LSU Journal of Energy Law and Resources

Volume 9
Issue 2 *Spring 2021*

5-5-2022

Contra Proferentem in the Oilpatch? The “Against the Lessee” Rule of Lease Construction

Byron C. Keeling

Contra Proferentem in the Oilpatch? The "Against the Lessee" Rule of Lease Construction

Byron C. Keeling[*]

TABLE OF CONTENTS

* Shareholder, Keeling & Fredrickson, P.C., Houston, Texas. B.A., J.D., Baylor University, LL.M., University of Illinois. I am grateful to my colleague, Anna Fredrickson, for her comments and assistance on this Article.

INTRODUCTION

After Elizabeth Swann invoked the Pirate's Code in the first *Pirates of the Caribbean* movie, Captain Hector Barbossa responded: "[T]he code is more what you'd call 'guidelines' than actual rules."[1] As a general rule, most rules are not hard-and-fast rules. Grade school students learn that they should place "*i* before *e* except after *c*," but with enough caffeine and the weight of experience, they soon discover the weird and ancient truth that the "*i* before *e* except after *c*" rule is subject to many exceptions. Some rules are indeed only guidelines. Some rules are indeed subject to many exceptions. Some rules are subject to so many exceptions that they effectively apply only in very limited situations.

Law students become familiar with the *contra proferentem* doctrine—the rule that courts will construe a contract against the party who drafted it—in their first year of law school. The *contra proferentem* doctrine does not literally mean that *all* contracts will *always* be construed in favor of the non-drafting party. If that were true, then the actual terms of contracts would be largely meaningless. As law students discover with enough caffeine and the weight of experience, the *contra proferentem* doctrine applies only in very limited circumstances. It applies only to ambiguous contracts; and even then, it applies only as a last resort—where a court has no other rule of contract construction available to construe the ambiguous contract language.[2]

Over the years, courts in oil and gas cases have developed a variation of the *contra proferentem* doctrine—the rule that courts will construe an oil and gas lease against the lessee and in favor of the lessor. Yet, while the "against the lessee" rule of construction evolved from the *contra proferentem* doctrine, courts seemingly have treated the "against the lessee" rule as more of a hard-and-fast rule than it really should be.[3] The "against the lessee" rule of construction is no justification for courts to rewrite an oil and gas lease to achieve a result that they may believe to be more fair or equitable to the lessor. Like the *contra proferentem* doctrine, the "against the lessee" rule of lease construction should apply only to ambiguous contracts, and even then, it should apply only as a last resort.[4]

---

1. PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003).
2. *See* discussion *infra* Part II.
3. *See* discussion *infra* Part III.
4. *See* discussion *infra* Part IV.

I. THE RULES OF CONTRACT CONSTRUCTION: THE CONTEXT OF THE "AGAINST THE LESSEE" RULE OF CONSTRUCTION

An oil and gas lease is a contract between a lessor and lessee.[5] The "lessor" in an oil and gas lease is the mineral owner—i.e*.*, the party who owns the rights to the oil or gas under a tract of property.[6] The "lessee," commonly an oil and gas producer or developer, is the party who hopes to recover and produce the oil or gas from the ground.[7] Under a typical oil and gas lease, the lessor gives the lessee not only the contractual right to explore for and produce oil, gas, or other minerals, but also a property interest in the minerals themselves.[8] The lessee, in turn, agrees to pay the lessor royalties on any oil, gas, or other minerals that the lessee may produce from the lease.[9]

Generally, an oil and gas lease is subject to the same rules of construction as any other kind of contract.[10] The first and foremost rule of

---

5. *See* Jack O'Neill & Byron C. Keeling, *Valuation of Oil Royalties: From the Perspective of the Payor*, 47 PROC. ANN. INST. ON OIL AND GAS L. & TAX'N § 6.05[1], at 6-41 (1996) ("An oil and gas lease is a contract, and as such, it is subject to the general principles of contract law."); *see also* Bi-County Props. v. Wampler, 378 N.E.2d 311, 314 (Ill. App. Ct. 1978); Baker v. Mangum Hunter Prod., Inc., 473 S.W.3d 588, 592 (Ky. 2015); Shedden v. Anadarko E. & P. Co., 136 A.3d 485, 490 (Pa. 2016); Exxon Corp. v. Emerald Oil & Gas Co., 348 S.W.3d 194, 210 (Tex. 2011).

6. *See* 3 HOWARD R. WILLIAMS & CHARLES J. MEYERS, MANUAL OF OIL AND GAS TERMS 580 (9th ed. 1994).

7. *Id.* at 579.

8. David E. Pierce, *Incorporating a Century of Oil and Gas Jurisprudence Into the "Modern" Oil and Gas Lease*, 33 WASHBURN L.J. 786, 788–89 (1994); *see* Dayna Ferebee, Comment, *Handshakes and Heartaches: Who Owns the Oil After* Rogers v. Ricane*?*, 2 TEX. WESLEYAN L. REV. 129, 130-31 (1995) ("The oil and gas lease, like a conveyance, transfers an interest in property, but like a contract, contains conditions and covenants.").

9. Jefferson D. Stewart & David F. Maron, *Post-Production Charges to Royalty Interests: What Does the Contract Say and When Is It Ignored?*, 70 MISS. L.J. 625, 628 (2000).

10. Byron C. Keeling & Karolyn King Gillespie, *A New Era of Royalty Accounting: Practical Advice for the Payor*, 44 ROCKY MTN. MIN. L. FOUND. J. 15, 16 (2007); *see* D.R. Lauck Oil Co. v. Breitenbach, 893 P.2d 286, 288 (Kan. Ct. App. 1995); Moerman v. Prairie Res., Inc., 308 P.3d 75, 79 (Mont. 2013); Tittizer v. Union Gas Corp., 171 S.W.3d 857, 860 (Tex. 2005); Moncrief v. Harvey, 816 P.2d 97, 103 (Wyo. 1991); *see also* Valentina Williston, LLC v. Gadeco, LLC, 878 N.W.2d 397, 401 (N.D. 2016) ("The same general rules that govern interpretation of contractual agreements apply to oil and gas leases."); Lutz v. Chesapeake Appalachia, L.L.C., 71 N.E.3d 1010, 1013 (Ohio 2016)

contract construction is that a court must seek to give effect to the intent of the parties.[11] As Professor Bruce Kramer has observed, "[i]ntent is the polestar of any judicial interpretation of a written instrument."[12] If the parties' intent is obvious on the face of a contract, then a court has no need to resort to any other rule of contract construction.[13] Thus, if a contract, such as an oil and gas lease, is unambiguous, a court must enforce it as it is written.[14] A court may enforce an unambiguous oil and gas lease as a matter of law.[15]

As with any other kind of contract, a court should give the terms of an oil and gas lease their plain, ordinary, and generally accepted meaning.[16]

("[A]n oil and gas lease is a contract that is subject to the traditional rules of contract construction."); Matthew J. Salzman & Aaron K. Friess, *Royalty Clauses: What is Everyone Fighting About (and How Do I Avoid It)?*, *in* DRAFTING AND NEGOTIATING THE MODERN OIL AND GAS LEASE 7-3, 7-10 (Rocky Mtn. Min. L. Found. 2018) ("An oil and gas lease is, first and foremost, a contractual agreement. It is subject to the general rules governing contract interpretation.").

11. *See, e.g.*, Owens v. Superior Oil Co., 730 P.2d 458, 459 (N.M. 1986); State *ex rel.* Comm'rs of Land Office v. Couch, 298 P.2d 452, 453 (Okla. 1956); Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550, 554 (Tex. 2002); *see also* Daniel B. Kostrub & Roger S. Christenson II, *Canons of Construction for the Interpretation of Mineral Conveyances, Severances, Exceptions, and Reservations in Producing States*, 88 N.D. L. REV. 645, 652 (2012) ("Courts today uniformly follow a golden rule of contract interpretation: a court will construe a written instrument to give effect to the clear intent expressed by the parties when they entered the contract.").

12. Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1, 55 (1993).

13. *Id.*; *see* Fast v. Kahan, 481 P.2d 958, 961 (1971) ("The provision in question is common in oil and gas leases. It is plain, unambiguous, and means just what it says. Hence, there is no room for application of rules of construction.").

14. Keeling & Gillespie, *supra* note 10, at 16; *see* Meisler v. Gull Oil, Inc., 848 N.E.2d 1112, 1114 (Ind. Ct. App. 2006); Davis v. Key Gas Corp., 124 P.3d 96, 102 (2005); Sun Oil Co. v. Madeley, 626 S.W.2d 726, 728 (Tex. 1981); Flanagan v. Stalnaker, 607 S.E.2d 765, 770 (W. Va. 2004).

15. *See, e.g.*, ConocoPhillips Co. v. Lyons, 299 P.3d 844, 849 (N.M. 2012); TSB Exco, Inc. v. E.N. Smith, III Energy Corp., 818 S.W.2d 417, 421 (Tex. App. 1991); Energy Dev. Corp. v. Moss, 591 S.E.2d 135, 143 (W. Va. 2003); *see also* Kramer, *supra* note 12, at 13 ("The issue of whether or not there is an ambiguity is a question of law for the court.").

16. *See, e.g.*, Jacobs v. CNG Transmission Corp., 332 F. Supp. 2d 759, 772 (W.D. Pa. 2004); Hanners v. Giant Oil Co., 284 S.W.3d 468, 472 (Ark. 2008); Sabre Oil & Gas Corp. v. Gibson, 72 S.W.3d 812, 817 (Tex. App. 2002).

And when a lease uses technical terms that are common in the oil and gas business, a court should give those terms their common technical meaning.[17] An oil and gas lease is not ambiguous simply because the parties disagree about the meaning of its terms.[18] To the contrary, a lease is ambiguous only if—after giving its terms their plain, ordinary, and generally accepted meaning—the lease is *reasonably* susceptible to two or more different interpretations.[19]

If a lease is truly ambiguous, then the parties may offer extrinsic evidence to prove their intent at the time that they entered into the lease.[20] Such extrinsic evidence may include not only subjective testimony about the parties' understanding of the disputed terms, but also any other evidence relevant to the parties' intent—such as, for example, correspondence between the parties memorializing their negotiations over the terms of the lease.[21] It may also include (i) evidence of a prior course

---

17. RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b) (AM. LAW INST. 1981); *see* David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation,* 57 SMU L. REV. 387, 402 (2004); Schroeder v. Terra Energy, Ltd., 565 N.W.2d 887, 891 (Mich. Ct. App. 1997); PNP Petroleum I, LP v. Taylor, 438 S.W.3d 723, 736 (Tex. App. 2014); *see also* Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 121 (Tex. 1996) ("If a lease term has a generally accepted meaning in the oil and gas industry, we use its generally accepted meaning."); 2 NANCY SAINT-PAUL, SUMMERS ON OIL AND GAS § 16:2 (3d ed. 2016) ("The technical words in an oil and gas lease are to be interpreted as they are usually understood by persons in the profession or business to which they relate, unless there is evidence that the words were used in a different sense."); Salzman & Friess, *supra* note 10, at 7-11 ("It is a widely-recognized practice for courts to acknowledge 'terms of art' for particular industries when interpreting [an] industry contract containing such terms in order to accurately deduce the parties' intent. A corollary to that practice is taking into consideration the established industry custom and practice and the prevailing law at the time the contract was executed.").

18. *See, e.g.*, Dynegy Midstream Servs., L.P. v. Apache Corp., 294 S.W.3d 164, 168 (Tex. 2009); Flanagan v. Stalnaker, 607 S.E.2d 765, 769 (W. Va. 2004).

19. *See, e.g.*, *Jacobs,* 332 F. Supp. 2d at 772; *Heritage Res., Inc.*, 939 S.W.2d at 121; *see also* Souders v. Montana Power Co., 662 P.2d 289, 290 (Mont. 1983).

20. *See, e.g.*, Maverick Oil & Gas, Inc. v. Barberton City Sch. Dist. Bd. of Educ., 872 N.E.2d 322, 328 (Ohio Ct. App. 2007); Panhandle Co-op. Royalty Co. v. Cunningham, 495 P.2d 108, 115 (Okla. 1971); *Souders*, 662 P.2d at 290; Double Eagle Petroleum & Mining Corp. v. Questar Expl. & Prod. Co., 78 P.3d 679, 682 (Wyo. 2003); *see also* SAINT-PAUL, *supra* note 17, at § 16:5 ("[I]f the terms of the lease are ambiguous, a court may consider parole evidence to determine the parties' intent."); Kostrub & Christenson, *supra* note 11, at 654.

21. *See, e.g.*, Roxana Petroleum Corp. v. Corn, 28 F.2d 168, 170 (8th Cir. 1928).

of dealing between the parties or (ii) evidence of a common industry custom or practice or a usage of trade.[22] When the parties to an oil and gas lease offer conflicting evidence of their contractual intent, the meaning of the disputed terms in their lease is generally a question of fact for a jury or other finder of fact to answer.[23]

If the parties offer no extrinsic evidence of their contractual intent, then a court may have to apply other rules of contract construction to divine the meaning of any ambiguous terms in an oil and gas lease.[24] Most of these rules of construction apply equally to all types of contracts, not just oil and gas leases.[25] These rules of construction are familiar to practitioners. For example, a court may reconcile inconsistent terms in a lease or contract by holding that a specific term controls over a more general term,[26] or that a handwritten or "non-printed" term prevails over a printed form term.[27] A court may hold that it must construe a lease or contract in a way that avoids creating irreconcilable conflicts or rendering terms meaningless.[28]

One rule of construction that is unique to oil and gas practice is the "against the lessee" rule, which holds that a court should construe an oil

---

22. *See* Pierce, *supra* note 17, at 401; *see also* Salzman & Friess, *supra* note 10, at 7-11 ("It is a widely-recognized practice for courts to acknowledge 'terms of art' for particular industries when interpreting industry contract[s] containing such terms in order to accurately deduce the parties' intent. A corollary to that practice is taking into consideration the established industry custom and practice . . . .").

23. Johnson v. Mineral Estate, Inc., 343 N.W.2d 778, 780–81 (N.D. 1984); *see Jacobs*, 332 F. Supp. 2d at 772 ("[T]he finder of fact resolves conflicts in parole or extrinsic evidence submitted to resolve a dispute.").

24. *E.g.*, West v. Russell, 90 Cal. Rptr. 772, 774 n.1 (Cal. Ct. App. 1970); *see* Kostrub & Christenson, *supra* note 11, at 651 ("[W]hen properly applied by the courts, canons arise at a distinct stage in the decision making process to resolve irreconcilable ambiguities in the words of a contract, once the actual intent of the parties thereto proves indecipherable."). Professor Arthur Corbin distinguished between "interpretation" and "construction." To interpret a contract, according to Professor Corbin, was to determine the parties' intent and understanding. To construe a contract was to give a legally binding meaning to disputed contract terms when it was otherwise impossible to interpret them. 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 534 (1960); *see* Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1109–10 (2006).

25. SAINT-PAUL, *supra* note 17, at § 16.3.

26. *E.g.*, Kramer, *supra* note 12, at 85–90.

27. *Id.* at 96–100.

28. *Id.* at 73–80.

and gas lease in favor of the lessor and against the lessee.[29] While unique to oil and gas practice, the "against the lessee" rule of construction has its roots in basic contract law.[30] The "against the lessee" rule derives from the *contra proferentem* doctrine, a common law rule holding that a court should construe a contract against the party who drafted it.[31] Consistent with the *contra proferentem* doctrine, the "against the lessee" rule rests on the premise that the lessee is usually the party who drafts an oil and gas lease.[32]

Presumably, the "against the lessee" rule of construction should be nothing more than a straightforward application of the *contra proferentem* doctrine to oil and gas leases. Courts in some states, however, have applied

---

29. *See* SAINT-PAUL, *supra* note 17, at § 16.3 ("The only rule of construction for oil and gas leases different from the rules employed in the construction and interpretation of other written instruments is that oil and gas leases are to be construed in favor of the lessor and against the lessee.").

30. Kramer, *supra* note 12, at 103.

31. *See* SAINT-PAUL, *supra* note 17, at § 16.4 (noting that one of the common law rules "that led to the traditional construction of oil and gas leases in favor of the lessor is that where there is uncertainty or ambiguity as to the intent or meaning of a writing it will be construed against the party preparing the instrument in question"); David L. Hancock, Note, *The Gas Producer's Dilemma: Royalty Clauses and Long-Term Purchase Contracts*, 46 U. PITT. L. REV. 517, 530–31 (1985) ("The general rule has been that oil and gas leases are construed in favor of the lessor and against the lessee. Not only is this merely the general rule, it is also embodied in the historical contract maxim of *contra proferentem*. This maxim states that a contract is to be interpreted against its profferer or author.").

32. *See, e.g.*, Rook v. James E. Petroleum, Inc., 879 P.2d 158, 164 (Kan. 1984) ("Oil and gas leases containing ambiguities are to be strictly construed against the lessee-producer and in favor of the lessor-royalty owner because the lessee usually provides the lease form or dictates the terms thereof, and where the lessee desires it may protect itself by the manner in which the lease is drawn."); Freeman v. Samedan Oil Corp., 78 S.W.3d 1, 7 (Tex. App. 2001) (noting that the language in a lease "is generally regarded as that of the lessee"); *see also* 17 RICHARD A. LORD, WILLISTON ON CONTRACTS § 50:57 (4th ed. 2017) ("[A]n oil and gas lease is often construed most favorably to the lessor because the lessee usually drafts the lease and has more experience drafting the lease to give itself an advantage."); David E. Pierce, *Rethinking the Oil and Gas Lease*, 22 TULSA L.J. 445, 452–53 (1987) ("Courts generally view the oil and gas lease as a contract drafted by the lessee for the lessee."); Francis M. Dougherty et al., *Preference in Favor of Lessor or of Lessee*, 55 TEX. JUR. 3D *Oil and Gas* § 177 (Supp. 2017) ("The preference for the lessor in construing oil and gas leases rests on the fact that such leases are usually prepared, or standard forms completed, by the lessee rather than the lessor.").

the "against the lessee" rule in a way that goes beyond the historical limitations of the *contra proferentem* doctrine.[33] Instead of using the "against the lessee" rule as a tool of last resort to divine the meaning of an ambiguous lease term, these courts have applied the rule as a means to create an ambiguity that did not otherwise exist and then construe a lease against the lessee contrary to its plain and express terms.[34]

The question is, "Why?" Courts have articulated no justification for applying the "against the lessee" rule more broadly than the *contra proferentem* doctrine. And there is none. The historical limitations on the *contra proferentem* doctrine should apply as equally to oil and gas leases as they do to insurance policies and other forms of contract.[35]

II. THE PROGENITOR OF THE "AGAINST THE LESSEE" RULE: THE *CONTRA PROFERENTEM* RULE OF CONSTRUCTION

The *contra proferentem* doctrine has a long history. In the seventeenth century, Sir Francis Bacon, in his seminal treatise on English common law, observed that the *contra proferentem* doctrine was "one of the most common grounds of the law."[36] By the early nineteenth century, the doctrine had found its way into American jurisprudence.[37] In 1932, the American Law Institute incorporated the *contra proferentem* doctrine into its Restatement of Contracts, stating that "[w]here words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law."[38]

---

33. *See* discussion *infra* Part III.

34. *See* discussion *infra* Parts III.A, III.B.

35. David E. Pierce, *The Renaissance of Law in the Law of Oil and Gas: The Contract Dimension,* 42 WASHBURN L.J. 909, 938 (2004) ("An 'oil and gas' contract should be treated no differently from any other type of contract.").

36. 3 FRANCIS BACON, *The Elements of the Common Laws of England*, *in* THE WORKS OF FRANCIS BACON 225 (London, Longman & Co. ed. 1857); *see* Bradley D. Liggett, Comment, *Contra Applicatem or Contra Proferentem Applicatio: The Need for Clarification of the Doctrine of Contra Proferentem in the Context of Insured-Created Ambiguities in Insurance Applications*, 2008 B.Y.U. L. REV. 211, 213–14 (2008).

37. *See* Liggett, *supra* note 36, at 214 & n.14 (citing United States v. Heth, 7 U.S. (3 Cranch) 399, 409 (1806); Duncan v. Cavallos' Ex'rs, 4 Mart. (o.s.) 571 (La. 1817); Segur v. Syndics of St. Maxent, 1 Mart. (o.s.) 231, 231 (Orleans 1811)).

38. RESTATEMENT OF CONTRACTS § 236(d) (AM. LAW INST. 1932). Even today, the Restatement continues to reflect the *contra proferentem* rule. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981) ("In choosing among the reasonable meanings of a promise or agreement or a term

The *contra proferentem* doctrine rests on the notion that the party who drafted a contract should bear the responsibility for any ambiguous language in the contract.[39] Rightly or wrongly, the doctrine assumes that the party who drafted a contract controlled the contract's terms and was in a better position to clarify or remove any ambiguous language from the contract.[40] Thus, courts invoking the *contra proferentem* doctrine have often justified it on the theory that it discourages poor or careless draftsmanship, arguing that a drafting party is more likely to prepare a clearer contract when it knows that a court may construe any ambiguous language in favor of the other party.[41]

---

thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

39. *E.g.*, Vargas v. Insurance Co. of N. Am., 651 F.2d 838, 841 (2d Cir. 1981); Balandran v. Safeco Ins. Co., 972 S.W.2d 738, 741 n.1 (Tex. 1998).

40. *See, e.g.*, Nw. Adm'rs, Inc. v. B.V. & B.R., Inc., 813 F.2d 223, 226 (9th Cir. 1987) ("The doctrine of *contra proferentem* is based on the common sense notion that ambiguous language should be interpreted against the drafter because that party was in the best position to prevent the ambiguity . . . ."); *see also* E. ALLEN FARNSWORTH, CONTRACTS 473–74 (3d ed. 1999) (noting that the *contra proferentem* rule "is often rationalized on the ground that the party against whom it operates had the possibility of drafting the language so as to avoid the dispute."); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1608 (2005) ("The doctrine of *contra proferentem* may still be a sensible tiebreaker, on the ground that the party who drafted the contract was probably in the better position to avoid ambiguities. But this is not always the case.").

41. *E.g.*, Dardovitch v. Haltzman, 190 F.3d 125, 141 (3d Cir. 1999); MCI Diagnostic Cen., LLC v. United States, 147 Fed. Cl. 246, 278 (2020); Twin City Fire Ins. Co. v. Delaware Racing Ass'n, 840 A.2d 624, 630 (Del. 2003); Snow v. City of Columbia, 409 S.E.2d 797, 800 (S.C. Ct. App. 1991); *see* Kenneth E. Dzien & Keith Jonathan Turner, *Not All Insurance Policies Are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy*, 33 TORT & INS. L.J. 1123, 1130 (1998) ("Historically, the *contra proferentem* rule was created to encourage careful contract drafting."); David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 437 (2009) ("The traditional rationale for *contra proferentem* hinges on control: to deter ambiguities, courts interpret them against the party responsible for the faulty language."); Ethan J. Leib & Steve Thel, *Contra Proferentem and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773, 776 (2015) ("Courts and commentators have offered a variety of rationales for *contra proferentem*. Perhaps the dominant explanation is that the rule discourages ambiguity: Drafters will draft clearer contracts if they know that ambiguous language will be construed against them."); Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 807,

Because the *contra proferentem* doctrine assumes that the drafting party controlled the contract's terms, the rule finds its greatest application in cases where the non-drafting party had little or no ability to negotiate any of the contract's terms—particularly insurance cases, where the *contra proferentem* doctrine is commonly known as the "ambiguity doctrine."[42] Courts invoking the *contra proferentem* doctrine in such cases have offered a further justification for the rule: They argue that it protects consumers (and other parties who have little or no bargaining power) against overreaching form contracts and contracts of adhesion.[43]

The arguments that courts have cited to justify the *contra proferentem* doctrine necessarily limit the scope of the rule. Even in insurance cases, the *contra proferentem* doctrine does not mean—or, at least, should not

---

819 (1993) ("[C]ourts construe ambiguous language against the drafter to encourage clearer, more careful, and precise contract language and place the costs of uncertainty—that is, litigation losses—on the party better able to bear and spread the loss."); Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 2019 J. DISP. RESOL. 149, 178 ("This [*contra proferentem*] rule incentivizes the drafter to make the clearest contract possible.").

The *contra proferentem* doctrine not only assumes that it serves the present purpose of deterring careless draftsmanship, but also "that judges will use their power to induce a rewrite of unsatisfactory contract terms *in future contracts*." Michelle E. Boardman, *The Unpredictability of Insurance Interpretation*, 82 L. & CONTEMP. PROBS. 27, 27 (2019) (emphasis in original).

42. *See* Liggett*, supra* note 36, at 214; *see also* David S. Miller, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849, 1849 (1988); Ed E. Duncan, *The Demise of Contra Proferentem as the Primary Rule of Insurance Contract Interpretation in Ohio and Elsewhere*, 41 TORT TRIAL & INS. PRAC. L.J. 1121, 1121 (2006).

43. *E.g.*, New Castle Cty. v. Nat'l Union Fire Ins. Co., 243 F.3d 744, 755–56 (3d Cir. 2001); Kunin v. Benefit Tr. Life Ins. Co., 910 F.2d 534, 540 (9th Cir. 1990); Buchanan v. Mass. Protective Ass'n, 223 F.2d 609, 612–13 (D.C. Cir. 1948); Thompson-Harbach v. USAA Fed. Sav. Bank, 359 F. Supp. 3d 606, 632 (N.D. Iowa 2019); Wismer Distrib. Co. v. Brink's Inc., No. Civ. A.H-03-5897, 2005 WL 1840149, at *8 (S.D. Tex. Aug. 2, 2005); Parrot v. Guardian Life Ins. Co. of Am., 866 A.2d 1273, 1280 n.11 (Conn. 2005); Economy Premier Assurance Co. v. W. Nat'l Mut. Ins. Co., 839 N.W.2d 749, 754–55 (Minn. Ct. App. 2013); *see* 1A PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 3:59 (2017) ("To a great degree, the *contra proferentem* rule was developed as a means of avoiding the consequences of contracts that courts felt were either unfair or created on a 'take it or leave it' basis with little real negotiation."); Leib & Thel*, supra* note 41, at 776 (noting that courts have often tried to justify the *contra proferentem* rule on the basis that it "serves to protect the public against institutions that are inclined to draft obscure contracts to entrap consumers").

mean—that the insured's interpretation will *always* prevail over the insurer's interpretation.[44] Where the policies underlying the *contra proferentem* doctrine do not apply, the doctrine itself should not apply. *Contra proferentem* serves no useful purpose where there is no culpable party to blame for the ambiguous language in a contract or no innocent party to protect from the contract. Consequently, courts over the years have recognized several limitations on the applicability of the *contra proferentem* doctrine.[45]

Most of the historical limitations on the *contra proferentem* doctrine are intuitive. First, the *contra proferentem* doctrine is a rule of last resort.[46]

---

44. *E.g.*, Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983); *see* Hall v. Life Ins. Co. of N. Am., 317 F.3d 773, 776 (7th Cir. 2003) (noting that the *contra proferentem* rule does not require a "pro-insured decision in every case"); *see also* Paul Sullivan & Jeffrey Gordon, *Contra Proferentem Doesn't Always Mean "Against the Insurer"*, JDSUPRA (July 21, 2016), https://www.jdsupra.com/legalnews/contra-proferentem-doesn-t-always-mean-89102/ [https://perma.cc/YQP7-ZUGT] ("Contrary to what sometimes appears to be common understanding, the English translation of the Latin phrase *contra proferentem* is not 'the insurance company loses.'"). Many commentators have complained that courts, particularly in insurance cases, have improperly applied the *contra proferentem* rule beyond its historical limitations. *See, e.g.*, Duncan, *supra* note 42, at 1124 ("Although the ambiguity rule is a secondary rule of construction and should therefore be a last resort, for decades, Ohio courts have invariably applied the doctrine as the primary rule of construction.").

45. *See* DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 58 (2015) ("[T]he reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was."); *see also* John R. Riddlefe, *"If It's a Tie, You Lose" — The Limits of the Contra Proferentem Doctrine in Construing Insurance Policies*, 27th Annual N.E. Surety & Fidelity Claims Conf., Sept. 22, 2016, at 4–7.

46. *E.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1409, 1417 (2019); Record Club of Am., Inc. v. United Artists Records, Inc., 890 F.2d 1264, 1271 (2d Cir. 1989); Quad Constr., Inc. v. Wm. A. Smith Contracting Co., 534 F.2d 1391, 1394 (10th Cir. 1976); Hurd v. Ill. Bell Tel. Co., 136 F. Supp. 125, 134 (N.D. Ill. 1955), *aff'd,* 234 F.2d 942 (7th Cir. 1956); Prestige Oilfield Servs., LLC v. Devon Energy Prod. Co., No. 18-1173, 2019 WL 764669, at *6 (D.N.M. Feb. 21, 2019); Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington, No. 19035, 2002 WL 418032, at *9 (Del. Ch. Mar. 12, 2002); Petersen v. Magna Corp., 773 N.W.2d 564, 570 (Mich. 2009); Fernandez v. Price, 880 N.Y.S.2d 169, 173 (N.Y. App. Div. 2009); GTE Mobilnet of S. Tex. Ltd. P'ship v. Telecell Cellular, Inc., 955 S.W.2d 286, 291 (Tex. App. 1997); *see* Michelle Boardman, *Penalty Default Rules in Insurance Law*, 40 FLA. ST. U. L. REV. 305, 326–27 (2013) ("Although some courts seem unclear on the concept, contra proferentem is meant to be a rule of last resort . . . ."); Michele L. Fenice & Adam P. Friedman, *The Rule of Contra Proferentem and Why It Should Not Apply to the Interpretation of Fidelity Bonds*,

It applies only where a contract is ambiguous and a court has no other means available to construe the ambiguous language.[47] Effectively, the *contra proferentem* doctrine is contract law's equivalent of baseball's rule that a tie goes to the runner. As a rule of last resort, the *contra proferentem* doctrine is relevant only in the event of a *tie*—i.e., the parties have respectively advanced two or more equally reasonable, but mutually inconsistent, interpretations of their contract.[48] Therefore:

---

21 FIDELITY L.J. 233, 242 (2015) (noting that the modern trend is that "automatic application of the rule of *contra proferentem* is discouraged, and courts resort to the rule only as a last resort"); Miller, *supra* note 42, at 1851 ("Under contract law, *contra proferentem* was strictly a device of last resort.").

47. *E.g.*, Hugo Boss Fashions, Inc. v. Fed. Ins. Co., 252 F.3d 608, 616 (2d Cir. 2001); Ranger Ins. Co. v. Bowie, 574 S.W.2d 540, 542 (Tex. 1978); *see* Gardiner, Kamya & Assocs., P.C. v. Jackson, 467 F.3d 1348, 1352 (Fed. Cir. 2006) (noting that the *contra proferentem* rule is "applied only when other approaches to contract interpretation have failed"); *see also* BRUNER & O'CONNOR, *supra* note 43, at § 3:59 ("The *contra proferentem* rule . . . [is] a rule of last resort, when all other means of resolving a latent ambiguity prove unsuccessful. The rule means that, with no other way to resolve the latent ambiguity, the interpretations of the parties each remain reasonable, the courts as a last resort will construe the ambiguity against the drafter of the [contract] specifications and permit the interpretation of the non-drafter to prevail."); Boardman, *supra* note 46, at 327 ("Only after all other interpretive methods have been exhausted—and the court is still left with language that either has no clear meaning or two plausible meanings—is contra proferentem to apply."); Duncan, *supra* note 42, at 1123 (noting that the *contra proferentem* rule "has been classified as a secondary rule to be utilized only if the meaning of the contract remains unclear after the primary rules have been applied and all other secondary rules have failed").

48. *E.g.*, Residential Mktg. Grp. v. Granite Inv. Grp., 933 F.2d 546, 549 (7th Cir. 1991); Pitcher v. Principal Mut. Life Ins. Co., 870 F. Supp. 903, 915 (S.D. Ind. 1994), *aff'd,* 93 F.3d 407 (7th Cir. 1996); Cruz v. Visual Perceptions, LLC, 84 A.3d 828, 837 (Conn. 2014); *see* Durrett v. Nationwide Prop. & Cas. Ins. Co., No. A-14-CA-167-SS, 2015 WL 1564783, at *8 (W.D. Tex. Apr. 7, 2015) (noting that the *contra proferentem* rule "is essentially a tie-breaking device used to prevent arbitrary decisions when all other methods of interpretation and construction prove unsatisfactory"); *see also* Leib & Thel, *supra* note 41, at 786 (noting that "courts tend to treat the rule as 'tiebreaker' or a 'rule of last resort,' as it has often been characterized").

Because the *contra proferentem* doctrine is a rule of last resort that applies only as a tiebreaker, Professor Corbin argued that *contra proferentem* was not a rule of construction at all, but rather a "rule of policy, generally favoring the underdog." 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 24.27 (Joseph M. Perillo ed., 1998); *see* Klapp v. United Ins. Grp. Agency, Inc., 663 N.W.2d 447, 456 (Mich. 2003) ("In our judgment, the rule of contra proferentem is not a rule of

• The doctrine does not apply where "the intent of the parties is clear and a resort to the rule will defeat that intent."[49]

• The doctrine does not apply where the parties' contract is unambiguous and only one interpretation of the disputed contract language is reasonable.[50]

• The doctrine does not apply where a court or fact finder may determine the intent of the parties through other means, such as extrinsic evidence or other applicable rules of contract construction.[51]

Second, the *contra proferentem* doctrine applies only against a party who is properly responsible for the ambiguous language. At its essence, the *contra proferentem* doctrine holds that if a clause in a contract is

---

construction; rather . . . it is a rule of legal effect. While rules of construction are designed to help determine the parties' intent, the rule of contra proferentem is designed to resolve a dispute where the parties' intent cannot be determined."); *see also* Boardman, *supra* note 46, at 325 ("If the goal of modern interpretation is to determine the meaning the parties attached to the words at the time of contracting, counting the words themselves as primary but not exclusive evidence, contra proferentem is *not* a rule of interpretation.").

49. Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc., 88 F.3d 347, 355 (5th Cir. 1996) (quoting Modular Tech. Corp. v. City of Lubbock, 529 S.W.2d 273, 276 (Tex. Civ. App. 1975)).

50. *See* Savedoff v. Access Grp., Inc., 524 F.3d 754, 767 (6th Cir. 2008) (noting that while the parties to a contract may interpret it differently, "an ambiguity may only be found (and, thus, the *contra proferentem* rule may only be applied) if those different interpretations are both *reasonable* ones").

51. *E.g.*, Penford Corp. v. Nat'l Union Fire Ins. Co., 662 F.3d 497, 505 (8th Cir. 2011); Andy Warhol Found. for Visual Arts, Inc. v. Fed. Ins. Co., 189 F.3d 208, 215 (2d Cir. 1999); Klapp v. United Ins. Grp. Agency, Inc., 663 N.W.2d 447, 456 (Mich. 2003); State Farm Mut. Auto. Ins. v. Esswein, 43 S.W.3d 833, 842 (Mo. Ct. App. 2000); *see* Micro Focus (U.S.), Inc. v. Express Scripts, Inc., No. PX-16-0971, 2019 WL 557080, at *7 (D. Md. Feb. 12, 2019) ("To allow otherwise would mean that claims of contractual ambiguity must be taken away from the jury once the Court ascertains *a* reasonable meaning in favor of the non-drafter, competing facts be damned. The law does not support reading the [*contra proferentem*] doctrine to supplant the function of the jury."); *see also* Miller, *supra* note 42, at 1851 (noting that historically the *contra proferentem* rule "was not to be employed until the court had first examined all the contemporaneous circumstances and communications, any past agreements between the two parties, the local, general, technical, and trade usages of the disputed terms, and finally the customs of the relevant community").

ambiguous, a court may construe the clause against the party who caused the ambiguity in the first place—i.e., the party who drafted the ambiguous clause.[52] In that sense, the doctrine presumes that one of the parties is more responsible or culpable than the other for the ambiguous language.[53] Historically, a court may not construe ambiguous language against a party who was not solely, or at least predominantly, responsible for drafting the ambiguous language.[54] Therefore:

• The doctrine does not apply against one party where the other party drafted the ambiguous language; and specifically, the rule does not apply against an insurer where the insured drafted the ambiguous language.[55]

• The doctrine does not apply where both parties participated equally in drafting the ambiguous contract language.[56]

---

52. *See supra* text accompanying notes 39–40.

53. *E.g.*, Aleynikov v. Goldman Sachs Grp., Inc., 765 F.3d 350, 366 (3d Cir. 2014); Northwest Adm'rs, Inc. v. Sacramento Stucco, 86 F. Supp. 2d 974, 986 (N.D. Cal. 2000).

54. *E.g.*, Intel Corp. v. VIA Techs., Inc., 319 F.3d 1357, 1363 (Fed. Cir. 2003).

55. *E.g.*, BB Syndication Servs., Inc. v. First Am. Title Ins. Co., 780 F.3d 825, 830 n.4 (7th Cir. 2015); Harrah's Entm't, Inc. v. Ace Am. Ins. Co., 100 F. App'x 387, 391 (6th Cir. 2004); E. Associated Coal Corp. v. Aetna Cas. & Sur. Co., 632 F.2d 1068, 1071 (3d Cir. 1980); Standard & Poor's Corp. v. Cont'l Cas. Co., 718 F. Supp. 1219, 1221 (S.D.N.Y. 1989); Buckeye Cellulose Corp. v. Atlantic Mut. Ins. Co., 643 F. Supp. 1030, 1037–38 (S.D.N.Y. 1986); Metpath, Inc. v. Birmingham Fire Ins. Co., 449 N.Y.S.2d 986, 989 (N.Y. App. Div. 1982); *see* Sullivan & Gordon, *supra* note 44 ("Analytically, it stands to reason that when the insured drafts the policy, the doctrine of *contra proferentem* would apply against the insured, as the drafter of the instrument, for the same reasons it has been often applied against the insurer. The drafting party chooses the language, can take steps to protect its interests and should bear the consequences of any drafting errors."). *But see* James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation? Text Versus Context*, 24 ARIZ. ST. L.J. 995, 1014 (1992) (noting that some courts have applied the *contra proferentem* rule against an insurer "even though the portion of the insurance contract to be construed was drafted by the insured") (citing Eli Lilly & Co. v. Home Ins. Co., 794 F.2d 710, 715 (D.C. Cir. 1986)).

56. *E.g.*, Tranzact Techs., Ltd. v. Evergreen Partners, Ltd., 366 F.3d 542, 545 n.1 (7th Cir. 2004); Porous Media Corp. v. Midland Brake, Inc., 220 F.3d 954, 960 (8th Cir. 2012); Calcasieu-Marine Nat'l Bank v. Am. Emp'rs Ins. Co., 533 F.2d 290, 296 n.6 (5th Cir.), *cert. denied*, 429 U.S. 922 (1976); Info. Leasing Corp. v. McGladrey & Pullen, L.L.P., No. 03-5111JNEJGL, 2005 WL 1706113,

• The doctrine does not apply to benefit a stranger to the contract, such as a reinsurer complaining about the scope of allegedly ambiguous coverage in the primary insurance policy.[57]

Third, at least as a general rule, the *contra proferentem* doctrine applies only in favor of an innocent party who had little or no ability to negotiate any of the terms of the contract.[58] Especially in the insurance context, most courts have recognized a sophisticated party exception to the *contra proferentem* doctrine.[59] A sophisticated party does not need the benefit of

---

at *3 (D. Minn. July 21, 2005); Kozura v. Tulpehocken Area Sch. Dist., 791 A.2d 1169, 1175 n.8 (Pa. 2002); Superior Water, Light & Power Co. v. Certain Underwriters at Lloyds, London, No. 2018AP1926, 2019 WL 6121350, at *6 n.6 (Wis. Ct. App. 2019).

57. *E.g.*, U.S. Fid. & Guar. Co. v. Heritage Mut. Ins. Co., 230 F.3d 331, 333 (7th Cir. 2000); U.S. Fid. & Guar. Co. v. W. Cas. & Sur. Co., 408 P.2d 596, 598 (Kan. 1965); Econ. Premier Assur. Co. v. W. Nat'l Mut. Ins. Co., 839 N.W.2d 749, 755 (Minn. Ct. App. 2013); Travelers Ins. Co. v. Am. Cas. Co., 441 P.2d 177, 180 (Mont. 1968).

58. *E.g.*, Shaw Hofstra & Assocs. v. Ladco Dev., Inc., 673 F.3d 819, 828 (8th Cir. 2012); *see* Pacifico v. Pacifico, 920 A.2d 73, 78 (N.J. 2007) (noting that the *contra proferentem* doctrine "is only available in situations where the parties have unequal bargaining power"); *see also* Leib & Thel, *supra* note 41, at 780 (noting that the *contra proferentem* doctrine "has especial importance in the take-it-or-leave-it context of standard form contracting").

59. *E.g.*, Penford Corp. v. Nat'l Union Fire Ins. Co., 662 F.2d 497, 505 (8th Cir. 2011); Payless Shoesource, Inc. v. Travelers Cos., 585 F.3d 1366, 1372 (10th Cir. 2009); Beanstalk Grp., Inc. v. AM Gen. Corp., 283 F.3d 856, 858–59 (7th Cir. 2002); Prof'l Consultants Ins. Co. v. Emp'rs Reinsurance Co., No. 1:03-CV-216, 2006 WL 751244, at *3 n.5 (D. Vt. Mar. 8, 2006); *In re* Enron Corp. Sec. Litig., 391 F. Supp. 2d 541, 578 (S.D. Tex. 2005); Rouse Co. v. Fed. Ins. Co., 991 F. Supp. 460, 466 (D. Md. 1998); Indus. Risk Insurers v. New Orleans Pub. Serv., Inc., 666 F. Supp. 874, 881 (E.D. La. 1987); St. Paul Mercury Ins. Co. v. Grand Chapter of Phi Sigma Kappa, Inc., 651 F. Supp. 1042, 1045 (E.D. Pa. 1987); Baxter Int'l, Inc. v. American Guar. & Liab. Ins. Co., 861 N.E.2d 263, 268–69 (Ill. App. Ct. 2006); Benjamin Moore & Co. v. Aetna Cas. & Sur. Co., 843 A.2d 1094, 1103–04 (N.J. 2004); Cummins, Inc. v. Atlantic Mut. Ins. Co., 867 N.Y.S.2d 81, 83 (N.Y. App. Div. 2008); Union Pac. R.R. Co. v. Certain Underwriters at Lloyd's London, 771 N.W.2d 611, 616–17 (S.D. 2009).
Several courts have applied a sophisticated party exception to the *contra proferentem* doctrine even outside of the insurance context. *See, e.g.*, FabArc Steel Supply, Inc. v. Composite Constr. Sys., Inc., 914 So. 2d 344, 359 (Ala. 2005); Kinney v. Capitol-Strauss, Inc., 207 N.W.2d 574, 577 (Iowa 1973); Norcomo Corp. v. Franchi Constr. Co., 587 S.W.2d 311, 317 (Mo. Ct. App. 1979).

an artificial rule of contract construction: It is perfectly capable of protecting itself against ambiguous contract language.[60] This is true even if the sophisticated party did not draft the ambiguous language.[61] And in any event, a court or fact finder usually has sufficient extrinsic evidence to determine the meaning of any ambiguous language in a contract that is

---

Not all courts, however, have embraced the sophisticated party exception to the *contra proferentem* doctrine. Some courts have rejected the sophisticated party exception. *See, e.g.*, Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co., 124 F.3d 508, 521 (3d Cir. 1997); Central Tel. Co. v. Sprint Commc'ns Co., No. 3:09cv720, 2011 WL 6205975, at *11 n.12 (E.D. Va. Dec. 13, 2011).

60. El Paso Field Servs., L.P. v. MasTec N. Am., Inc., 389 S.W.3d 802, 810–11 (Tex. 2012); *see* Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983) ("[I]n cases involving bargained-for contracts, negotiated by sophisticated parties, the underlying adhesion contract rationale for the doctrine is inapposite."); Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1976) ("We do not feel compelled to apply, or, indeed, justified in applying the general rule that an insurance policy is construed against the insurer in the commercial insurance field when the insured is not an innocent but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated business men, and represented by counsel on the same professional level as the counsel for insurers. . . . There is no purpose in following a legal platitude that has no realistic application to a contract confected by a large corporation and a large insurance company each advised by competent counsel and informed experts."); Farmers Auto. Ins. Ass'n v. St. Paul Mercury Ins. Co., 482 F.3d 976, 977 (7th Cir. 2007) ("The argument for *contra proferentem* is pretty feeble when the policyholder is a sophisticated commercial enterprise rather than an individual consumer."); Vought Aircraft Indus., Inc. v. Falvey Cargo Underwriting, Ltd., 729 F. Supp. 2d 814, 823 (N.D. Tex. 2010) (holding that the *contra proferentem* doctrine does not apply to sophisticated insureds because "they are able to interpret the policy on their own, lessening the likelihood that the insurer will take advantage of them"); *Pacifico,* 920 A.2d at 78 ("If both parties are equally 'worldly-wise' and sophisticated, contra proferentem is inappropriate."); *see also* Barry R. Ostrager & David W. Ichel, *The Role of Bargaining Power Evidence in the Construction of the Business Insurance Policy: An Update*, 18 FORUM 577, 583 (1983) ("[I]n cases involving bargained-for contracts, negotiated by sophisticated parties, the underlying adhesion contract rationale for the doctrine is inapposite.").

61. *See* Fenice & Friedman, *supra* note 46, at 247 ("If the reason courts interpret insurance policies against the insurer is because most policies are considered to be contracts of adhesion, then where an insured is a large, sophisticated entity, the policy by rule cannot be an adhesion contract and the rule of *contra proferentem* should not apply. . . . The question should not be whether the insured actually participated in the process of drafting or negotiating the terms of the policy; it should be whether the insured had the ability to do so.").

the product of negotiations between parties of relatively equivalent bargaining strength.[62]

At the risk of stating a tautology, the necessary consequence of these historical limitations is that the *contra proferentem* doctrine is a rule of limited application: In those rare instances when a court has no extrinsic evidence or other available tools to divine the meaning of ambiguous contract language, the court may construe the language against the party, if any, who actually drafted the language and was responsible for creating the ambiguity in the first place.[63] The *contra proferentem* doctrine, at least based on its historical limitations, does not permit a court to redraft an otherwise unambiguous contract for the purpose of producing an outcome that the court may deem to be more equitable to one of the parties.[64]

III. MISUSE OF THE "AGAINST THE LESSEE" RULE OF CONSTRUCTION: THE EXAMPLE OF FIRST MARKETABLE PRODUCT CASE LAW

The "against the lessee" rule of construction masquerades as an oil and gas version of the *contra proferentem* rule.[65] Just as the *contra proferentem* rule assumes that an insurer is the party responsible for any ambiguous language in an insurance policy, the "against the lessee" rule assumes that a lessee is the party responsible for any ambiguous language in an oil and gas lease.[66] Like the *contra proferentem* rule, the "against the lessee" rule purports to discourage poor draftsmanship.[67] And like the

62. *E.g.*, Emp'rs Reinsurance Corp. v. Mid-Continent Cas. Co., 358 F.3d 757, 767 (10th Cir. 2004); United States Fire Ins. Co. v. General Reinsurance Corp., 949 F.2d 569, 573–74 (2d Cir. 1991); Superior Water, Light & Power Co. v. Certain Underwriters at Lloyds, London, No. 2018AP1926, 2019 WL 6121350, at *6 n.6 (Wis. Ct. App. 2019); *see* BRUNER & O'CONNOR, *supra* note 43, at § 3:59 ("The 'contra proferentem' rule is used less frequently in private agreements negotiated between parties in roughly equal bargaining positions. This is because there usually is sufficient extrinsic evidence available to reach a resolution as to what the parties intended.").

63. *See supra* text accompanying notes 46–63.

64. *See* Fenice & Friedman, *supra* note 46, at 235.

65. *See, e.g.*, Lomree, Inc. v. Pan Gas Storage, LLC, No. 10-14425, 2011 WL 3498131, at *9 (E.D. Mich. Aug. 10, 2011) (noting that the "against the lessee" rule essentially re-states the *contra proferentem* rule by declaring that courts should construe oil and gas leases in favor of the lessor), *rev'd on other grounds*, No. 11-2132, 2012 WL 3871882 (6th Cir. Sept. 6, 2012).

66. *See supra* text accompanying note 32.

67. *See, e.g.*, Rook v. James E. Russell Petroleum, Inc., 679 P.2d 158, 164 (Kan. 1984) ("[W]here the lessee desires it may protect itself by the manner in which the lease is drawn."); *cf. supra* text accompanying note 41.

contra proferentem rule, the "against the lessee" rule purports to protect lessors and other royalty owners against overreaching form leases that may appear to operate as contracts of adhesion.[68]

If, in fact, the "against the lessee" rule of construction is simply an oil and gas version of the *contra proferentem* doctrine, then the same principles that limit the reach of the *contra proferentem* doctrine should apply equally to the "against the lessee" rule. Many courts, however, have seemingly applied the "against the lessee" rule far more broadly than the *contra proferentem* doctrine.[69] Often they have done so innocently and in a way that has not materially changed the outcome of a dispute: For example, courts in many cases have cited the "against the lessee" rule to bolster a pro-lessor interpretation of leases that they have already found to be unambiguous.[70] If the leases in those cases were indeed unambiguous, then those courts likely reached the correct result even though the *contra*

---

68. *See, e.g.*, Stanolind Oil & Gas Co. v. Guertzgen, 100 F.2d 299, 300 (9th Cir. 1938) ("[P]rotection of the interests of the lessor is considered of paramount importance."); *see also* Williston H. Symonds, Note, *The Michaelangelo of the Oklahoma Oil & Gas Industry: The Cessation of Production Clause, Spontaneous Lease Terminations, and Cyclical or Marginal Production Problems,* 17 OKLA. CITY U. L. REV. 413, 413 (1992) (noting that the "against the lessee" rule satisfies "a number of goals, one of which was to improve the balance between the bargaining position of the lessor against the stronger bargaining position of the lessee"); *cf. supra* text accompanying note 43.
In cases where the lessor argues that an oil and gas lease terminated after the lessee failed to develop the lease or secure any production from the lease in paying quantities, some courts have suggested that the "against the lessee" rule serves the purpose of promoting oil and gas development. *E.g.*, Greer v. Salmon, 479 P.2d 294, 299 (N.M. 1970).

69. *See infra* notes 70–80 and accompanying text.

70. *E.g.*, Hanna Oil & Gas Co. v. Taylor, 759 S.W.2d 563, 565 (Ark. 1988); *Greer*, 479 P.2d at 298; *see* Sundheim v. Reef Oil Corp., 806 P.2d 503, 508–09 (Mont. 1991) ("Further support of this holding is found in the general rule that oil and gas leases are to be construed liberally in favor of the lessor and against the lessee."); *see also* Pierce, *supra* note 35, at 919 (noting that courts often tend to use the "against the lessee" rule when it supports "the desired outcome even though there may be no need to resolve an ambiguity, or even a need to interpret the express terms of the contract").
Some courts have cited the "against the lessee" rule without making any effort to apply it or discuss it at all. *E.g.*, Geysers Dev. P'ship v. Geysers Power Co., 805 F. App'x 489, 490 (9th Cir. 2020); Lough v. Coal Oil, Inc., 266 Cal. Rptr. 611, 614 (Cal. Ct. App. 1990); Davis v. Cramer, 837 P.2d 218, 225 (Colo. App. 1992); State *ex rel.* Comm'rs of the Land Office v. Couch, 298 P.2d 452, 453 (Okla. 1956); Clark v. Perez, 679 S.W.2d 710, 714 (Tex. App. 1984).

proferentem doctrine is a rule of last resort and does not normally apply to an unambiguous contract.[71]

But in other cases, courts have applied the "against the lessee" rule in a way that not only has materially altered the outcome of oil and gas disputes, but is also potentially harmful rather than innocent. The opinions in those cases follow a familiar pattern: Without applying any other rules of lease or contract construction, those courts have declared that lease language is "ambiguous" and then invoked the "against the lessee" rule of construction to reach a result that favors the lessor.[72] They often have done so even when the lease language either unambiguously favors the lessee or is subject to a reasonable interpretation that a jury or other factfinder could reach in favor of the lessee after considering extrinsic evidence.[73]

A notable example is the case law that developed the first marketable product doctrine. Many oil and gas leases require that lessees pay royalties on the basis of the market value of their oil and gas production "at the well" or "at the wellhead."[74] Until the first marketable product doctrine came into prominence, courts routinely ruled that the term "at the well" was unambiguous and designated the location at which lessees were to calculate the market value of their production for royalty purposes; consequently, those courts concluded that lessees could use a "workback" methodology to calculate their royalty payments.[75] Under a workback methodology, lessees may calculate the market value of their lessors' royalty share of the oil or gas production "at the well" by subtracting the lessors' share of any post-production expenses from the lessors' share of

71. *See supra* text accompanying notes 46–62.

72. *See infra* text accompanying notes 80–113.

73. *See infra* notes 74–79 and accompanying text.

74. *See* Byron C. Keeling & Karolyn King Gillespie, *The First Marketable Product Doctrine: Just What is the "Product"?*, 37 ST. MARY'S L.J. 1, 15–16 (2005).

75. *See* Potts v. Chesapeake Expl., L.L.C., 760 F.3d 470, 475 (5th Cir. 2014); Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225, 231 (5th Cir. 1984); Hurinenko v. Chevron, USA, Inc., 69 F.3d 283, 285 (8th Cir. 1995); Hemler v. Union Producing Co., 40 F. Supp. 824, 832 (W.D. La. 1941), *rev'd on other grounds*, 134 F.2d 436 (5th Cir. 1943); Cumberland Pipe Line Co. v. Commonwealth *ex rel.* Ky. St. Tax Comm'n, 15 S.W.2d 280, 284 (Ky. 1929); Atl. Richfield Co. v. State, 262 Cal. Rptr. 683, 688 (Cal. Ct. App. 1989); Wall v. United Gas Pub. Serv. Co., 152 So. 561, 564 (La. 1934); Merritt v. Sw. Elec. Power Co., 499 So. 2d 210, 214 (La. Ct. App. 2d Cir. 1986); Mont. Power Co. v. Kravik, 586 P.2d 298, 303 (Mont. 1978); Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 130 (Tex. 1996) (Owen, J., concurring); Tana Oil & Gas Corp. v. Cernosek, 188 S.W.3d 354, 361 (Tex. App. 2006).

the price that the lessees received on selling the oil or gas at a downstream sales location.[76]

By contrast, courts that have adopted the first marketable product doctrine have ruled that lessees generally may *not* use a workback methodology to calculate their royalty payments.[77] According to courts that have adopted the first marketable product doctrine, lessees must bear all of the costs necessary to achieve a marketable product, including almost all post-production costs.[78] Those courts have concluded that even under a royalty clause requiring lessees to pay royalties based on the market value of its production "at the well," lessees must normally calculate their royalty payments on the basis of the price or value of their production at the downstream location where they first acquire a

---

76. *See* Keeling & Gillespie, *supra* note 10, at 21; *see also Potts*, 760 F.3d at 472 (noting that a workback methodology is "nothing more than a method of determining market value at the well in the absence of comparable sales data at or near the wellhead"); Salzman & Friess, *supra* note 10, at 7-9 ("[T]he common practice of lessees for determining the value upon which to pay royalties is to take the value produced by the downstream sale of the production and subtract the postproduction expenses incurred downstream of the well to get the production to the point of sale. This process is often referred to as a netback or workback method of calculating royalties."); *see also Atl. Richfield Co.*, 262 Cal. Rptr. at 688 ("[I]t is commonly understood that 'market price at the well' is often determined by working back from the price at the point of sale, deducting the cost of processing and transportation to the wellhead, to determine 'market value at the wellhead[.]'"); Burlington Res. Oil & Gas Co. v. Tex. Crude Energy, LLC, 573 S.W.3d 198, 207 (Tex. 2019) ("A royalty on production valued at the well does not include the value added by post-production costs. When a royalty payment is based on a downstream sales price, the value added by post-production costs must be subtracted from the sales price or otherwise accounted for in order to approximate the 'at the well' value of the products." (citations omitted)); *Heritage Res., Inc.*, 939 S.W.2d at 130 (Owen, J., concurring) ("Evidence of market value . . . can be proven by the so-called net-back approach, which determines the prevailing market price at a given point and backs out the necessary, reasonable costs between that point and the wellhead.").

77. *See* Byron C. Keeling, *In the New Era of Oil & Gas Royalty Accounting: Drafting a Royalty Clause that Actually Says What the Parties Intend It to Mean*, 69 BAYLOR L. REV. 517, 535–36 (2017).

78. *E.g.*, Rogers v. Westerman Farm Co., 29 P.3d 887, 901 (Colo. 2001); Garman v. Conoco, Inc., 886 P.2d 652, 659 (Colo. 1994); Gilmore v. Superior Oil Co., 388 P.2d 602, 605 (Kan. 1964); Sternberger v. Marathon Oil Co., 894 P.2d 788, 797 (Kan. 1995); Mittelstaedt v. Santa Fe Minerals, Inc., 954 P.2d 1203, 1208 (Okla. 1998); Estate of Tawney v. Columbia Nat. Res., L.L.C., 633 S.E.2d 22, 29 (W. Va. 2006); Wellman v. Energy Res., Inc., 557 S.E.2d 254, 265 (W. Va. 2001).

marketable product, not on the basis of the price or value that they may calculate for their production at the wellhead under a workback methodology.[79]

Two of the most prominent cases on the first marketable product doctrine are the Colorado Supreme Court opinion in *Rogers v. Westerman Farm Co.*[80] and the West Virginia Supreme Court opinion in *Estate of Tawney v. Columbia Natural Resources, L.L.C.*[81]

A. Rogers v. Westerman Farm Co.

The Colorado Supreme Court in *Rogers* relied heavily on the "against the lessee" rule of construction to support its decision to adopt the first marketable product doctrine. The plaintiffs in *Rogers* were royalty owners under oil and gas leases providing that their lessees would pay royalties on the basis of the market value or market price of their production "at the well."[82] The defendant lessees argued that the term "at the well" permitted them to calculate their royalty payments by using a workback methodology.[83] The supreme court disagreed, holding that the term "at the well" was insufficient in itself to "set forth the proper allocation between the parties of the costs of gathering, compressing, and dehydrating the gas."[84]

In reaching its conclusion that the defendant lessees could not use a workback methodology to calculate their royalty payments, the court in *Rogers* emphasized that it was "mindful of the generally accepted rule that oil and gas leases are strictly construed against the lessee in favor of the lessor."[85] The court cursorily observed that "lessors are not usually familiar with the law related to oil and gas leases, while lessees, through experience drafting and litigating leases, generally are."[86] But tellingly,

---

79. *See* Keeling & Gillespie, *supra* note 10, at 21 (discussing the first marketable product case law).

80. 29 P.3d 887 (Colo. 2001).

81. 633 S.E.2d 22 (W. Va. 2006).

82. *Rogers*, 29 P.3d at 891.

83. *Id.* at 894.

84. *Id.* at 887.

85. *Id.* at 901; *see* Savage v. Williams Prod. RMT Co., 140 P.3d 67, 69 (Colo. App. 2005) (citing *Rogers* and noting that the "generally accepted rule is that oil and gas leases are strictly construed against the lessee and in favor of the lessor").

86. *Rogers,* 29 P.3d at 902; *see* David E. Pierce, *Royalty Jurisprudence: A Tale of Two States*, 49 WASHBURN L.J. 347, 363 (2010) (noting that the court in *Rogers* cited a presumed lack of lessor sophistication "as the predicate for unsheathing contract law's bluntest of interpretive instruments — the *contra proferentem* rule of construction").

the supreme court did not discuss the experience, knowledge, or sophistication of any of the actual plaintiffs in *Rogers*. Nor did it address whether any of those plaintiffs had participated in drafting or negotiating any of the royalty clauses at issue in *Rogers*.

Nor did the court in *Rogers* find that the term "at the well" was ambiguous. Despite acknowledging that a majority of courts had concluded that the term "at the well" unambiguously defined the location at which lessees could calculate the market value of their oil and gas production for royalty purposes, the court in *Rogers* reasoned that the term "at the well" was "silent with respect to allocation of costs."[87] The supreme court did not hold that the term "at the well" was reasonably susceptible to two different interpretations. Instead, the court in *Rogers* held that the term "at the well" had no meaning at all, and it effectively rewrote the parties' leases to delete the term "at the well" from the leases' royalty clauses.[88]

Having determined that the term "at the well" was silent with respect to the allocation of costs, the court in *Rogers* ruled that under a royalty clause requiring that lessees pay royalties on the market value of their production "at the well," lessees must calculate their royalty payments on the basis of the value of their production at the location where they first acquire a marketable product.[89] The court stated:

> [W]e have concluded that the "at the well" lease language in this case is silent as to allocation of all costs . . . . Under these circumstances, the logic of the first-marketable product rule requires that the allocation of all costs be determined based on when the gas is marketable.
>
> . . . .
>
> Once gas is deemed marketable based on a factual determination, the allocation of all costs can properly be determined. Absent express lease provisions addressing allocation of costs, the

---

87. *Rogers*, 29 P.3d at 902. The supreme court conceded that it was "in the minority" in reaching this conclusion. *Id.* at 901.

88. *Id.* at 902; *see* David E. Pierce, *The Royalty Value Theorem and the Legal Calculus of Post-Extraction Costs*, 23 ENERGY & MIN. L. INST. § 6.01, at 152 (2003) ("In *Rogers* the Colorado Supreme Court interpreted the phrase 'at the well' out of existence."); *cf.* Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 225 (1995) (criticizing an application of the *contra proferentem* doctrine in which judges "hold unambiguous terms to be ambiguous to avoid giving effect to provisions they perceive to be harsh").

89. *Rogers*, 29 P.3d at 906.

> lessee's duty to market requires that the lessee bear the expenses incurred in obtaining a marketable product. Thus, the expense of getting the product to a marketable condition and location are borne by the lessee.[90]

In citing the "against the lessee" rule of construction to support its conclusion, the court in *Rogers* emphasized that "the bargaining power between a lessor and lessee is similar to that historically found between an insurance company and its customers."[91] That, however, is at best misleading, if not flatly untrue. There often are no negotiations at all in an insurance transaction: insurance companies typically offer their policies on a "take it or leave it" basis. Oil and gas leases, by comparison, are not adhesion contracts.[92] They commonly are the product of active and extensive negotiations, especially on the terms of the royalty clause.[93]

---

90. *Id.* The court's argument that the term "at the well" is silent with respect to "allocation of costs" erects a strawman. The term "at the well" does not purport to serve the purpose of "allocating" costs between the lessee and lessor; rather, the term "at the well" defines the location or point at which the lessee should calculate the market value or price of its production for royalty purposes. *See* Scott Lansdown, *The Marketable Condition Rule*, 44 S. TEX. L. REV. 667, 673 (2003) (noting that "the issue may best be framed not as whether post-production costs are deductible, but rather the point at which royalty is to be calculated"); *cf.* Keeling & Gillespie, *supra* note 74, at 36 ("[T]he workback method is simply an appraisal technique. It is not a cost-shifting rule, and it does not apply when the lessee does not need to estimate the value of its production at the wellhead by reference to its value at a downstream location."). On its face, a royalty clause stating that a lessor's royalty is 25% of the market value of the lessee's oil production "at the well" is reasonably susceptible only to one interpretation—that the lessee should calculate its royalty payments on the basis of 25% of the market value of its oil production at the wellhead, not at a downstream sales location. *See* Keeling & Gillespie, *supra* note 74, at 87–88.

91. *Rogers*, 29 P.3d at 902.

92. *See* Pierce, *supra* note 86, at 363 n.76; *see also* Pierce, *supra* note 35, at 916 ("[L]essees rarely present their offers to lease on a take-it-or-leave-it basis.").

93. *See* O'Neill & Keeling, *supra* note 5, § 6.02[1][a], at 6-4; *see also* Jeff King, *Lessor vs. Lessee and the Implied Covenant to Market*, 63 TEX. BAR J. 854, 854 (2000) ("Oil and gas leases are negotiated contracts. . . . As to the royalty amount, the parties to the lease are free to decide and define the type, basis, or standard for the royalties to be paid."); Pierce, *supra* note 17, at 418 n.182 ("[M]any oil and gas leases are in fact negotiated and [contain] significant concessions made by the lessee to obtain the lessor's assent."); Pierce, *supra* note 35, at 917 (noting that oil and gas leases often are "the product of active negotiation between the lessor (or the lessor's legal counsel or other representative) and the lessee"); Shannon H. Ratliff & S. Jack Balagia, Jr., *Oil*

While lease negotiations will often begin with a printed form lease that the lessee presents to the lessor, a lessor enjoys much greater bargaining power against a lessee than an insured enjoys against an insurer.[94]

But even if it were true that the bargaining power between a lessor and lessee is akin to the bargaining power between an insured and insurer, the supreme court in *Rogers* should have applied the "against the lessee" rule of construction consistently with the way that courts apply the *contra proferentem* doctrine to an insurance policy. The court in *Rogers* did not do so. It applied the "against the lessee" rule as a rule of first resort, not a rule of last resort. And instead of using the rule to resolve an ambiguity, the court in *Rogers*, by its own admission, invoked the rule to create an ambiguity—by interpreting the term "at the well" to mean something entirely different from what most other courts had previously interpreted it to mean.

B. Estate of Tawney v. Columbia Natural Resources, L.L.C.

The "against the lessee" rule of construction served an equally prominent role in *Estate of Tawney.* The plaintiffs in *Estate of Tawney* filed a class action alleging that their lessee, Columbia Natural Resources, L.L.C., had not paid adequate royalties to its royalty owners.[95] Many of the class members were lessors under leases containing "language indicating that the royalty payment is to be calculated 'at the well.'"[96] Columbia filed a motion for summary judgment arguing that the term "at the well" is unambiguous and permitted it to use a workback methodology to calculate its royalty payments.[97] The trial court denied Columbia's

---

and Gas Royalty Class Action Litigation: Pushing the Limits of Rule 23 and Comparable State Class Action Rules, 46 ROCKY MTN. MIN. L. INST. § 21.01[2][b], at 21-9 (2000) (noting that "oil and gas leases are frequently and fiercely negotiated").

94. *See* Pierce, *supra* note 86, at 363 n.76 ("The situation of the parties to an oil and gas lease is fundamentally different from that of an insured under an insurance policy. In an oil and gas lease, only one party controls whether her property will be leased, and on what terms: the lessor. Once a lessor is aware she does not have to lease her property to anyone, she has the power to hold out for the best deal she can negotiate under the circumstances — or elect not to lease. The oil and gas lease is not an adhesion contract. Although landowners may be presented with a developer's printed form, in most cases the resulting lease will be the product of negotiation between the parties.").

95. Estate of Tawney v. Columbia Nat. Res., L.L.C., 633 S.E.2d 22, 25 (W. Va. 2006).

96. *Id.*

97. *Id.*

motion and certified the summary judgment issues to the West Virginia Supreme Court.[98] The supreme court stated: "[T]he present dispute boils down to whether the "at the wellhead"-type language at issue is sufficient to alter our generally recognized rule that the lessee must bear all costs of marketing and transporting the product to the point of sale. We conclude that it is not."[99]

Unlike the court in *Rogers*, the court in *Estate of Tawney* explicitly ruled that the term "at the well" is ambiguous.[100] Without citing or mentioning any extrinsic evidence on the meaning of the term, the supreme court in *Estate of Tawney* asserted:

> [T]he language lacks definiteness. In other words, it is imprecise. While the language arguably indicates that the royalty is to be calculated at the well or the gas is to be valued at the well, the language does not indicate *how* or *by what method* the royalty is to be calculated or the gas is to be valued. For example, notably absent are any specific provisions pertaining to the marketing, transportation, or processing of the gas. In addition, in light of our traditional rule that lessors are to receive a royalty of the sale price of gas, the general language at issue simply is inadequate to indicate an intent by the parties to agree to a contrary rule—that the lessors are not to receive 1/8 of the sale price but rather 1/8 of the sale price less a proportionate share of deductions for transporting and processing the gas.[101]

Thus, the West Virginia Supreme Court noted that it was unable to conclude that the term "at the well" was "originally intended by the parties, at the time of execution, to allocate post-production costs between the lessor and the lessee."[102]

Having found that the "at the well" language in the parties' leases was ambiguous, the court in *Estate of Tawney* emphasized that the "against the lessee" rule required that it "construe the language against the lessee."[103]

---

98. *Id.*

99. *Id.* at 28. The supreme court in *Estate of Tawney* did not write in a total vacuum. In a 2001 opinion, the West Virginia Supreme Court held that as a general rule, a lessee "must bear all costs incurred in exploring for, producing, marketing and transporting [its production] to the point of sale." Wellman v. Energy Res., Inc., 557 S.E.2d 254, 265 (W. Va. 2001).

100. *Estate of Tawney*, 633 S.E.2d at 28.

101. *Id.*

102. *Id.*

103. *Id.* at 29.

The lessee, Columbia, raised two objections to the "against the lessee" rule:

> • First, Columbia argued that the "against the lessee" rule was inapplicable because many of the class members were either sophisticated royalty owners or had consulted with oil and gas counsel before signing their leases.[104] The supreme court declined to recognize any sophisticated lessor exception to the "against the lessee" rule,[105] asserting that the lessee bears the responsibility of drafting "specific language" which informs its lessors—whether sophisticated or not—"exactly how their royalties were to be calculated and what deductions were to be taken from the royalty amounts for post-production expenses."[106]
>
> • Second, Columbia argued that the "against the lessee" rule was inapplicable because a jury or other fact finder, and not a court as a matter of law, should determine the meaning of any ambiguous language in an oil and gas lease.[107] But even though the *Estate of Tawney* case came to the supreme court as an interlocutory appeal from a class action in which the parties presumably had not yet completed all of their discovery efforts, the supreme court ruled that the record contained no conflicting extrinsic evidence that would require a jury to determine the meaning of the "at the well" language in the parties' leases.[108]

Despite suggesting that conflicting extrinsic evidence might in some cases raise a jury issue about the meaning of the term "at the well," the court in *Estate of Tawney* reasoned—seemingly as a matter of law—that the term "at the well" is insufficient in itself to permit a lessee to use a workback methodology to calculate its royalty payments:

> [T]his Court now holds that language in an oil and gas lease that is intended to allocate between the lessor and lessee the costs of marketing the product and transporting it to the point of sale must

---

104. *Id.*
105. *Id.*
106. *Id.* at 29–30.
107. *Id.* at 30.
108. *Id.* at 30 & n.5; *see* Pierce, *supra* note 86, at 369 n.113 (noting that the court in *Estate of Tawney* apparently "concluded, based upon a certified question submitted out of a summary judgment proceeding involving 8,000 plaintiffs, that whatever extrinsic evidence that might have existed regarding the intent of these thousands of parties, the evidence would not have, in any event, been in conflict").

> expressly provide that the lessor must bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs.[109]

Absent any such specific language, the court concluded that even under a lease requiring that a lessee pay royalties based on the market value of its oil or gas production "at the well," the lessee must calculate its royalty payments on the basis of the price that it receives for its production at the downstream "point of sale."[110]

Unlike *Rogers*, the supreme court in *Estate of Tawney* did not apply the "against the lessee" rule as a doctrine of first resort: it at least found that the language which it construed against the lessee was ambiguous. But neither did the court in *Estate of Tawney* apply the "against the lessee" rule as a doctrine of last resort. Even putting aside whether the parties, with complete discovery, could have developed extrinsic evidence on the meaning of the term "at the well,"[111] the West Virginia Supreme Court rejected case law from other states holding that the term "at the well" is unambiguous and means exactly what it says.[112] Instead, the court in *Estate of Tawney* found an ambiguity where historically there was no ambiguity at all—presumably in the guise of protecting lessors, at least

---

109. *Estate of Tawney*, 633 S.E.2d at 30. The court in *Estate of Tawney* imprecisely argued that a workback methodology permits a lessee to "deduct" post-production expenses from its royalties. In a later opinion, the supreme court acknowledged that the workback methodology "does not 'charge' the lessor with any expenses at all, but instead is simply a method of determining what the wellhead value of the gas would have been if there had been a market for the gas at the wellhead." Leggett v. EQT Prod. Co., 800 S.E.2d 850, 856 n.8 (W. Va. 2017) (quoting Brian S. Wheeler, *Deducting Post-Production Costs When Calculating Royalty: What Does the Lease Provide?*, 8 APPALACHIAN J.L. 1, 29 (2008)); *see* Potts v. Chesapeake Expl., L.L.C., 760 F.3d 470, 475 (5th Cir. 2014); Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 130 (Tex. 1996) (Owen, J., concurring); *see also* Lansdown, *supra* note 90, at 671 ("[T]he issue may best be framed not as whether post-production costs are deductible, but rather the point at which royalty is to be calculated.").

110. *Estate of Tawney*, 633 S.E.2d at 30.

111. *See supra* text accompanying note 51.

112. *Estate of Tawney*, 633 S.E.2d at 27. The court acknowledged that the Colorado Supreme Court in *Rogers* "recognized that it may be in the minority of states on this issue." *Id.* (citing Rogers v. Westerman Farm Co., 29 P.3d 887, 897 (Colo. 2001)).

some of whom were sophisticated royalty owners perfectly capable of protecting themselves.[113]

Significantly, the current status of the first marketable product doctrine in West Virginia is unclear. In *Leggett v. EQT Production Co.*,[114] the West Virginia Supreme Court pointedly criticized its prior opinion in *Estate of Tawney*, suggesting that its reasoning in that case stood on "faulty legs."[115] The supreme court in *Leggett*, however, declined to overrule *Estate of Tawney*, instead stating: "[H]owever under-developed or inadequately reasoned this Court observes *Wellman* and *Tawney* to be, the issue presently before the Court simply does not permit intrusion into these issues. We therefore leave for another day the continued vitality and scope of *Wellman* and *Tawney*."[116]

---

113. *Id.* at 28; *see* Pierce, *supra* note 86, at 369 ("The court apparently believed West Virginia lessors needed protection against lessee adjustments to the proceeds received when calculating royalty. To provide that protection and to provide the lessor with a larger piece of the gas-production pie, it resorted to the powerful one-two punch of an ambiguity finding followed by the construe-against-the-lessee rule of construction to negate the troublesome 'at the well' language."); *see also* W.W. McDonald Land Co. v. EQT Prod. Co., 983 F. Supp. 2d 790, 807–08 (S.D.W. Va. 2013) (noting that while the court would "normally admit parol evidence to resolve [an] ambiguity," it would rule in favor of the lessor's interpretation as a matter of law because under *Estate of Tawney*, "ambiguities in oil and gas leases are construed against the lessee").

114. 800 S.E.2d 850 (W. Va. 2017).

115. *Id.* at 862.

116. *Id.* at 864; *see* Cather v. EQT Prod. Co., No. 1:17-CV-208, 2019 WL 3806629, at *5 (N.D.W. Va. Aug. 13, 2019) (noting that while the court in *Leggett* criticized its earlier opinions in *Wellman* and *Estate of Tawney*, "*Wellman* and *Tawney* continue to have the same vitality and scope they have had since being decided"); Kay Co. v. EQT Prod. Co., No. 1:13-CV-151, 2017 WL 6403031, at *1 (N.D.W. Va. July 11, 2017) ("[A]ny criticism of *Tawney* and *Wellman* contained within *Leggett* is mere dicta and does not alter the current controlling nature of those precedents."). The leases at issue in *Leggett* were old flat-rate leases. Previously, the West Virginia Legislature had statutorily declared that on any flat-rate leases, the lessees must pay royalties on the basis of 1/8 of the amount that they realized for their production at the wellhead. W. VA. CODE § 22-6-8(e) (1994). After the supreme court in *Leggett* ruled that lessees could use a workback methodology to calculate their amount realized at the wellhead, the West Virginia Legislature amended the statute to require that on any flat-rate leases, lessees must calculate their royalty payments on the basis of "one eighth of the gross proceeds, free from any deductions for post-production expenses, received at the first point of sale to an unaffiliated third-party purchaser in an arm's length transaction." W. VA. CODE § 22-6-8 (e) (2018).

Whatever West Virginia may ultimately decide to do with its version of the first marketable product doctrine, *Estate of Tawney* remains a glaring example of an opinion that misapplies the "against the lessee" rule of lease construction in a way that is inconsistent with the historical limitations on the *contra proferentem* doctrine.

IV. A RETURN TO ITS *CONTRA PROFERENTEM* ROOTS: THE PROPER SCOPE OF THE "AGAINST THE LESSEE" RULE OF CONSTRUCTION

Even in states that have not adopted the first marketable product doctrine, courts have cited the "against the lessee" rule of construction so frequently that a casual observer might conclude that it is the first and foremost rule of construction in oil and gas lease disputes. As in all other types of contract disputes, however, the first and foremost rule of construction in lease disputes is to give effect to the parties' intent, which—more often than not—is reflected in the plain terms of the parties' oil and gas lease.[117] Courts should have no need to resort to, or even cite to, a rule of construction or other interpretive aid when the parties' oil and gas lease unambiguously reflects the parties' intent.[118]

If courts were to apply the "against the lessee" rule of construction consistently with the *contra proferentem* doctrine, then they would properly invoke the "against the lessee" rule only in rare cases—specifically, only in those oil and gas lease disputes where (a) the relevant lease language is truly ambiguous, and there is no extrinsic evidence available to enable a fact finder to resolve the ambiguity as a matter of fact and no other rule of construction available to enable a judge to resolve the ambiguity as a matter of law; (b) the lessee actually drafted or is otherwise responsible for the relevant lease language; and (c) there is a true disparity in the bargaining power between the lessee and the lessor.[119]

The "against the lessee" rule of construction is no justification for a court automatically to conclude, "Lessor wins, and Lessee loses."[120] Even in insurance cases, the *contra proferentem* doctrine does not automatically mean, "Insured wins, and Insurer loses."[121] There is no sound reason for

---

117. *See supra* text accompanying note 11.

118. *See supra* text accompanying note 13.

119. *See infra* text accompanying notes 122–93.

120. *In re* Aurora Oil & Gas Corp., 460 B.R. 470, 481 (Bankr. W.D. Mich. 2011); *see* Keeling, *supra* note 77, at 561 n.224.

121. *See* Kenneth Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 532 (1996) (noting that the *contra proferentem* rule is "not merely a label for pro-coverage results reached for other reasons").

the "against the lessee" rule to apply differently in oil and gas cases than the *contra proferentem* doctrine does in insurance cases.

A. The "Against the Lessee" Rule Should Be a Rule of Last Resort

Generally, a court's role in resolving a dispute over oil and gas lease terms should be to construe the parties' lease, not to rewrite it for the parties.[122] The *contra proferentem* doctrine does not permit a court to override the parties' contractual intent if the court may divine the parties' intent from the contract itself or from other available sources.[123] The same should be true of the "against the lessee" rule. A court has no need to resort to the "against the lessee" rule of construction where (a) the parties' lease is unambiguous, (b) a fact finder may construe the lease through extrinsic evidence, or (c) the court may construe the lease through other relevant rules of construction.[124] Many courts have correctly recognized that the "against the lessee" rule of construction is a rule of last resort.[125]

---

122. *See* David E. Pierce, *Exploring the Jurisprudential Underpinnings of the Implied Covenant to Market*, 48 ROCKY MTN. MIN. L. INST. § 10.01, at 10-2 (2002) ("Fundamental freedom of contract concepts require that courts enforce the parties' contract — not a contract of the court's making.").

123. *See, e.g.*, Arnold v. Ashbel Smith Land Co., 307 S.W.2d 818, 824 (Tex. Civ. App. 1957) (noting that the rule "is not applicable in the absence of ambiguity, and even in its presence is never used a hypercritical and overly literal tool to override the manifest object and purpose of the language of [the] writings"); *see also* Kramer, *supra* note 12, at 55 ("When intent is obvious on the face of the instrument, no resort to canons is justified.").

124. *See supra* text accompanying notes 49–51.

125. *See, e.g.*, Frontier Energy, LLC v. Aurora Energy, Ltd., No. 1:12-CV-424, 2013 WL 1289362, at *3 (W.D. Mich. Mar. 27, 2013) ("Like the rule of *contra proferentem*, [the 'against the lessee' rule] is not designed to discern the parties' intent, and should only be applied as a tie-breaking rule."); Pollock v. Energy Corp. of Am., No. 10-1553, 2013 WL 275327, at *3 (W.D. Pa. Jan. 24, 2013) (noting that the "against the lessee" rule is inapplicable where "there is no ambiguity to resolve"); Jacobs v. CNG Transmission Corp., 332 F. Supp. 2d 759, 774 (W.D. Pa. 2004) (noting that the "against the lessee" rule is "not to be applied in a manner that creates a contract beyond the parties' intent"); Roye Realty & Dev., Inc. v. Watson, 2 P.3d 320, 329 (Okla. 1996) ("Although oil and gas leases are to be construed against the lessee and in favor of the lessor, . . . the intention of the parties is to be ascertained from the writing alone if possible. . . . A fundamental precept of contract law in Oklahoma is that the law will not make a better contract than the parties themselves entered."); TSB Exco, Inc. v. E.N. Smith, III Energy Corp., 818 S.W.2d 417, 422 (Tex. App. 1991) ("The rule requiring a construction against the lessee does not apply here. It applies only when the contract is ambiguous.").

But as *Rogers* and *Estate of Tawney* illustrate, other courts have *not* applied the "against the lessee" rule as a rule of last resort.[126] The decisions in *Rogers* and *Estate of Tawney* are perhaps the inevitable extension of case law which over the years has declared, without any apparent exception or limitation, that courts must construe leases against their lessees.[127] Absent any exceptions or limitations, the "against the lessee" rule becomes a tool for abuse.[128] When courts do not recognize that the "against the lessee" rule is a rule of last resort, then as in *Rogers* and *Estate of Tawney*, they may try to use the rule as a means to rewrite an oil and lease and dictate a result that is contrary to its plain terms.[129] The function of the rule should be to resolve ambiguity, not to create ambiguity where it otherwise does not exist.[130]

This is certainly true in interpreting oil and gas royalty clauses.[131] In *Schroeder v. Terra Energy, Ltd.*,[132] a Michigan case predating *Rogers* and *Estate of Tawney*, the plaintiff lessors complained that they had received inadequate royalties under a clause requiring that the lessee calculate its royalty payments on the basis of the "gross proceeds at the wellhead."[133] The court in *Schroeder* acknowledged that when a royalty clause is ambiguous, a court may need to construe the clause in favor of the lessor.[134] However, citing case law from other states holding that the term

---

126. *See supra* text accompanying notes 80–113.

127. *See supra* note 69 and accompanying text.

128. *See* Pierce, *supra* note 35, at 919 (noting that courts often improperly apply the "against the lessee" rule of construction to "support the desired outcome even though there may be no need to resolve an ambiguity, or even a need to interpret the express terms of the contract").

129. *See, e.g.*, Miller, *supra* note 42, at 1863 (noting that the *contra proferentem* doctrine, if unfettered and not used as a rule of last resort, "provides a cloak under which courts may exercise an inordinate amount of discretion. Since all language is arguably ambiguous, courts are able to use the doctrine to dictate results."); Rappaport, *supra* note 88, at 225 (noting that the *contra proferentem* doctrine, if unfettered and not used as a rule of last resort, may lead "judges to stretch to find that harsh terms are ambiguous"); *see also* Fischer, *supra* note 55, at 1005 ("Indeed, it is difficult to envision a term that cannot be deemed 'ambiguous' if the court so wishes.").

130. *See* Fenice & Friedman, *supra* note 46, at 235.

131. *See* Rappaport, *supra* note 88, at 254 ("In general, the ambiguity rule is no more attractive outside of insurance than within.").

132. 565 N.W.2d 887 (Mich. Ct. App. 1997).

133. *Id.* at 890.

134. *Id.* at 892.

"at the wellhead" is unambiguous,[135] the court concluded that the lessee in *Schroeder* had properly used a workback methodology to calculate its royalty payments on the basis of the value of its production at the wellhead:

> [T]o accede to plaintiffs' interpretation of "gross proceeds at the wellhead" would be to require defendant to pay royalties to plaintiffs, based not only on the value of the gas at the wellhead, but also upon the costs that defendant has incurred to prepare the gas for, and transport the gas to, market. Thus, plaintiffs' royalties would be increased merely as a function of defendant's own efforts to enhance the value of the gas through postproduction investments that it has exclusively underwritten. We simply do not believe that such an interpretation of the disputed term is more compatible with either the plain language of the agreement or with the logical expectations of the parties to the agreement.[136]

The court noted that in the absence of any ambiguity, it had no need to resort to any rules of contract construction.[137]

Especially in the oil and gas context, case law that applies common lease terms should remain consistent and uniform. *Schroeder* was one of a long line of cases holding that the term "at the well" is unambiguous.[138] *Rogers* and *Estate of Tawney* rejected the *Schroeder* line of cases. The Colorado Supreme Court in *Rogers* reasoned that the term "at the well" was "silent with respect to allocation of costs," acknowledging that its opinion reflected a minority view.[139] The West Virginia Supreme Court in

135. *Id.* at 893–94 (citing, *inter alia*, Atl. Richfield Co. v. State, 262 Cal. Rptr. 683, 688 (Cal. Ct. App. 1989); Merritt v. Sw. Elec. Power Co., 499 So. 2d 210, 214 (La. Ct. App. 2d Cir. 1986)); *see supra* note 75 and accompanying text.

136. *Schroeder*, 565 N.W.2d at 894. The Michigan Legislature statutorily abrogated *Schroeder* in 2000, when it enacted a statute that effectively codified a version of the first marketable product doctrine. *See* MICH. COMP. LAWS SERV. § 324.61503(b)(1) (LexisNexis 2017).

137. *Schroeder*, 565 N.W.2d at 896.

138. *See supra* text accompanying notes 74–75; *see also* Salzman & Friess, *supra* note 10, at 7-11 (noting that up until *Rogers* and other first marketable product cases, the phrase "at the well" was a term of art in oil and gas leases meaning that "historically production was typically valued at the wellhead for royalty purposes").

139. Rogers v. Westerman Farm Co., 29 P.3d 887, 901–02 (Colo. 2001).

Estate of Tawney reasoned that the term "at the well" was ambiguous,[140] citing its earlier opinion in *Wellman*, which concluded that *Rogers* and other first marketable product cases were more "persuasive" than the older *Schroeder* line of cases.[141]

The "against the lessee" rule of construction creates particularly confusing results when courts reject earlier case law finding a lease term to be unambiguous.[142] Once an opinion like *Rogers* or *Wellman* suggests that a lease term does not necessarily mean what prior courts have thought it to mean, then the opinion may become a self-fulfilling prophecy, inducing later courts to cite the split in case law as evidence that the lease term is indeed ambiguous and that they should construe it in the lessor's favor.[143] In such an event, the "against the lessee" rule does exactly the opposite of what it is supposed to do: Instead of resolving an ambiguity, it creates an ambiguity—leaving oil and gas practitioners unclear about the meaning of a lease term that they formerly believed to be clear and unambiguous.[144]

The "against the lessee" rule of construction should be a rule of last resort, not a rule of first resort. If a court may construe a lease term as it is written, then it should do so.[145] If a lease term has an accepted industry meaning, then it is not ambiguous; and a court may enforce it consistently

140. Estate of Tawney v. Columbia Nat. Res., L.L.C., 633 S.E.2d 22, 28–29 (W. Va. 2006) (citing Wellman v. Energy Res., Inc., 557 S.E.2d 254, 265 (W. Va. 2001)).

141. *Wellman*, 557 S.E.2d at 264–65.

142. *See, e.g.*, Boardman, *supra* note 24, at 1123.

143. *See* Boardman, *supra* note 46, at 333 n.119; *see also* Boardman, *supra* note 24, at 1123 ("[T]his follow-the-leader approach leads to awkward results once a jurisdiction has already ruled that particular language is not ambiguous, only to find a later split among the jurisdictions. . . . The somewhat random result is that whether a term is considered ambiguous or not in a given jurisdiction may turn on the order of decisions.").

144. *See* Jake B. Ware, Note, *Contractual Interpretations, Ambiguities, and Litigation Difficulties Presented in the Context of Oil and Gas Leases as a Result of the Texas Supreme Court's Decision in* Murphy Exploration & Prod. Co.-USA v. Adams*, 560 S.W.3d 105 (Tex. 2018)*, 5 ONE J. 795, 809 (2020) (noting that a court may "create costly uncertainty in the interpretation of typical lease agreements when they are not interpreted according to their industry definition"); *cf.* Rappaport, *supra* note 88, at 202 (noting that the *contra proferentem* doctrine creates uncertainty by making it harder for industry parties "to know for certain that a term will be given its intended meaning").

145. *See supra* text accompanying notes 11–15.

with its industry meaning.[146] If a lease term is truly ambiguous, then a court should first seek to determine what the parties actually intended it to mean at the time that they entered into their oil and gas lease—either through extrinsic evidence or other more specific rules of contract construction.[147] Only then, if the court is unable to determine what the parties actually intended the term to mean, should a court apply an artificial rule of construction that favors one party's construction over the other's.[148]

As Professor Bruce Kramer has observed: "Canons when used as a tool in the interpretive process are useful. Canons when used as a substitute for the interpretational process are counter-productive."[149]

B. The "Against the Lessee" Rule Should Apply Only If the Lessee is the Drafter

By definition, the *contra proferentem* doctrine assumes that the party who drafted a contract is responsible for any ambiguous terms in the contract.[150] Similarly, the "against the lessee" rule of construction rests on the premise that the lessee is *usually* the drafter of an oil and gas lease and in a better position to ensure that its terms are unambiguous.[151] Even today, that premise is still frequently true. A lessee, through a landman, will often

146. *See* Ware, *supra* note 144, at 809–10; *see also supra* text accompanying note 17.

147. *See supra* text accompanying notes 20, 51.

148. *See supra* text accompanying notes 46–62.

149. Kramer, *supra* note 12, at 129.

150. *See supra* text accompanying notes 39–40.

151. *See* Rook v. James E. Russell Petroleum, Inc., 679 P.2d 158, 164 (Kan. 1984) ("Oil and gas leases containing ambiguities are to be strictly construed against the lessee-producer and in favor of the lessor-royalty owner because the lessee *usually* provides the lease form or dictates the terms thereof, and where the lessee desires it may protect itself by the manner in which the lease is drawn.") (emphasis added); *see also supra* text accompanying note 32. The term "drafter" does not mean that the lessee must literally have drafted or authored the ambiguous language for the "against the lessee" rule to apply. Under the *contra proferentem* doctrine, courts will deem that an insurer is the "drafter" of an insurance policy if the policy is a form policy which the insurer presented to the insured and which the insured signed without any negotiation or discussion. *See* Rappaport, *supra* note 88, at 174. The same presumably would be true of the "against the lessee" rule of construction. Courts will deem that a lessee is the "drafter" of a lessee-friendly form lease which the lessee presented to the lessor and which the lessor signed without any negotiation or discussion. *E.g.*, *Rook*, 679 P.2d at 164.

trigger lease discussions with prospective lessors by offering them a lessee-friendly lease form; and often those prospective lessors will simply sign the lease forms without any negotiation or debate.[152] As Professor David Pierce has noted, lessors may react to lessee-friendly lease forms in the same way that many people react to other form contracts, simply asking: "How much and where do I sign?"[153]

But the fact that the lessee is *usually* the drafter of a lease does not mean that the lessee is *always* the drafter of a lease. Over the years, lessors have become increasingly more sophisticated.[154] While their conversations with a landman may begin with a lessee-friendly form, they may not end there. Many lessors engage oil and gas counsel to assist them in their negotiations with lessees over the terms of an oil and gas lease.[155] More and more commonly, lessors and their counsel either insist on their own lessor-friendly lease forms or, through the negotiation process, require that their lessees substantially revise lease terms that otherwise would have favored the lessees.[156]

Some courts have explicitly recognized that the "against the lessee" rule applies only if the lessee drafted or was otherwise responsible for the ambiguous lease term.[157] Indeed, consistent with the *contra proferentem* doctrine and its presumption that a court should construe a contract against its drafter, an "against the *lessor*" rule of construction may apply where the *lessor*—rather than the lessee—is responsible for the ambiguous lease term.[158] An example is *Schwatken v. Explorer Resources, Inc.*[159] The lessors, Wilbur and Veva Schwatken, filed suit seeking a declaration that their oil and gas lease with the lessee had expired. The lessee relied on Paragraph 18 of the lease to argue that the lease remained in effect.[160] The Kansas Court of Appeals stated:

152. Pierce, *supra* note 32, at 452.
153. *Id.* at 450 n.25.
154. Salzman & Friess, *supra* note 10, at 7-6.
155. Schwatken v. Explorer Res., Inc., 125 P.3d 1078 (Kan. Ct. App. 2006).
156. Keeling, *supra* note 77, at 561 n.224; *see* Salzman & Friess, *supra* note 10, at 7-6 ("While historically [a] landman would typically lease acreage from landowners on standard form contracts with little or no edits, today it is not uncommon for lessors to negotiate each provision of the proposed oil and gas lease, sometimes presenting either their own rider to the producer's lease form or their own separate lease form.").
157. *See, e.g.*, Camp Ne'er Too Late, LP v. Swepi, LP, 185 F. Supp. 3d 517, 549 (M.D. Pa. 2016); *Schwatken*, 125 P.3d at 1080.
158. *See Camp Ne'er Too Late, LP*, 185 F. Supp. 3d at 549; *Schwatken*, 125 P.3d at 1080.
159. 125 P.3d 1078 (2006).
160. *Id.* at 1080.

> While it is true that ambiguities in oil and gas leases ordinarily are construed in favor of the lessor, . . . this is based on the fact that the lessee is most often responsible for drafting the document. Here, paragraph 18 was incorporated into the lease at the insistence of the Schwatkens. Its absence would have been a deal-breaker for them . . . . Thus, paragraph 18 should be construed strictly against the Schwatkens.[161]

Nor should the "against the lessee" rule of construction apply where the parties, through the negotiation process, collaborated or participated equally in drafting the ambiguous lease term.[162] In *Colburn v. Parker & Parsley Development Co.*,[163] the parties disputed whether a salt water disposal agreement required the lessee to pay the lessors for all salt water that the lessee injected in a disposal well on the leased premises.[164] The trial court applied the "against the lessee" rule and enforced the lessors' construction of the salt water disposal agreement.[165] On appeal, the Kansas Court of Appeals stated:

> We do not agree with the trial court's statement that the same rule would apply to the construction of the saltwater disposal agreement as to the construction of an oil and gas lease (strictly against the lessee) . . . . A careful review of the record reveals both parties participated equally in drafting and negotiating the final written saltwater disposal agreement. "The general rule that doubtful language in a contract is construed against the drafter is of little consequence where the parties are of equal bargaining power and have each had an opportunity to fully examine

---

161. *Id.*
162. *See, e.g.*, Wallis v. Dog Day, Inc., No. 107,896, 2014 WL 278704, at *1 (Kan. Ct. App. Jan. 24, 2014); Colburn v. Parker & Parsley Dev. Co., 842 P.2d 321, 328 (Kan. Ct. App. 1992); Devon Energy Prod. Co. v. Sheppard, No. 13-19-00036-CV, 2020 WL 3478680, at *5 n.7 (Tex. App. 2020) (not designated for publication); *see also* Kramer, *supra* note 12, at 116 ("The underlying rationale for this canon is that the scrivener, who is usually the grantor, should be responsible for the lack of clarity in the use of the language. . . . In cases where the grantee is the scrivener, or both parties are equally responsible for the drafting of the instrument, this canon should not apply.").
163. 842 P.2d 321 (Kan. Ct. App. 1992).
164. *Id.* at 327.
165. *Id.* at 328.

proposed contract provisions before the contract is executed."[166]

The court of appeals in *Colburn* emphasized that "[w]here an ambiguous contract is prepared jointly and equally by the parties, it will not be liberally or strictly construed against either party."[167]

The "against the lessee" rule of construction is certainly *not* a blanket rule that a court should blindly apply in every case involving a dispute over the terms of an oil and gas lease. Like the *contra proferentem* doctrine, the "against the lessee" rule necessarily presumes that a court should construe an ambiguous term against the party who was actually responsible or culpable for the ambiguous language.[168] If the lessee did not draft the ambiguous lease term, then the lessee was *not* actually responsible or culpable for the ambiguous language.[169] Applying the "against the lessee" rule in such a situation would mean that the rule is simply a penal doctrine—a rule that punishes the lessee for the mere fact that the parties' oil and gas lease contains a term which a court deemed to be ambiguous.[170]

The "against the lessee" rule of construction serves little useful purpose when the lessee was not responsible or culpable for the ambiguous lease term.[171] If the lessor drafted the ambiguous lease term, or even if the lessor and lessee participated equally in drafting the ambiguous term, then the ambiguous term was likely the product of negotiations between the parties—in other words, the lessor likely rejected a lessee-friendly lease form and entered into active negotiations with the lessee over the terms of the lease.[172] In that event, the extrinsic evidence of their negotiation process—and not some artificial rule of lease construction—would be far

166. *Id.* (quoting Wood River Pipeline Co. v. Willbros Energy Servs. Co., 738 P.2d 866, 867–68 (Kan. 1987)).

167. *Id.* (quoting Crestview Bowl, Inc. v. Womer Constr. Co., 592 P.2d 74, 75 (Kan. 1979)).

168. *See supra* text accompanying note 32.

169. *See supra* text accompanying notes 52–57.

170. *See, e.g.*, Fischer, *supra* note 55, at 1017; *cf.* Dzien & Turner, *supra* note 41, at 1129 ("[It] seems inequitable to interpret an ambiguity against an insurer and in favor of coverage if the insured contributed to the ambiguity because of its participation in the drafting process.").

171. Fischer, *supra* note 55, at 1017.

172. *See supra* text accompanying notes 90–93. The *contra proferentem* doctrine is a mandatory rule that the parties to a contract typically cannot disclaim. *See* Leib & Thel, *supra* note 41, at 790. However, where a lease is the product of extensive negotiations, a prudent lessee may wish to insist that the lease contain a provision stating that both the lessee and the lessor participated equally in drafting the lease.

more helpful in revealing what the parties intended the disputed lease language to mean.[173]

Regardless, a court should not apply the "against the lessee" rule of construction when the lessee did not draft—and was not otherwise responsible or culpable for—the ambiguous lease term.

C. The "Against the Lessee" Rule Should Not Apply if the Lessor is Sophisticated

At its essence, the *contra proferentem* doctrine seeks to protect innocent parties who enter into form contracts or contracts of adhesion with little or no ability to negotiate any of the terms of those contracts.[174] But especially in the oil and gas context, sophisticated parties, such as large companies or industry professionals, do not require the protection of the *contra proferentem* doctrine: they may, and generally do, hire counsel to assist them in negotiating the terms of their contracts.[175] Consequently, many courts have ruled that the *contra proferentem* doctrine does not apply where all of the parties to a transaction are sophisticated and equally capable of negotiating favorable terms—whether or not they actually try to do so.[176]

Some courts have similarly concluded that the "against the lessee" rule does not apply to oil and gas leases with sophisticated lessors.[177] An example is *Dorchester Minerals, LP v. Chesapeake Exploration, LLC*.[178] The lessor in that case, Dorchester Minerals, was a publicly-traded entity with oil and gas interests in 25 states.[179] Dorchester alleged that its lessee, Chesapeake, had failed to pay gas royalties consistently with the terms of the gas royalty clause in their leases. The parties offered competing interpretations of the gas royalty clause.[180] Dorchester argued that the district court should construe the gas royalty clause in Dorchester's favor. The district court disagreed, holding that the "against the lessee" rule—like the *contra proferentem* doctrine—does not apply where the lessee and

173. *See, e.g.*, BRUNER & O'CONNOR, *supra* note 43, at § 3:59.
174. *See supra* text accompanying notes 42–43.
175. *See supra* text accompanying notes 90–93.
176. *See supra* text accompanying notes 58–62.
177. *See, e.g.*, Dorchester Minerals, LP v. Chesapeake Expl., LLC, 215 F. Supp. 3d 746, 755 (E.D. Ark. 2016); Colburn v. Parker & Parsley Dev. Co., 842 P.2d 321, 328 (Kan. Ct. App. 1992).
178. 215 F. Supp. 3d 746 (E.D. Ark. 2016).
179. *Id.* at 749.
180. *Id.* at 748–49.

lessor are "equal in bargaining power" and equally capable of negotiating favorable terms.[181]

Other courts, such as the West Virginia Supreme Court in *Estate of Tawney*, have concluded that the "against the lessee" rule applies even in cases involving sophisticated lessors.[182] The arguments they have offered for this conclusion have varied, but among other things, these courts have asserted (i) that even as to sophisticated lessors, the lessee bears the responsibility to ensure that its leases are unambiguous,[183] (ii) that even sophisticated lessors are "often" at an "informational or technical disadvantage" on oil and gas matters,[184] and (iii) that the very existence of the "against the lessee" rule encourages oil and gas development by warning a lessee that it may lose a lease if it unreasonably construes the lease contrary to the interests of its lessors.[185]

The courts that have declined to apply the "against the lessee" rule in favor of sophisticated lessors have the better side of the debate. If the "against the lessee" rule indeed rests on the same principles as the *contra proferentem* doctrine, then the "against the lessee" rule necessarily assumes that the drafter of an oil and gas lease is more culpable than the non-drafter for the consequences of any ambiguous language.[186] This assumption is inapposite in cases involving sophisticated lessors.[187] With sophisticated lessors, an oil and gas lease is typically not an adhesion contract or a "take it or leave it" transaction. Moreover, a court may fairly presume that sophisticated lessors are familiar with—or have access to information about—the meaning of any technical terms or other common oil and gas industry terms.[188]

Whether the "against the lessee" rule of construction applies in favor of a sophisticated lessor may not, or at least should not, matter in many cases. If an oil and gas lease is unambiguous, then a court has no need to apply the "against the lessee" rule of construction—whether the lessor is

---

181. *Id.* at 755.

182. *See, e.g.*, N. Oil & Gas, Inc. v. Cont'l Res., Inc., No. CV 14-90-BLG-CSO, 2016 WL 3079692, at *5 (D. Mont. May 31, 2016); Estate of Tawney v. Columbia Nat. Res., L.L.C., 633 S.E.2d 22, 29–30 (W. Va. 2006); Energy Dev. Corp. v. Moss, 591 S.E.2d 135, 144 (W. Va. 2003); *see also supra* text accompanying notes 102–03.

183. *See, e.g.*, *Estate of Tawney*, 633 S.E.2d at 29–30.

184. *Energy Dev. Corp.*, 591 S.E.2d at 144.

185. *See, e.g.*, *N. Oil & Gas, Inc.*, 2016 WL 3079692, at *5.

186. *See supra* text accompanying note 32.

187. *See* Ostrager & Ichel, *supra* note 60, at 583.

188. *See* Pierce, *supra* note 17, at 391.

sophisticated or not.[189] If any disputed terms in the lease are oil and gas industry terms that have a common technical meaning, then a court may enforce those terms consistently with their common technical meaning.[190] If, as is certainly possible in cases involving sophisticated lessors, the parties engaged in negotiations over the terms of the lease, then a court—or a jury—may consider any extrinsic evidence of the parties' negotiations, or any extrinsic evidence of a course of dealing or a usage of trade, to determine the parties' contractual intent.[191]

Even in those rare cases where it may matter, there is little justification for a court simply to declare, "Lessor wins." If a lessee and a sophisticated lessor dispute the meaning of a lease term that is truly ambiguous—i.e., that is reasonably susceptible to two or more meanings—then a court need not use an artificial rule of construction to resolve the dispute. Instead, it may properly treat the dispute as a fact issue. Unlike an unsophisticated lessor or a typical non-drafting party under a contract of adhesion, a sophisticated lessor presumably at least read the provisions of its oil and gas lease before signing it. Consequently, a sophisticated lessor presumably is capable of speaking for itself at a trial on the merits.[192] Both the lessee and the lessor may testify to their respective understanding of the disputed ambiguous term, and a jury or other fact finder may determine which of the two interpretations is the correct one.[193]

---

189. *See supra* text accompanying notes 10–15.

190. *See supra* text accompanying note 17.

191. *See supra* text accompanying notes 20–23; *cf.* Miller, *supra* note 42, at 1865 ("Such proof would be relatively simple to show with respect to corporate insureds since businesses that seek insurance are generally either familiar with the usage of particular terms within the insurance world or may be charged with such knowledge because of their ability to bargain over terms.").

192. *See supra* text accompanying notes 91–93.

193. Courts in some states may instruct a jury on the *contra proferentem* doctrine and advise it that it may, in its discretion, construe a contract against the drafter. *See* Leib & Thel, *supra* note 41, at 784. In those rare cases in which the "against the lessee" rule of construction actually applies, it would seem more appropriate for a court to apply the rule than a jury: if there is no extrinsic evidence or other evidence of the parties' contractual intent, then there is likely no issue of "fact" for a jury to resolve. Even in those cases in which a lessee and a sophisticated lessor dispute the meaning of an ambiguous lease, a court should not instruct the jury that it may construe the lease against the lessee. In a dispute between equally sophisticated parties, any such instruction would not serve the purpose of balancing any inequity in bargaining power; instead, any such instruction would only serve the improper purpose of tilting or nudging the jury in favor of one party over the other.

Like the *contra proferentem* doctrine, the "against the lessee" rule of construction should be a rule of limited application. It serves no useful purpose in a dispute between a sophisticated lessee and lessor.

CONCLUSION

In lawsuits arising from oil and gas leases, courts often recite the "against the lessee" rule of construction as if it were a truism, giving little regard for whether the rule is actually relevant. Even worse, some courts—most notably, in cases involving the first marketable product doctrine—have invoked the "against the lessee" rule to achieve a result that is contrary to the plain meaning of common oil and gas terms. But if the "against the lessee" rule of construction is indeed merely an oil and gas variation on the *contra proferentem* doctrine, then it is not, and should not be, a hard-and-fast rule. Instead, consistent with the *contra proferentem* doctrine, the "against the lessee" rule should be a rule of limited application—with many exceptions.

Like the *contra proferentem* doctrine, the "against the lessee" rule of construction should be a rule of last resort. It should apply only in disputes arising from ambiguous lease language. It should apply only when no other rule of construction is available to enable a court to resolve the ambiguity as a matter of law. It should apply only when there is no extrinsic evidence available to enable a fact finder to resolve the ambiguity as a matter of fact. It should apply only when the lessee is responsible for the ambiguous language. It should apply only when the lessor is unsophisticated and has no practical ability to negotiate any alternative language. There is no justification for courts to apply the "against the lessee" rule more broadly than the *contra proferentem* doctrine. There certainly is no justification for courts to apply the "against the lessee" rule for the purpose of rewriting a lease to say something other than what it actually says.