rainer Michael Rilke, GariWalkowitz, *Lying and Team Incentives*, 34 JOURNAL OF ECONOMIC PSYCHOLOGY 1 (2013).
25. *See* Michael C Jensen, *Self-interest, altruism, incentives, and Agency Theory*, 7(2) JOURNAL OF APPLIED CORPORATE FINANCE 40 (1994); Dale T. Miller, *The Norm of Self-interest*, 54(12) AMERICAN PSYCHOLOGIST 1053 (1999).
26. Chapin F. Cimino, *The Relational Economics of Commercial Contract*, 3 TEX. A&M L. REV. 91 (2015).
27. *Id*.
28. Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U.L. REV. 1753, 1754 (2017).
29. "When a contract is ambiguous and the parties suggest different interpretations, the issue of the proper interpretation is an issue of fact requiring the submission of evidence extrinsic to the contract bearing upon the intent of the parties." *Elias v. Elias*, 152 So. 3d 749 (Fla. 4th DCA 2014).
30. *See e.g.* Robert Cooter & Thomas Ulen, Law and Economics, 6th edition, https://scholarship.law.berkeley.edu/books/2/; William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L & ECON 385 (1993). Other books on the topic include: Posner, Richard A., *Economic Analysis of Law* (7th ed. 2007); Steven Shavell, *Foundation of the Economic Analysis of Law* (2003).
31. The term 'rational' here is used in the economic sense: most people are rational, that is humans maximize the benefits to themselves. This concept is a fundamental maxim of economics. *See* Robert Cooter & Thomas Ulen, *Law and Economics* 12-14, 328-418 (6th ed. 2016) (Some Fundamental Concepts: Maximization, Equilibrium and Efficiency and An Economic Theory of the Legal Process). Behavioral Economics teaches that no one is completely rational – that is humans have cognitive limitations on their ability to understand a situation and make rational choices. For example, some people are unable to see that a 1 in 10 chance of winning is the same as a 10 in 100 chance of winning. This cognitive inability affects their ability to make good choices therefore, their rationality is said to be bounded. See Robin Paul Malloy, *Law and Economics: An Introductory Toolkit for Lawyers*, location 837 (ebook) (2019).
32. This statement is generalized. Parties act differently depending on the relationship. If the relationship is likely to be a one-time only relationship, the parties will act more aggressively to maximize benefits to themselves that is act in their own self-interest. If the relationship is perceived to be long-term, the concept of reciprocity comes into play and the parties are more likely to be fair and take the other party's interests into account. See e.g. Robin Malloy, *supra* note 31, at location 410 (ebook).
33. The U.S Financial Education Foundation estimates that approximately 40 million lawsuits are filed annually in the Unites States. *See e.g. What is Frivolous Lawsuit?,* U.S Financial Education Foundation, http://ogdenpage.com/frivolous_lawsuits.htm.
34. Pierre Schlag, Coase Minus the *Coase Theorem - Some Problems with Transaction Cost Analysis*, 99 IOWA L. REV. 175, ftnt 61 (2013) (quoting R.H. Coase, Law and Economics at Chicago, 36 J.L.&ECON. 239, 250-51 (1993)).
35. *Id*. at 181.
36. R.H. Coase, *The Problem of Social Cost*, The Journal of Law and Economics, Vol. III, 1 (1960).
37. Schlag, *supra* at note 34, 193.
38. *Id*. at 203.
39. *Id*. at 221.
40. *Appeals of -- B. J. Larvin, General Contractor, Inc.*, 77-2 B.C.A. (CCH) P12, 717; 1977 ASBCA LEXIS 109 (1977).
41. "Salvaged or reclaimed building materials are materials that are recycled for reuse. They originate from buildings that have been deconstructed, rather than demolished. Typically, there is little left that is salvageable after a building has been demolished. When it has been deconstructed, however, there is much that can be reused. There are two main classifications of materials that are salvaged from deconstructed buildings: Salvaged lengths of wood to be used in future construction materials, such as lumber, steel and bricks; and appliances and ornamental items that may be fitted into an existing home. Examples include lighting fixtures, bathtubs, sinks, toilets, doors, stained glass, windows, ironwork, kitchen appliances, countertops, fireplaces, molding, flooring, household siding, pipes and insulation." Nick Gromicko, *Salvaged Building Materials Inspection*, https://www.nachi.org/salvaged-building-materials-inspection.htm.

42. CORBIN *supra* at § 1.1.
43. *See e.g.* Robin Paul Malloy, *Law and Economics: An Introductory Toolkit for Lawyers*, "Core Concept Two -Efficiency" location 837 (e-book) (2019).
44. Shavel, *supra* note 5, at 289-314.
45. Karen Eggleston, The Design and Interpretation of Contracts: Why Complexity Matters, 95 Nw. U.L. Rev. 91 (Fall 2000).
46. Oliver E. Williamson, *Transaction Cost Economics: An Overview*, (2010), https://pdfs.semanticscholar.org/5556/a1204a2a0e3734b463702ea75df13b68c597.pdf
47. Juliet P. Kostritsky, A Bargaining Dynamic Transaction Cost Approach to Understanding Framework Contracts, 68 AM. U.L. REV. 1621 (2019).
48. This topic involves the questions of how does innovation move into the market? What is the role of production as it relates to innovation? *See e.g.* Suzanne Berger, *Making in America: From Innovation to Market and Production in the Innovation Economy* (2013) and Richard M. Locke & Rachel L. Wellhausen (eds), *Production in the Innovation Economy* (2014).
49. Juliet P. Kostritsky, A Bargaining Dynamic Transaction Cost Approach to Understanding Framework Contracts, 68 AM. U.L. REV. 1621 (2019).
50. Carl J. Dahlman, *The Problem of Externality*, 22(1) JOURNAL OF LAW AND ECONOMICS 141 (1979).
51. Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 926 (2010).
52. Once the gift has been delivered title to the gift transfers to the receiver.
53. Eric A. Posner, Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises, 1997 WIS. L. REV. 567 (1997).
54. Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (Sp 1989).
55. A promise to do something one is not obligated to do is "something of value". *See e.g.* David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U. CHI. L. REV. 1299, 1300 (2006).
56. Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1878 (2001). This article also summarizes the history of the doctrine of consideration.
57. Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45; CORBIN supra at § 5.1-7.21 (Topic B: Consideration).
58. This is a simplification of the process. A review of actual cases involving this issue reveals courts will often proceed to Step 2 as outlined here and then circle back and decide the case by determining the contract is not ambiguous. For cases involving the parol evidence rule see *Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004) where the court said extrinsic evidence may always be received by the judge on the interpretation of contract terms. Not all state courts would agree with the statement, but courts routinely review parol evidence and then decide how to treat it. Parol evidence is seldom ignored by the judge. *See Alaska Diversified Contractors, Inc. v. Lower Kuskokwim School District*, 778 P.2d 581 (Alaska, 1989) cert. denied, 493 U.S. 1022, 110 S. Ct. 725, 107 L. Ed. 2d 744 (1990).
59. *In re Millburn Peat Co., Inc.*, 384 B.R. 510 (N.D. Ind. 2008).
60. "A court will decree reformation of a written instrument if it is conclusively shown that the words of the writing do not correctly express the meaning that the parties agreed upon." CORBIN *supra* at § 28.45 (Reformation of Mistaken Instrument). See also RESTATEMENT OF THE LAW (SECOND) CONTRACTS § 155 (When Mistake of Both Parties as to Written Expression Justifies Reformation).
61. 6 CORBIN *supra* at § 25.13 (What is Ambiguity?).
62. If the parties have a specialized meaning of the word or phrase, that specialized meaning prevails. See RESTATEMENT (SECOND) OF CONTRACTS § 220 (Usage Relevant to Interpretation). *See also* Frederick W. Claybrook, Jr., *It's Patent that "Plain Meaning" Dictionary Definitions Shouldn't Dictate: What Phillips Portends for Contract Interpretation*, 6 FED. CIR. B.J. 91 (2007) where specialized meanings in patent litigation are discussed.
63. CORBIN *supra* at § 2.8, 2.9 (Preliminary Agreements Part I—Agreements to Negotiate, Preliminary Agreements Part II—Agreements to Agree, Formal Document Contemplated by the Parties).
64. CORBIN *supra* at § 2.1 (What Constitutes a Written Contract—There May Be a Series of Communications).
65. Restatement of the Law (Second) Contracts § 209 (Integrated Contracts).

66. *Tecom, Inc. v. U.S.*, 66 Fed. Cl. 736 (Ct. Cl. 2005) (citing *In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 74, 18 L. Ed. 137, 30 How. Pr. 346 (1865)). See also Intergraph Corp. v. Intel Corp., 241 F.3d 1353, 1354 (Fed. Cir. 2001); CORBIN *supra* at § 25.8 (Merger Clauses).
67. *Nucla Sanitation District v. Rippy*, 344 P.2d 976, 140 Colo. 444 (Co. 1959).
68. Arthur L. Corbin, The Parol Evidence Rule, 53 Yale L.J. 603, 620 (1944). *See also* CORBIN *supra* at § 25.8 (Merger Clauses).
69. It is irrelevant whether the words are oral or written. *See* RESTATEMENT OF THE LAW (SECOND) CONTRACTS § 110 (Classes of Contracts Covered) for a list of the types of contracts needing some type of writing to be enforceable, that is are covered by the Statute of Frauds. *See also* RESTATEMENT OF THE LAW (SECOND) CONTRACTS § 27 (Existence of Contract Where Written Memorial Is Contemplated). However, ambiguity issues more commonly arise when the words are written, rather than in oral contracts. If the dispute involves an oral contract it is more likely each party will claim the contract consists of a different set of words or phrases and thus no ambiguity exists, but an issue of fact is raised instead. For example, assume the parties enter into an oral contract for Painter to do a "top notch job" on Owners home. The contractor testifies the contract was for a "top notch job". The owner testifies the agreement was for "two coats of paint". A factual issue has been raised. Factual issues are more difficult to prove than legal issues, such as "is the contract ambiguous?" and therefore allow for more bargaining. *See* James B. Thayer, *Law and Fact in Jury Trials*, 4 HARV. L. REV. 147, 147 (1890) for an early explanation of issues of fact as compared to law. A more recent discussion of this topic can be found in Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U.L. REV. 1769 (2003) where the authors claim there is no difference between facts and laws. However, the actual topic of the article is the difference between what the law decides is an issue of fact as compared to what the law decides is an issue of law no support is given for the proposition no difference exists between facts and laws.
70. See Jiri Janko, Linguistically Integrated Contractual Interpretation: Incorporating Semiotic Theory of Meaning-Making into Legal Interpretation, 38 RUTGERS L. J. 601, 612 (2007). He observes linguistics does not explain the meaning of all language strings but instead provides guidance on how to analyze the meaning of all language strings. He recommends courts rely on linguistic experts, abandon the idea of objective meaning, and legal interpretation should be conducted in two steps but steps different from those outlined in this Article. The first step is that the contract be interpreted in accord with the language practices of the non-drafting party. The second step follows if the parties disagree at the first step. At this step courts should impose a burden on the challenging party to overcome the proposed legal interpretation. This approach differs from the two-step approach suggested in this Article.
71. Rodd, *supra*, note 4 at 96.
72. The course of dealing rule basically states the way the parties have treated the meaning of the disputed meaning can be used to determine the meaning of the disputed term.
73. *Teamsters Industrial Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132, 133, 1993 U.S. App. LEXIS 5313, *1, 142 L.R.R.M. 2815, 124 Lab. Cas. (CCH) P10,597, 16 Employee Benefits Cas. (BNA) 1923 (1993).
74. In some cases, the custom and usage in the trade, rather than the plain meaning is used. For example, everyone in the construction industry knows pieces of wood commonly called "2x4" are not actually 2 inches by 4 inches but approximately 1.5 inches by 3.5 inches. "It is well settled that where words or expressions are used in a written contract, which have in particular trades or vocations a known technical meaning, parol evidence is competent to inform the court and jury as to the exact meaning of such expression in that particular trade or vocation, and it is for the jury to hear the evidence and give effect to such expressions as they may find their meaning to be." *R.S. Neal v. Camden Ferry Co.*, 166 N.C. 563, 82 S.E. 878 (N.C. 1914).
75. *Delaney v. Kusminski*, No. 02-7096, 2005 WL 1109625, at *4 (R.I. Super. May 4, 2005) (citation omitted); *Arrow Elec., Inc. v. Hecmma, Inc.*, 500 F. Supp. 2d 648, 651 (2005).
76. *Allen v. United States*, 119 Fed. Cl. 461, 2015 U.S. Claims LEXIS 22 (2015). This is an area where data analytics may be useful in understanding what is occurring with this rule.
77. Ladner Testing Laboratories, Inc., v. United States Fidelity & Guaranty Company, 2000 U.S. App. Lexis 29208 (6th Cir. 2000).
78. See Stephen J. Lubben, Chief Justice Traynor's Contract Jurisprudence and the Free Law Dilemma: Nazism, the Judiciary, and California's Contract Law, 7 S. CAL. INTERDIS. L.J. 81 (1998) where the author claims California has abolished the plain meaning rule in the case of Pacific Gas & E. Co. v. G. W.

Thomas Drayage etc. Co., 442 P.2d 641, 69 Cal. 2d 33, 69 Cal. Rptr. 561, 1968 Cal. LEXIS 225, 40 A.L.R.3d 1373 (1968).

79. See Ferdinand S. Tinio, The Parol Evidence Rule and Admissibility of Extrinsic Evidence to Establish and Clarify Ambiguity in Written Contract, 40 A.L.R.3d 1384 (2019). In Still v. Cunningham, 94 P.3d 1104 (Alaska 2004) the court said extrinsic evidence may always be received by the judge on the interpretation of contract terms. While the judge may prevent parol evidence from being presented to the jury or may refuse to give the parol evidence any credence when presented to the court, the parol evidence will be reviewed by the judge. Parol evidence is seldom ignored by a judge.
80. *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, 69 Cal. 2d 33, 37, 442 P.2d 641, 644, 69 Cal. Rptr. 561, 564, 1968 Cal. LEXIS 225, *6, 40 A.L.R.3d 1373 (1968).
81. CORBIN *supra* at § 25.3 (Why Do We Have a Parol Evidence Rule?). See also 2 Williston, THE LAW OF CONTRACTS §632, at 1224 (1920) and 9 John Henry Wigmore & James H Chadbourn, EVIDENCE IN TRIALS AT COMMON LAW § 2400 (1981).
82. Tinio, *supra*, 1384.
83. *Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004).
84. *Alaska Diversified Contractors, Inc., v. Lower Kuskokwim School District*, 778 P.2d 581 (Alaska, 1989) cert. denied, 493 U.S. 1022, 110 S. Ct. 725, 107 L. Ed. 2d 744 (1990).
85. Yihan Goh, From context to text in contractual interpretation: Is there really a problem with a plain meaning rule?, 45(4) COMMON LAW WORLD REVIEW 298 (2016); Aaron D. Goldstein, The Public meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation, 53 Santa Clara L. Rev. 73 (2013); Frederick W. Claybrook, Jr., It's Patent that "Plain Meaning" Dictionary Definitions Shouldn't Dictate: What Phillips Portends for Contract Interpretation, 16 FED. CIR. B.J. 91 (2007); Larry A. DiMatteo, A Theory of Interpretation in the Realm of Idealism, 5 DEPAUL BUS. & COMM. L.J. 17 (2006).
86. *Goh*, supra at note 85.
87. For an overview of classical contract theory, in which the plain meaning rule plays an important part, and other contract interpretation approaches see Larry A. DiMatteo, *A Theory of Interpretation in the Realm of Idealism*, 5 DEPAUL BUS. & COMM. L.J. 17 (2006).
88. Kemit A. Mawakana, In the Wake of Coast Federal: The Plain Meaning Rule and the Anglo American Rhetorical Ethic, 11 U. MD. L.J. RACE RELIG. GENDER & CLASS 39 (2011).
89. *Coast Federal Bank, FSB v. United States*, 323 F.3d 1035 (Fed. Cir. 2003) (en banc).
90. Jerald D. Stubbs, The Federal Circuit and Contract InterPretation: May Extrinsic Evidence Ever be Used to Show Unambiguous Language is Ambiguous?, 39 PUB. CONT. L.J. 785, 785 (2010).
91. Mark A. Geistfeld, Interpreting the Rules of Insurance Contract Interpretation, 68 RUTGERS U. L. REV. 371 (2015).
92. Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts Via Surveys and Experiments*, 92 N.Y.U.L. REV. 1753 (2017).
93. Numerous cases exist to support this rule. *See e.g. Edward R. Marden Corp. v. U.S.*, 803 F.2d 701, 705 (Fed. Cir. 1986), *Highway Prods., Inc. v. U.S.*, 530 F.2d 911, 917 (Ct. Cl. 1976), *Sun Shipbuilding & Dry Dock Co. v. U.S.*, 183 Ct. Cl. 358, 393 F.2d 807, 815-16 (Ct. Cl. 1968). "However, contracts are not necessarily rendered ambiguous by the mere fact that the parties disagree as to the meaning of their provisions… That the parties disagree with a specification, or that a contractor's interpretation thereof is conceivable, does not necessarily render that specification ambiguous …A contract is ambiguous if it is susceptible of two different and reasonable interpretations, each of which is found to be consistent with the contract language…"[93] *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1582 (Fed. Cir. 1993).
94. *Community Heating*, id note 93.
95. Tinio, *supra* at 1384; CORBIN supra at § 25.1-25.25 (Overview of parol evidence rule).
96. CORBIN *supra* at § 25.9 (Partial Integration and Collateral Contracts). RESTATEMENT OF THE LAW (SECOND) CONTRACTS § 213 (Effect of Integrated Agreement on Prior Effect of Integrated Agreement on Prior Agreements, Parol Evidence Rule),
97. CORBIN *supra* at § 24.17 (Course of Dealing: The Parties' Conduct in Prior Transactions with Each Other); RESTATEMENT OF THE LAW (SECOND) CONTRACTS § 223 (Course of Dealing).
98. CORBIN *supra* at § 28.45 (Reformation of Mistaken Instruments).
99. CORBIN *supra* at § 25.20 (Fraud, Illegality and Other Disqualifying Matters Agreement Defined); RESTATEMENT OF THE LAW (SECOND) CONTRACTS § 3 (Bargain Defined); RESTATEMENT OF THE LAW (SECOND) CONTRACTS § 208 (Unconscionable Contract or Term).

100. Elizabeth D. Lauzon, Construction and Application of Patent Ambiguity Doctrine to Federal Government Contracts, CORBIN *supra* at § 25.8 (Evidence of Ambiguity).
101. CORBIN *supra* at § 24.13 (Proof of Local or Limited Usage, Including Trade Usage, to Establish The Meaning of Words and Other Symbols); RESTATEMENT OF THE LAW (SECOND) CONTRACTS § 222 (Usage of Trade).
102. CORBIN *supra* at § 26.2 (Using Implied Terms to Fill Parties' Gaps Merger Clauses); RESTATEMENT OF THE LAW (SECOND) CONTRACTS § 204 (Supplying an Omitted Essential Term).
103. CORBIN *supra* at § 24.21 (Interpretation of The Contract as a Whole).
104. CORBIN *supra* at § 24.23 (Conflicting Provisions—Words of General Description Yield to More Specific Words Merger Clauses).
105. RESTATEMENT OF THE LAW (SECOND) CONTRACTS § 212 (Interpretation of Integrated Agreement,).
106. WDC West Carthage Associates v. U.S., 324 F.3d 1359 (Fed. Cir. 2003).