

NEW YORK AND DELAWARE'S SURPRISING
DOCTRINAL DISSONANCE CONCERNING THE
ADMISSIBILITY OF UNCOMMUNICATED
CONTRACTUAL INTENT

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TABLE OF CONTENTS

I. INTRODUCTION.....	860
II. ROADMAP FOR INTERPRETING CONTRACTS UNDER NEW YORK LAW	868
A. <i>Guiding Principles</i>	868
B. <i>Determining Whether the Contract is Ambiguous and Its Meaning if Not</i>	869
1. When ruling on a motion to dismiss or a motion for summary judgment concerning the interpretation of a contract, the judge first evaluates whether the agreement at issue is ambiguous as a matter of law.	869
2. Courts have several principles of textual interpretation to guide them in determining whether a contract is ambiguous, and—if not ambiguous—what the contract means.....	870
3. If a contract is unambiguous, the contract is applied on its face.....	872
C. <i>Interpreting a Facially Ambiguous Contract</i>	872
1. Once a judge deems a contract ambiguous as a matter of law, the court reviews all the extrinsic evidence available to determine whether resolution becomes a question of fact—and, if so, the factfinder conducts further review of the extrinsic evidence.	872
2. As a last resort, the contract should be construed against the drafter (if possible).....	873
III. THE JURISPRUDENTIAL HISTORY: EVOLUTION OF THE ADMISSIBILITY OF UNCOMMUNICATED SUBJECTIVE INTENT EVIDENCE IN NEW YORK	874
A. <i>The Wells Opinion</i>	875
B. <i>The Post-Wells Trio</i>	877
C. <i>Nycal's Tolerance and Propagation of the Trio's Jurisprudential Leaps</i>	879

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IV. THE MODERN DOCTRINE: THREE APPROACHES TO UNCOMMUNICATED SUBJECTIVE INTENT EVIDENCE UNDER NEW YORK LAW	882
A. <i>Total Exclusion</i>	882
B. <i>Admission to Explain Other Evidence</i>	883
C. <i>Less Probative Among the General Mix of Evidence</i>	886
V. THE DELAWARE APPROACH	887
A. <i>Delaware's Embrace of Contra Proferentem and Presumptions</i>	890
1. <i>Contra Proferentem</i>	890
2. <i>Presumptions</i>	891
B. <i>The Forthright Negotiator Doctrine</i>	892
VI. A PROPOSED TWEAK: THE "EXPECTATION DEFAULT DOCTRINE"	894
A. <i>Stage 1: Expectation and Industry Default Analysis</i>	894
B. <i>Stage 2: Evidence-Based Expectation Testimony</i>	896
C. <i>Stage Three: The Unambiguous Precedent Default</i>	897
D. <i>Applying the "Expectation Default Doctrine" to the Chesapeake Scenario</i>	898
VII. CONCLUSION	900

I. INTRODUCTION

Sophisticated parties undertake a familiar tradeoff when designing contracts: they weigh the up-front costs of bespoke provisions against the ex-post price of litigation—and the risk of a court getting it wrong should a disagreement arise.¹ In calibrating the level of specificity of their contracts, parties often adjust their drafting to the circumstances of the deal.² When necessary, sophisticated parties routinely overcome perceived flaws in contract law by contracting around undesirable doctrines.³

However, even when parties choose specificity and devote resources to careful drafting up front, they can never completely

¹See, e.g., Robert E. Scott, *Contract Design and the Goldilocks Problem*, MARQUETTE LAWYER, 32–33 (Spring 2015); George Triantis, *Product Design in Contract Drafting*, MARQUETTE LAWYER, 34–35 (Spring 2015); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006).

²Triantis, *supra* note 1.

³*Id.*

extinguish the possibility that some form of ambiguity materializes through the course of performance. In a world inescapably wrought with incomplete drafting and ultimately inconvenient (even if initially somewhat intentional) ambiguities, one area parties do not yet routinely contract around is what the courts should do when contracts remain ambiguous even after the presiding court has reviewed all the traditionally admissible parol evidence and such extrinsic evidence still fails to help resolve the contract's meaning. Scholars, practitioners, and the judiciary have largely overlooked this last frontier of contract interpretation before having to find no meeting of the minds.

Though Delaware and New York courts generally share a formalistic approach to contract interpretation, they surprisingly diverge over the admissibility of uncommunicated subjective intent evidence when the contract at issue remains ambiguous even after considering the parol evidence concerning the parties' objective manifestations of intent. These differences can yield billion-dollar ramifications. And, as it stands now, neither the Delaware nor the New York judiciary has explicated its differing approach to the admissibility of uncommunicated subjective intent evidence with the clarity that sophisticated parties desire and deserve.

Approximately forty-six percent of sophisticated parties choose New York law to govern their contracts, and fifteen percent choose Delaware.⁴ It appears they choose New York and Delaware because their courts privilege the words of the contract itself over ex-post insistence that they should mean something else, and this formalistic approach to contract interpretation offers predictability to parties reluctant to leave contractual questions to the whim of the judiciary.⁵

So it is especially surprising that the order that characterizes New York contract law, for example, disintegrates when it comes to the most difficult interpretative challenges. The state's courts uniformly agree that, when the words of a contract are inescapably ambiguous, they may begin to consider extrinsic evidence that was communicated among the parties at the time of contracting to help elucidate the parties' intent. But when this evidence proves unhelpful to resolving the contract's meaning or is in equipoise, New York courts generally disagree whether they may

⁴Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1478 (2009).

⁵Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1522 (2010) (describing New York's contract law doctrine as "formalistic, literalistic, nonjudgmental, and deferential to the freedom of parties to bargain for mutual advantage"); Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1102-03 (2009).

then consider evidence of the parties' *uncommunicated* subjective intent—evidence concerning a party's subjective understanding of a contract that it *did not* communicate with the other party at the time of formation.

The lack of clarity on the admissibility of uncommunicated subjective intent evidence has prompted New York courts and those applying its law to forge a range of approaches to assessing its admissibility. And, naturally, the resulting cacophony of methodologies has left litigants unable to predict how courts will apply the law in this arena. The product can be devastating for sophisticated parties with millions at stake, who sometimes display bouts of inartful drafting—intentional or otherwise.⁶

The high-stakes case of *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Company* showcases New York's jurisprudential morass in this arena and its consequences.⁷ The parties disputed whether Chesapeake filed a timely and thus effective notice of its desire to redeem over \$1 billion in notes at par value plus interest under the terms of the "Supplemental Indenture" governing these notes.⁸ Chesapeake believed its March 15, 2013 notice to BNY Mellon that it sought to redeem the notes at par value on May 13 complied with the requirements for redemption at par value, whereas BNY Mellon insisted that Chesapeake missed the February 13 deadline and, thus, Chesapeake could not redeem the notes under the terms Chesapeake desired: i.e., at par value plus interest on May 13.⁹ If Chesapeake missed the deadline,

⁶See Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisition*, 119 YALE L.J. 848, 883 (2010) (describing how "[v]ague terms [can] reduce the front-end costs of negotiation and drafting contracts," and thus why parties might choose to use them).

⁷*Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, 957 F. Supp. 2d 316 (S.D.N.Y. 2013) (*Chesapeake I*); *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, 773 F.3d 110 (2d Cir. 2014) (*Chesapeake II*); *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, No. 13 Civ. 1582(PAE), 2015 WL 4191419 (S.D.N.Y. July 10, 2015).

⁸*Chesapeake I*, 957 F. Supp. 2d at 322.

⁹*Id.* at 322. The parties' duel over the due date stemmed from disagreement over how the Supplemental Indenture should be interpreted in light of the Base Indenture, whose terms it explicitly referenced. *Id.* at 323–24. Section 1.7(b) of the Supplemental Indenture provided that "[a]t any time from and including November 15, 2012 to and including March 15, 2013 (the 'Special Early Redemption Period'), [Chesapeake], at its option, may redeem the Notes" at par value plus interest. *Id.* at 323 (quoting Section 1.7(b)) (quotation marks omitted) (emphasis in original). The provision also established Chesapeake could "redeem the notes pursuant to this Section 1.7 so long as it gives the notice of redemption pursuant to Section 3.04 of the Base Indenture during the Special Early Redemption Period." *Id.* at 323. (quoting Section 1.7(b)) (quotation marks omitted). Section 3.04 of the Base Indenture provided that, after Chesapeake gave its notice of redemption, Chesapeake had to wait "between 30 and 60 days before redeeming the subject Notes." *Id.* at 324.

as BNY Mellon insisted it did, the redemption would be governed by a different provision of the Supplemental Indenture, which would require Chesapeake to pay as much as \$400 million more than if Chesapeake satisfied the terms for redemption at par value.¹⁰ The controversy essentially turned on what it meant to "redeem" the notes under the contract—whether it meant giving notice of redemption, or actually redeeming them.¹¹

On February 20, 2013, Chesapeake first mentioned to a BNY Mellon representative its plans to redeem (whatever that might mean) the notes on March 15.¹² And in the days that followed, the parties traded threats and engaged in judicial gamesmanship that included motions for declaratory judgment, emergency relief, and a preliminary injunction, as they disagreed over whether Chesapeake had missed the deadline.¹³ District Judge Paul Engelmayer of the Southern District of New York arranged for expedited discovery and set the trial to begin April 23, 2013, to allow time to issue a ruling by May 13, 2013.¹⁴

Discovery "focused on the extrinsic evidence bearing on the intent of the drafters of the key provision of the Supplemental Indenture, § 1.7(b)."¹⁵ Partly thanks to limited waivers of attorney-client privilege, this evidence included over a dozen depositions of people who participated in negotiations: representatives from Chesapeake; its outside counsel Bracewell & Giuliani LLP; the lead underwriter Bank of America Merrill Lynch, Pierce, Fenner & Smith ("BAML"); and the lawyers from Cravath, Swaine & Moore LLP whom BAML enlisted to assist negotiations over § 1.7(b).¹⁶ The trial featured testimony of ten witnesses who negotiated and drafted the various deal documents,

As Chesapeake understood it, the Special Early Redemption Period constituted the period in which it had to give notice of its desire to redeem the notes, but Chesapeake also believed redemption at par value plus interest could be effectuated as late as 60 days following that window. *Id.* at 323. However, its indenture trustee, BNY Mellon, thought March 15, 2013—the last day of the Special Early Redemption Period—was the final day on which the notes could be redeemed at par value plus interest (not just the last day on which notice could be given). *Id.* at 324. Therefore, BNY Mellon thought Chesapeake had to give notice 30 days prior—i.e., February 13—if it wanted to redeem the notes at par value. *Id.* at 324.

¹⁰*Id.* 324–25. Section 1.7(c) of the Supplemental Indenture would govern if Chesapeake was deemed to have missed the Special Early Redemption Period, and it would require Chesapeake to pay noteholders the "Make Whole Price" between 30 and 60 days later. *Id.*

¹¹*Chesapeake I*, 957 F. Supp. 2d at 323–25

¹²*Id.* at 325.

¹³*Id.* at 325–28.

¹⁴*Id.* at 328.

¹⁵*Chesapeake I*, 957 F. Supp. 2d at 328.

¹⁶*Id.* at 328–29.

including the Supplemental Indenture itself.¹⁷ The court also reviewed drafts and final versions of these deal documents; emails commenting on and editing the deal documents; and expert testimony concerning industry custom and usage of the various terms in question and investor expectations.¹⁸ Witnesses also testified about statements that Chesapeake and investment industry professionals made following execution of the deal documents that suggested how they interpreted the various deadlines for redemption before the specter of litigation materialized.¹⁹ BNY representatives did not testify as fact witnesses because they neither participated in the negotiations nor drafting of the agreement, even though BNY Mellon was a critical party to the contract.²⁰

All this extrinsic evidence ultimately turned out to be for naught as Judge Engelmayer found the text itself unambiguously favored Chesapeake's interpretation.²¹ On appeal, a majority of the Second Circuit panel undertook similar textual analysis and found, to the contrary, that the contract unambiguously favored BNY Mellon's position.²² More likely, the dissenting judge, District Judge Katherine Polk Failla (sitting by designation on the Second Circuit), reached the correct assessment of the contract: the contract was ambiguous.²³ After all, as Judge Failla observed, "[w]hile ambiguity is not found by counting noses, the simple fact that the judges of the court below and the majority—all, it can safely be said, 'reasonably intelligent person[s]—have arrived at the opposite conclusions as to the meaning of the language suggests the presence of ambiguity."²⁴ (Even though he considered the contract unambiguous, Judge Engelmayer nonetheless included his own interpretation of the extrinsic evidence presented at trial, so his opinion offers fodder for exploring here.)

In future cases resembling *Chesapeake*, but where courts correctly find the language of the contract ambiguous, the question is bound to arise: how should the court view evidence of the parties' uncommunicated subjective intent? For the time being, at least, New

¹⁷*Id.* at 329, 340. Judge Engelmayer approved a limited waiver of attorney-client privilege for communications during a window beginning February 8, 2012—the day Chesapeake first floated the idea of issuing the notes under dispute—until February 21, 2013, the last day before the dispute between Chesapeake and BNY Mellon arose. *Id.* at 329.

¹⁸*Id.* at 340.

¹⁹*Chesapeake I*, 957 F. Supp. 2d at 328.

²⁰*See id.* at 346–47.

²¹*Id.* at 332–40.

²²*Chesapeake II*, 773 F.3d at 112, 117.

²³*Id.* at 118–20 (Failla, J., dissenting).

²⁴*Id.* at 118 ((Failla, J., dissenting) (quoting *Seiden Assocs. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992)).

York law provides no ready answer.²⁵ As a result, New York courts and those applying its law have followed disparate approaches to such evidence. For example, in their opinions in the alternative, Judge Engelmayer and Judge Failla disagreed how the uncommunicated subjective intent evidence should be credited, if at all.²⁶ Judge Engelmayer deemed the doctrine inapplicable to communications among Chesapeake, BAML, and their attorneys because "the relationship between issuer and underwriter [i]s arm's length," so their communications could not qualify as *uncommunicated*, in Judge Engelmayer's opinion.²⁷ Meanwhile, Judge Failla believed, to the contrary, that such communications did in fact constitute uncommunicated "subjective intent" evidence and, thus, she argued that the extrinsic evidence considered "should be reevaluated to ascribe less weight to subjective intent [evidence that Judge Engelmayer did not consider subjective intent evidence] and more weight to what *was* successfully communicated to the purchasers of the bonds."²⁸

This article seeks to reconcile one of the last remaining areas of doctrinal confusion in the law of contract interpretation: the uncertainty surrounding uncommunicated subjective intent evidence. After grappling with the case law, I hope to offer a framework for confronting such interpretive problems and analyzing such evidence that instills order to courts' methodology; promotes predictability for contracting parties; and facilitates sound instrumental results, consistent with the philosophies undergirding contract law in the key commercial jurisdictions of Delaware and New York. Scholars have written surprisingly little about how courts should treat extrinsic evidence of intent²⁹—especially evidence of intent that was not communicated to the other party at the time of contracting³⁰—and this article strives to fill that gap.

²⁵Judge Engelmayer's opinion presents how he would have confronted evidence of the parties' uncommunicated subjective intent, as he included analysis of how he would have ruled after considering the extrinsic evidence had he found the text of the Supplemental Indenture to be ambiguous. See *Chesapeake I*, 957 F. Supp. 2d at 340–46. In her dissent, Judge Failla responded to Judge Engelmayer's approach to the doctrine of "unmanifested subjective intent," and expressed how she would advise Judge Engelmayer to weigh the evidence were he to be forced to reevaluate it on remand. See *Chesapeake II*, 773 F.3d at 117–18, 120–22 (Failla, J., dissenting). The judges disagreed how such evidence should be treated under New York law.

²⁶*Compare Chesapeake I*, 957 F. Supp. 2d at 342–43 with *Chesapeake II*, 773 F.3d at 120 (Failla, J., dissenting).

²⁷*Chesapeake I*, 957 F. Supp. 2d at 342–43. (Failla, J., dissenting).

²⁸*Chesapeake II*, 773 F.3d at 120 (Failla, J., dissenting) (emphasis added).

²⁹Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1025–26 ("[D]espite its theoretical and doctrinal centrality, little scholarly attention has been given to the structure of contractual intent.").

³⁰For example, my search of HeinOnline's Law Journal Library for "uncommunicated subjective intent" and "unmanifested subjective intent," as it is sometimes known, delivered

First, this article outlines the framework for resolving contract disputes under New York law. The New York approach to contract interpretation is rarely presented in the systematized, step-by-step fashion as offered in Part II—synthesizing the general principles and process universally espoused and followed by New York courts. Extracting order from the case law on contract interpretation helps reveal and underscore where the consensus unravels.

Courts applying New York law diverge when compelled to rule on the admissibility of uncommunicated subjective intent evidence, and it seems part of this tension stems from the occasionally contradictory aims of New York contract law: strict adherence to the four corners of the contract on the one hand, and the notion that contracts consummate the joint intent of the parties on the other. Part III examines how New York courts have grappled with such tensions—and traces the disparate strands of jurisprudence meandering through the opinions of New York's judiciary—from the days of Learned Hand, to the muddled state of the law by the turn of the century.

Yet, despite it all, the New York Court of Appeals has still not decided the precise issue at hand: whether uncommunicated subjective intent evidence is admissible to resolve the meaning of ambiguous contracts, and—if so—how. Part IV identifies the three approaches that trial and intermediate-level appellate courts and those applying its law have adopted absent guidance from the state's highest court. This part examines the benefits, drawbacks, and jurisprudential underpinnings of each approach.

But New York is not the only state whose courts have grappled with whether to receive such evidence. Delaware law largely shares New York's objective approach to contract interpretation, but its courts have formulated a more structured way of assessing uncommunicated subjective intent evidence. Part V presents Delaware's methodology for confronting such evidence—a combination of presumptions and the forthright negotiator doctrine.

five articles: each mentions uncommunicated subjective intent in passing, and none concentrates on the question of this paper: see Louis Holland, *Stansbury v. California: The Supreme Court Removes Consideration of an Officer's Subjective Beliefs from a Miranda Custody Inquiry*, 21 J. CONTEMP. L. 43, 54 (1995); Charles Miller, *Scope of Expert Testimony in Insurance Bad Faith Cases: Can the Expert Testify on the Meaning of the Insurance Policy*, 15 CONN. INS. L.J. 211, 233 (2008–2009); Thomas M. Reiter & John K. Baillie, *Better Late than Never: Holding Insurers to Their Bargain Regarding Coverage for Unforeseen, Gradual Pollution under Pennsylvania Law*, 5 DICK. J. ENVTL. L. & POL'Y 1, 39 (1996); Bruce A. Campbell, *Contracts Jurisprudence and Article Nine of the Uniform Commercial Code: The Allowable Scope of Future Advance and All Obligations Clauses in Commercial Security Agreements*, 37 HASTINGS L.J. 1007, 1060 (1986); *Survey of South Dakota Law*, 13 S.D. L. REV. 422, 452 (1968).

While Delaware's framework—combining presumptions with the forthright negotiator doctrine—is more coherent, efficient, and philosophically sound than New York's discordant approaches, the forthright negotiator doctrine appears arduous to apply and fails to guard against the possibility that there might not be any relevant and/or credible evidence to plug into the forthright negotiator framework. In such instances, the forthright negotiator doctrine suggests that there must not be a contract—which can seem unsatisfying and even destructive when it means finding no contract in a multimillion dollar deal.

Eager to solve this apparent problem, I have created a new approach for confronting interpretive situations that the forthright negotiator doctrine is designed to address. Part VI presents what I have termed the "Expectation Default Doctrine," which is designed to operate in tandem with the existing network of presumptions in Delaware law and strives to serve the same policy goals as the forthright negotiator doctrine—while being simpler to apply. The Expectation Default Doctrine also more appropriately limits the admissibility of uncommunicated subjective intent evidence, in line with the aversion to such evidence shared by both New York and Delaware for valid philosophical reasons.

The Expectation Default Doctrine is an information-producing "penalty default" rule in the mold of those described by Ian Ayres and Robert Gertner³¹: it incentivizes the informed party to clarify the confusion of the seemingly uninformed party upfront to protect against back-end disagreement and protracted litigation.³² And, should litigation occur, it streamlines the process of judicial resolution in a way that guards against introduction of seemingly un-credible ex-post recollections that might beguile judge or jury.³³ At the same time, the Expectation Default Doctrine seeks to lurk in the background—unintrusively promoting forthright negotiating without burdening the process—and avoid becoming "useless or inefficient," as other default rules might be.³⁴

³¹See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97–98 (1989–1990); see also, e.g., Ian Ayres & Gregory Klass, *New Rules for Promissory Fraud*, 48 GEO. L.J. 957, 964 (2006) (example of an information-forcing, majoritarian default rule).

³²See Choi & Triantis, *supra* note 6 at 882–83 (summarizing the back-end costs of litigating over the meaning of ambiguous provisions).

³³See *id.* at 882 (describing how "parties are likely to present self-serving and conflicting interpretive canons to address combinations of vague and precise language"); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 601–03 (2003) (explaining how vague standards create a "moral hazard" because they allow parties to argue for their view ex post).

³⁴See Schwartz & Scott, *supra* note 33 at 594.

Part VI, Section D applies the Expectation Default Doctrine framework to the *Chesapeake* scenario. At least at this preliminary stage of exploring this option, the Expectation Default Doctrine appears to achieve many of its goals (if I do say so myself).³⁵

The conclusion presents questions for future study and notes, for the time being at least, that it appears worthwhile for Delaware to adopt the Expectation Default Doctrine and for New York to adapt Delaware's presumptions and adopt the Expectation Default Doctrine.

Alternatively, if parties seek to avoid the Expectation Default Doctrine, they can contract around it by including in their contracts provisions that specify how courts should approach ambiguities. And if they do, the Expectation Default Doctrine offers one such approach.

II. ROADMAP FOR INTERPRETING CONTRACTS UNDER NEW YORK LAW

A. Guiding Principles

New York law views contracts as consummations of the "intention of the parties" when they reached their agreement.³⁶ "Intention" is in the singular to reflect the notion that contracts represent the *joint*—as opposed to individual—intent of the parties. And courts consider the wording, the language, of a contract the "best evidence" of that intent.³⁷ For this reason, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms."³⁸ However, ambiguities in a contract's language can make it infeasible, if not impossible, to enforce a contract according to its text. In such instances, courts resort to extrinsic evidence—beyond the four corners of the integrated agreement—but they may never abandon the idea that contracts must be interpreted to reflect to parties' common intent.³⁹ Courts applying New York law universally accept

³⁵Of course this is all very preliminary as of now. I have not run the Expectation Default Doctrine by anyone else, and I expect that feedback will help fine-tune the ultimate framework.

³⁶*Evans v. Famous Music Corp.*, 807 N.E.2d 869, 872 (2004) ("It is well settled that our role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract."); *Chesapeake II*, 773 F.3d at 113–14 ("When interpreting a contract, our 'primary objective . . . is to give effect to the intent of the parties as revealed by the language of their agreement.'" (quoting *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 232 F.3d 153 (2d Cir. 2000))).

³⁷*Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2002) (citation and internal quotation marks omitted).

³⁸*Id.* (citation and internal quotation marks omitted).

³⁹*Id.*; *Brown Bros. Elec. Contractors v. Beam Constr. Corp.*, 361 N.E.2d 999, 1001 (N.Y. 1977) (The court should strive for "a practical interpretation of the expressions of the

these principles and subscribe to the following approach before reaching their point of diversion at the admissibility of uncommunicated subjective intent.

*B. Determining Whether the Contract is Ambiguous
and Its Meaning if Not*

1. When ruling on a motion to dismiss or a motion for summary judgment concerning the interpretation of a contract, the judge first evaluates whether the agreement at issue is ambiguous as a matter of law.

When confronting a contract dispute, a judge's first task is to determine whether a contract is ambiguous. Ambiguity is a question of law,⁴⁰ so a judge undertakes this inquiry on his or her own⁴¹—without the aid of any extrinsic evidence whatsoever.⁴² When analyzing the language of the agreement, the judge must be mindful that "the words and phrases [in a contract] should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions."⁴³ As a general rule, a judge may only rule on summary judgment if he deems the contract unambiguous.⁴⁴

parties to the end that there be a 'realization of [their] reasonable expectations.'" (quoting CORBIN ON CONTRACTS § 1 (1960)).

⁴⁰*Greenfield*, 780 N.E.2d at 170; see also *Chesapeake II*, 773 F.3d at 118 (Failla, J., dissenting) ("Ambiguity is a question of law, and thus a district court's decision as to whether a contract is ambiguous is reviewed *de novo*." (citing *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 396–97 (2d Cir. 2009)).

⁴¹*Fed. Ins. Co. v. Am. Home. Assur. Co.*, 639 F.3d 557, 568 (2d Cir. 2011) ("The question of 'whether the language of a contract is clear or ambiguous' is one of law, and therefore must be decided by the court." (quoting *Compagnie Financiere*, 232 F.3d at 158)).

⁴²*Chesapeake II*, 773 F.3d at 114 (citing *Howard v. Howard*, 740 N.Y.S.2d 71, 71 (App. Div. 2d Dep't 2002)); *R/S Associates v. N.Y. Job Development Authority*, 771 N.E.2d 240, 242 (N.Y. 2002) ("[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (quoting *W.W.W. Assoc. v. Giancontieri*, 566 N.E.2d 639 (N.Y. 1990) (internal quotation marks and citations omitted))); *Greenfield v. Philles*, 780 N.E.2d 166 (N.Y. 2002) ("Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide.").

⁴³*Chesapeake II*, 773 F.3d at 114 (quoting *Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 99 (2d Cir. 2012) (internal quotation marks omitted)).

⁴⁴*Chesapeake I*, 957 F. Supp. 2d at 330 ("Judgment as a matter of law 'is generally proper in a contract dispute only if the language of the contract is wholly unambiguous.'" (quoting *Compagnie Financiere*, 232 F.3d at 157)). A judge may also rule on summary judgment if the only extrinsic evidence available favors one party or does not depend on the credibility of witnesses. See *Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 299–300 (S.D.N.Y. 1997) (citing *Mellon Bank, N.A. v. United Bank Corp. of N.Y.*, 31 F.3d 113, 115 (2d Cir. 1994)); *Hudson-Port Ewen Associates, L.P. v. Kuo*, 566 N.Y.S.2d 774, 776 (App. Div. 3d Dep't 1991).

a) Characteristics that Make a Contract Unambiguous

A contract is unambiguous when "the language it uses has a definite and precise meaning, unattended by the danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion."⁴⁵

b) Characteristics that Make a Contract Ambiguous

On the other hand, a contract is ambiguous when, "read as a whole, [it] fails to disclose its purpose and the parties' intent, or when specific language is 'susceptible of two *reasonable* interpretations."⁴⁶ To be reasonable, both interpretations supporting ambiguity must be plausible to "a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."⁴⁷ To be sure, "[t]hat a text is complex or imperfect does not mean it is ambiguous."⁴⁸

2. Courts have several principles of textual interpretation to guide them in determining whether a contract is ambiguous, and—if not ambiguous—what the contract means

The process of determining whether a contract is ambiguous can overlap with the task of deciphering its meaning if unambiguous: courts rely on the same tools and guiding principles. In general, the court

⁴⁵*Greenfield*, 780 N.E.2d at 170–71 (quoting *Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280 (N.Y. 1978)); *Chesapeake II*, 773 F.3d at 114 (quoting *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010)).

⁴⁶*Ellington v. EMI Music, Inc.*, 21 N.E.3d 1000, 1004 (N.Y. 2014) (quoting *Brooke Group JCH Syndicate* 488, 633 N.E.2d 635, 638 (N.Y. 1996); *State of N.Y. v. Home Indem. Co.*, 486 N.E.2d 827 (N.Y. 1985)) (emphasis added); see also *Chesapeake II*, 773 F.3d at 119 (Failla, J., dissenting) ("Where two contractual clauses conflict, the Second Circuit has found ambiguity where there is not a compelling reason to favor one or the other." (citing *Seiden Assocs. v. ANC Holdings, Inc.*, 959 F.2d 425, 429–30 (2d Cir. 1992))).

⁴⁷*Chesapeake II*, 773 F.3d at 114 (quoting *Law Debenture*, 595 F.3d at 466 (internal quotation marks omitted)). See also *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 299 (2d Cir. 1996) ("[N]o ambiguity exists where the alternative construction would be unreasonable."); *Law Debenture Trust*, 595 F.3d at 467 ("[T]he court should not find the contract ambiguous where the interpretation urged by one party would 'strain[]' the contract beyond its reasonable and ordinary meaning." (quoting *Bethlehem Steel Co. v. Turner Constr. Co.*, 141 N.E.2d 590 (N.Y. 1957))).

⁴⁸*Chesapeake I*, 957 F. Supp. 2d at 331 (citing *Aramony v. United Way of Am.*, 254 F.3d 403, 411 (2d Cir. 2001)).

should endorse the plain meaning of a contract's language.⁴⁹ However, there may be times when reaching a "reasonable interpretation" of the contract requires the court to adopt an "unusual construction[]" of a given word.⁵⁰ Yet Judge Failla, for one, cautions that "this principle does not extend so far as to allow two distinct constructions of a single term to coexist within the same contractual clause."⁵¹ Further, all terms are not always created equal and, when necessary, "specific and exact terms" can receive "greater weight than general language."⁵² Terms may not be added or deleted through construction.⁵³ The judge should read the entire integrated agreement as one document to guard against overemphasizing a particular word or sections, rendering any other useless,⁵⁴ and permitting inconsistency.⁵⁵ Finally, the interpretation should be practical⁵⁶: the court should take care to avoid clearly "bizarre" and "implausible" interpretations surely anathematic to the parties' intent.⁵⁷ When a contract is unambiguous, the court is never free to "alter the contract to reflect its personal notions of fairness and equity."⁵⁸ As always, the intent of the parties reigns.

⁴⁹See, e.g., *Ellington v. EMI* at 1003 ("The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning." (quoting *Brooke Group*, 663 N.E.2d at 638 (internal quotation marks omitted))).

⁵⁰*Chesapeake II*, 773 F.3d at 119 (Failla, J., dissenting).

⁵¹*Id.*

⁵²*Cty. of Suffolk v. Alcorn*, 266 F.3d 131, 139 (2d Cir. 2001).

⁵³*NFL Enters. LLC v. Comcast Cable Commc'ns, LLC*, 851 N.Y.S.2d 551, 555–56 (App. Div. 1st Dep't 2008) ("courts may not by construction add or exercise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (citing *Reiss v. Financial Performance Corp.*, 764 N.E.2d 958 (N.Y. 2001) (internal citations and quotation marks omitted))).

⁵⁴*Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 468 (2d Cir. 2010) ("The court should read the integrated contract 'as a whole to ensure that undue emphasis is not placed upon particular words and phrases,' and 'to safeguard against adopting an interpretation that would render any individual terms superfluous.'" (quoting *Bailey v. Fish & Neave*, 868 N.E.2d 956, 959 (N.Y. 2007); *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 86 (2d Cir. 2002))).

⁵⁵*Nat'l Conversion Corp. v. Cedar Bldg. Corp.*, 246 N.E.2d 351 (N.Y. 1969) ("All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency."); *Chesapeake II*, 773 F.3d at 119 (Failla, J., dissenting) ("New York courts have repeatedly emphasized that '[f]orm should not prevail over substance and a sensible meaning of the words should be sought.'" (quoting *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998))).

⁵⁶See *Ellington v. EMI Music, Inc.*, 21 N.E.3d 1000, 1003 (2014) ("Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole." (citing *Greenfield v. Philles Records*, 780 N.E.2d 166 (N.Y. 2002))).

⁵⁷*Chesapeake II*, 773 F.3d at 119 (Failla, J., dissenting).

⁵⁸*Selective Ins. Co. of Am. v. Cty. of Rensselaer*, 47 N.E.3d 458, 461 (N.Y. 2016) (quoting *Greenfield*, 780 N.E.2d at 171 (internal quotation marks omitted)).

3. If a contract is unambiguous, the contract is applied on its face

When the judge deems a disputed contract unambiguous, the court's reading of the agreement's unambiguous language rules, as the question is resolved as a matter of law according to that meaning.⁵⁹

C. Interpreting a Facially Ambiguous Contract

1. Once a judge deems a contract ambiguous as a matter of law, the court reviews all the extrinsic evidence available to determine whether resolution becomes a question of fact—and, if so, the factfinder conducts further review of the extrinsic evidence.

After a judge holds a contract ambiguous as a matter of law, the court may begin to receive extrinsic evidence.⁶⁰ Determining whether resolution of the contract remains an issue of law or becomes a question of fact depends on the extrinsic evidence available.⁶¹ If there is no extrinsic evidence, resolution of issue stays a question of law for the court—and the case may be resolved on summary judgment,⁶² though the New York Court of Appeals has not specified how courts should resolve such ambiguities on their own. Further, if the extrinsic evidence universally favors one interpretation, the issue similarly stays a question of law, and the judge may resolve the issue in favor of that interpretation as a matter of law.⁶³ Otherwise, the issue becomes a question of fact, and

⁵⁹*In re Coudert Bros.*, 487 B.R. 375, 389 (S.D.N.Y. 2013) ("A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties." (quoting *Acumen Re Mgmt. Corp. v. Gen. Sec. Nat'l Ins. Co.*, No. 09 Civ. 1796 (GBD), 2012 WL 3890128 (S.D.N.Y. Sept. 7, 2012))).

⁶⁰*E.g.*, *Evans v. Famous Music Corp.*, 807 N.E.2d 869, 872 (2004); *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2002); *Chesapeake I*, 957 F. Supp. 2d at 331 (citing *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 392 (2d Cir. 2009)).

⁶¹*See Hartford Acc. & Indem. Co. v. Wesolowski*, 305 N.E.2d 907, 909 (N.Y. 1973) ("[I]f the equivocality must be resolved wholly without reference to extrinsic evidence the issue is to be determined as a question of law for the court.").

⁶²*See Tracey Road Equipment, Inc. v. Village of Johnson City*, 571 N.Y.S.2d 586, 588 (App. Div. 3d Dep't 1991).

⁶³*Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 300 (S.D.N.Y. 1997) ("a court appropriately may dispose of a contract interpretation dispute on summary judgment . . . if [it] finds either that there is no relevant extrinsic evidence or that there is relevant extrinsic evidence but such evidence is so one-sided that it does not create a genuine issue of material fact."); *Hudson-Port Ewen Associates, L.P. v. Kuo*, 566 N.Y.S.2d 774, 776 (App. Div. 3d Dep't 1991) ("[T]he existence of ambiguity will not preclude summary judgment unless resolution of that ambiguity depends upon extrinsic evidence.").

But see, e.g., *Pepco Constr. of N.Y., Inc. v. CNA Ins. Co.*, 790 N.Y.S.2d 490, 491 (App. Div. 2d Dep't 2005) ("Where . . . the language of a contract is ambiguous, its

the trier of fact (judge or jury) may consider extrinsic evidence to determine the *joint* intent of the parties to the contract at the time of the contract's formation.⁶⁴ Extrinsic evidence to help the trier of fact elucidate the intent—and thus ostensible meaning—of an ambiguous contract may include documents shared among the parties during the negotiations, as well as depositions and live testimony that concern: the negotiations leading up to and during the drafting of the contract;⁶⁵ the parties' prior course of dealing;⁶⁶ the parties' course of performance under the contract;⁶⁷ and "industry practice and custom."⁶⁸ Most controversially, some courts may allow evidence of the parties' uncommunicated subjective intent, as we will explore.⁶⁹

2. As a last resort, the contract should be construed against the drafter (if possible)

If after evaluating all the extrinsic evidence the trier of fact still cannot resolve the meaning of the ambiguous contract, the court may—as a "last resort"—construe the agreement against the drafter, *contra proferentem*.⁷⁰ *Contra proferentem* may not be used if the party seeking its application "participated in negotiating the terms of the document,"⁷¹ which appears to make it inapplicable for many sophisticated contracts.

construction presents a question of fact which may not be resolved by the court on a motion for summary judgment.").

⁶⁴*Evans*, 807 N.E.2d at 872 (2004); *Greenfield*, 780 N.E.2d at 179; *Chesapeake I*, 957 F. Supp. 2d at 331 ("Where there is such extrinsic evidence [of intent], the meaning of the ambiguous contract is a question of fact for the factfinder." (quoting *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 392 (2d Cir. 2009) (internal quotation marks omitted))).

⁶⁵*Rudman v. Cowles Commc'ns*, 280 N.E.2d 867 (1972) ("[T]he court may and should look to prior negotiations to determine what was intended."); *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.*, 349 F.2d 569, 571 (2d Cir. 1991) (explaining that possible extrinsic evidence may include "negotiations . . . made prior to or contemporaneous with the execution of a written contract which may tend to vary or contradict its terms." (alteration omitted) (quoting *67 Wall St. Co. v. Franklin Nat'l Bank*, 333 N.E.2d 184 (N.Y. 1975))).

⁶⁶*See Louis Dreyfus Energy Corp. v. MG Refining and Marketing, Inc.*, 812 N.E.2d 936, 940 (N.Y. 2004); *J.A. Apparel Corp. v. Abboud*, 682 F. Supp.2d 294, 303 (S.D.N.Y. 2010) (citing *RESTATEMENT (SECOND) OF CONTRACTS* § 202 (1981)); *Chase Manhattan Bank v. First Marion Bank*, 437 F.2d 1040, 1047–48 (5th Cir. 1971) (applying New York law).

⁶⁷*Evans v. Famous Music Corp.*, 807 N.E.2d 869, 873 (N.Y. 2004); *Chase*, 437 F.2d at 1047–48.

⁶⁸*Evans*, 807 N.E.2d at 873; *Chase*, 437 F.2d at 1047–48.

⁶⁹*See infra* Parts II, III.

⁷⁰*Chesapeake I*, 957 F. Supp. 2d at 332 (citing *M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.*, 432 F.3d 127, 142 (2d Cir. 2005); *Albany Sav. Bank, FSB v. Halpin*, 117 F.3d 669, 674 (2d Cir. 1997)).

⁷¹*Westfield Family Physicians, P.C. v. Healthnow N.Y., Inc.*, 873 N.Y.S.2d 793, 795 (App. Div. 4th Dep't 2009) (citing *Coliseum Towers Assoc. v. Cty. of Nassau*, 769 N.Y.S.2d 293, *lv. denied* 814 N.E.2d 461 (N.Y. 2004)).

In the insurance context, New York courts appear to disagree whether *contra proferentem* should supply the rule of decision as soon as a court finds an insurance policy ambiguous,⁷² or if—alternatively—the contract should be construed against the insurer only if the extrinsic evidence fails to suggest the parties' intent.⁷³

III. THE JURISPRUDENTIAL HISTORY: EVOLUTION OF THE ADMISSIBILITY OF UNCOMMUNICATED SUBJECTIVE INTENT EVIDENCE IN NEW YORK

Courts applying New York law often present Judge Learned Hand as definitive proof—as if his words come from Mount Sinai—that they must never consider evidence of uncommunicated subjective intent when interpreting contracts, even ambiguous ones. Indeed, Judge Hand's words in the much-cited case, *Hotchkiss v. National City Bank of New York*, suggest an unquestionable truth in encapsulating the New York approach to contract interpretation (even though a federal district court opinion, not a New York state case): "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties."⁷⁴ Judge Hand explained, "A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which represent a *known* intent,"⁷⁵ implying that any evidence considered must have been received by the other party in the course of consummating the contract. Judge Hand then continued by suggesting contracts may be modified beyond their language on the page, but only if the acts or words purporting to alter the contract are communicated to the other party. Judge Hand wrote, "[I]f it appear by other words, or acts, of the parties,

⁷²*E.g.*, *Selective Ins. Co. of Am. v. Cty. of Rensselaer*, 47 N.E.3d 458 (N.Y. 2016) (citing *Fed. Ins. Co. v. Int'l Bus. Machs. Corp.*, 965 N.E.2d 934, 936 (N.Y. 2012)); *Fed. Ins. Co.*, 965 N.E.2d at 936 ("If there is a reasonable basis for a difference of opinion as to the meaning of the policy . . . the language at issue would be deemed to be ambiguous and thus interpreted in favor of the insured.") (internal citations and quotation marks omitted).

This approach would differentiate the process for interpreting insurance contracts from the process for other types of contracts, as in Delaware. *See, e.g.*, *Penn Mut. Life. Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149–50 (Del. 1997) (applying *contra proferentem* as soon as the text of an insurance contract is deemed ambiguous—before considering extrinsic evidence).

⁷³*E.g.*, *Stern v. Cigna Grp. Ins.*, No. 07-0772-CV, 2008 WL 4950067, at *1 (2d Cir. Nov. 20, 2008) ("[I]f extrinsic evidence cannot resolve the ambiguity, the district court must apply the rule of *contra proferentem* and construe the agreement against the insurer." (citing *Andy Warhol Found. for Visual Arts v. Fed. Ins. Co.*, 189 F.3d 208, 215 (2d Cir. 1999))).

⁷⁴*Hotchkiss v. Nat'l City Bank of N.Y.*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd sub nom. Nat'l City Bank v. Hotchkiss*, 231 U.S. 50 (1913); *see also, e.g.*, *Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 301 (S.D.N.Y. 1997) (citing *Hotchkiss*); *Mencher v. Weiss*, 114 N.E.2d 177, 181 (N.Y. 1953).

⁷⁵*Hotchkiss*, 200 F. 287 at 293 (emphasis added).

that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent."⁷⁶

Courts have viewed Judge Hand's aversion to evidence of unexpressed intentions as a dictate applicable to all contracts—no matter whether ambiguous. For example, as District Judge Lewis Kaplan wrote in *Nycal v. Inoco* of Judge Hand's *Hotchkiss* opinion, "[Hand's] exclusive reliance upon evidence of objective manifestations of intent renders evidence of uncommunicated subjective intent irrelevant, as demonstrated by the New York Court of Appeals' decision in *Wells v. Shearson Lehman/American Express*."⁷⁷ However, *Wells* never cites Hand and, in fact, *Wells* stands for a different proposition.⁷⁸

A. *The Wells Opinion*

Indeed, *Wells* has become the most important New York case addressing the admissibility of uncommunicated subjective intent evidence when interpreting ambiguous contracts. However, bizarrely, the case does not even concern an ambiguous contract. Rather, judges have misappropriated its most quotable line—"Uncommunicated subjective intent alone cannot create an issue of fact where otherwise there is none"⁷⁹—to circumstances not contemplated by the opinion, yet treat it as "well-established" that it may be applied to such situations.⁸⁰

In *Wells*, the New York Court of Appeals evaluated whether a settlement agreement to a Delaware class action released claims against financial advisors who provided fairness opinions concerning the transaction being challenged in both the Delaware and New York suits.⁸¹ The Delaware settlement released the named defendants and their "agents[,] representatives[,] or anyone else" from claims related to the challenged going-private transaction.⁸² If this settlement agreement indeed covered claims against the financial advisors who were not named defendants in the Delaware class action, the plaintiff's suit against financial advisors in New York could not proceed.⁸³

⁷⁶*Id.*

⁷⁷*Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 301 (S.D.N.Y. 1997) (citing *Wells v. Shearson Lehman/American Express*, 526 N.E.2d 8, 14 (N.Y. 1988)).

⁷⁸*See Wells*, 526 N.E.2d 8.

⁷⁹*Wells*, 526 N.E.2d at 15.

⁸⁰*Hudson-Port Assocs., L.P. v. Kuo*, 566 N.Y.S.2d 774 (App. Div. 3d Dep't 1991), *aff'd*, 578 N.E.2d 774 (N.Y. 1991) (citing *Wells*, 526 N.E.2d at 15).

⁸¹*Wells*, 526 N.E.2d at 9.

⁸²*Id.* at 9–11

⁸³*Id.* at 9.

The plaintiff argued that the settlement language did not satisfy statutes in both Delaware and New York requiring that settlement agreements releasing joint tortfeasors "expressly so provide."⁸⁴ The New York Court of Appeals disagreed. To the court, "the release [was] clear, unambiguous, and obviously meant to include defendants."⁸⁵ As such, the court believed it satisfied both the Delaware and New York statutes that required settlement terms "*expressly provide* for the release of persons other than the named defendants in the class action."⁸⁶

After rejecting additional arguments that might undermine the court's determination that the provision was unambiguous,⁸⁷ the court addressed plaintiff's final argument—that because she never intended to release the financial advisors, such intent must rule.⁸⁸ The *Wells* court's summary of this argument and the phraseology of its response have spurred some of the ensuing confusion over the meaning of *Wells*, so I excerpt it in full:

Plaintiff simply insists that her subjective intent not to release defendants creates an issue of fact that requires extrinsic evidence. But no manifestation of this alleged intent was made to anyone when the parties entered into the release. Uncommunicated subjective intent alone cannot create an issue of fact where otherwise there is none.⁸⁹

⁸⁴*Id.* at 12–13 (citing Uniform Contribution Among Tortfeasors Act, 10 DEL. CODE ANNOT. § 6304[a] ("A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasor unless the release so provides")) (quoting N.Y. GEN OBLIG. LAW § 15-108(a) ("When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide"))).

⁸⁵*Id.* at 12

⁸⁶*Id.* at 14 (emphasis in original) (noting as well that the plaintiff was not among the class of people the Delaware and New York statutes were designed to protect—those "in the position of the hapless common-law releaser, trapped by the operation of law into automatically discharging all the world upon the intended release of but one joint tort-feasor.")).

⁸⁷*Id.* at 15 (reading the provision in the context of the whole document, exploring whether there was fraud, and assessing whether it constituted boilerplate instead of being a "handmade document").

⁸⁸*Id.* at 14–15.

⁸⁹*Id.* at 15.

In opinions that followed, courts have quoted this section as supporting the proposition that uncommunicated subjective intent can never be considered, not that such evidence just cannot create an issue of fact.⁹⁰

It appears the *Wells* court's second sentence in the above excerpt contaminated this otherwise uncontroversial and straightforward proposition because it seems to suggest that, if such manifestation of plaintiff's alleged intent not to release the financial advisors *was communicated* to the other party at the time of contracting, perhaps the court could then consider it. In other words, the *Wells* court's phraseology might make it seem as if it was not the extrinsic character of the plaintiff's evidence that made it disqualifying, but rather that it was uncommunicated. However, given that the court had already found that the agreement was unambiguous as a matter of law, plaintiff's supposed intent not to release the financial advisors would be barred no matter whether she shared such desire with the other party at the time of contracting. As the *Wells* court noted earlier in the opinion, the court may "resort[] to extrinsic evidence *only* when the court concludes as a matter of law that the contract is ambiguous,"⁹¹ which was not the case here, as the court repeatedly emphasized the release's clarity and stressed that it was not ambiguous.

B. *The Post-Wells Trio*

In the aftermath of *Wells*, three Appellate Division cases—*Hudson-Port Assocs., L.P. v. Kuo*,⁹² *Sally v. Sally*,⁹³ and *Padovano v. Vivian*⁹⁴—propagated the notion that *Wells* bars consideration of uncommunicated subjective intent evidence where there is already an issue of fact given the contract at issue had been deemed ambiguous, even though *Wells* merely says that uncommunicated subjective intent evidence on its own cannot "*create*" one.⁹⁵ However, subsequent courts have tolerated this jurisprudential leap and allowed the notion that uncommunicated subjective intent evidence is always barred to stick.⁹⁶

In *Hudson-Port*, the commercial buyer of a parcel of real property, Hudson-Port, sued its sellers, Chien and Helen Kuo, to recover the

⁹⁰See *Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 301 (S.D.N.Y. 1997) (citing *Wells*, 526 N.E.2d at 14).

⁹¹*Wells*, 526 N.E.2d at 12 (citing e.g. *Van Wagner Adv. Corp. v. S & M Enters.*, 492 N.E.2d 756 (N.Y. 1986)) (emphasis added).

⁹²566 N.Y.S.2d 774 (App. Div. 3d Dep't), *aff'd*, 578 N.E.2d 774 (N.Y. 1991).

⁹³638 N.Y.S.2d 832 (App. Div. 3d Dep't 1996).

⁹⁴629 N.Y.S. 833 (App. Div. 3d Dep't 1995).

⁹⁵*Wells*, 526 N.E.2d at 15 (emphasis added)

⁹⁶See, e.g., *Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 301–02 (S.D.N.Y. 1997).

company's down payment and cost of examining the property's title.⁹⁷ Hudson-Port's title company had denied its request to insure the property after discovering encumbrances—including a right of reentry—burdened segments of the land. The sellers, the Kuos, counterclaimed for breach of contract.⁹⁸ The Kuos argued "the contract required only the tender of insurable title and that they complied with this requirement when they produced an insurance company willing to insure title for the purchase price."⁹⁹ However, another section of the contract specified that the seller must "convey to the purchaser(s) fee simple of said premises, *free of all encumbrances, except as herein stated,*" and no such exclusions were provided therein.¹⁰⁰

The Third Department panel deemed the contract ambiguous, but the majority refused to heed the defendants' request that the justices consider their "understanding" of the contract—that the Kuos only had to provide Hudson-Port with insurable title, not also marketable title.¹⁰¹ Citing *Wells*, the three-two Appellate Division majority explained that, because the defendant Kuos did not indicate that they shared their understanding of their contractual obligations with Hudson-Port "prior to or contemporaneous with the execution of the contract," the court could not consider such evidence: in the words of *Wells*, "[u]ncommunicated subjective intent alone cannot create an issue of fact where otherwise there is none."¹⁰² The court essentially ignored that the contract's ambiguity had already created an issue of fact. It then proceeded to resolve the meaning of the contract on its own by borrowing the interpretation that other courts in the jurisdiction had ascribed to similar contractual language.¹⁰³

To the contrary, the dissent keenly observed that *Wells* "merely indicates that where there is no ambiguity in the document, uncommunicated subjective intent alone cannot create it." Given the facial ambiguity of the contract at issue, the dissent concluded, "[a]ccordingly, *Wells* is inapplicable," and summary judgment was

⁹⁷*Hudson-Port Assocs., L.P. v. Kuo*, 566 N.Y.S.2d 774, 775 (App. Div. 3d Dep't), *aff'd*, 578 N.E.2d 774 (N.Y. 1991).

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Hudson-Port Assocs.*, 566 N.Y.S.2d at 776 (emphasis in original).

¹⁰¹*Id.*

¹⁰²*Id.* at 777 (citing *Wells v. Shearson Lehman/Am. Express*, 526 N.E.2d 8, 15 (N.Y. 1988)) (internal quotation marks omitted).

¹⁰³*Id.* (Yessawich and Harvey, JJ., dissenting) (citing *N.Y. Inv'rs v. Manhattan Beach Bathing Parks Corp.*, 243 N.Y.S. 548 (App. Div. 2d Dep't 1930), *aff'd* 176 N.E. 6 (N.Y. 1931); *Laba v. Carey*, 277 N.E.2d 641 (N.Y. 1971)).

inappropriate.¹⁰⁴ Rather, resolution depended on the trier of fact's perception of the parties' intent, following examination of all available extrinsic evidence. Such evidence included the defendants' "uncontroverted affidavit attesting that at the time of contracting they understood the contract to require title insurable in the amount of the purchase price only."¹⁰⁵ The dissent found it significant that the plaintiff did not dispute the defendants' recollection.¹⁰⁶ As such, the dissent argued summary judgment was premature.¹⁰⁷

In *Sally v. Sally*, the Third Department relied on both *Hudson-Port* and *Wells* in deflecting the parties' requests that the court consider their own interpretations of the stipulation that the court had already deemed ambiguous.¹⁰⁸ Given that the parties' own interpretations were the only extrinsic evidence offered—and the court viewed such evidence as "nothing more than uncommunicated subjective intent, which are insufficient to create a question of fact"—the court held that the trial court did not err in refusing to hold an evidentiary hearing.¹⁰⁹ The court proceeded to interpret the contract on its own accord, which is odd given that it considered the contract ambiguous, and presented what seems to be arbitrary and certainly unpredictable analysis.¹¹⁰

Further, in *Padovano v. Vivian*, the Third Department did not believe the phrase at issue, "good working order," was ambiguous, but nonetheless added in dicta, "Evidence of plaintiffs' uncommunicated subjective intent is irrelevant in any event."¹¹¹

C. Nycal's Tolerance and Propagation of the Trio's Jurisprudential Leaps

Judge Kaplan's exegesis of the doctrine in *Nycal* illustrates the uncertainty of the case law and how it can be used to support a range of approaches.¹¹² Judge Kaplan chose to view the Third Department's extension of *Wells* to ambiguous contracts—as illustrated in *Hudson-*

¹⁰⁴*Hudson-Port Assocs.*, 566 N.Y.S.2d at 776 (citing *Wells*, 526 N.E.2d 8) (internal citation omitted).

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 778.

¹⁰⁸*See Sally v. Sally*, 638 N.Y.S.2d 832, 834 (App. Div. 3d Dep't 1996).

¹⁰⁹*Id.* (citing *Wells*, 526 N.E.2d 8).

¹¹⁰*See id.* at 834–35.

¹¹¹*Padovano v. Vivian*, 629 N.Y.S. 833 (App. Div. 3d Dep't 1995) (citing *Hudson-Port Assocs., L.P. v. Kuo*, 566 N.Y.S.2d 774 (App. Div. 3d Dep't), *aff'd*, 578 N.E.2d 774 (N.Y. 1991)).

¹¹²*See Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 301–02 nn. 31–37 (S.D.N.Y. 1997).

Port—as supporting a clear rule: "[o]nly the parties' objective manifestations of intent are considered."¹¹³ It seems Judge Kaplan found a straightforward rule preferable to conceivable alternatives. As he acknowledged in a footnote, "[d]espite the clarity of this rule, a few cases have used language which could be construed as suggesting that unexpressed subjective views might be considered to resolve ambiguity."¹¹⁴

Notably, in *Walk-In Med. Center, Inc. v. Breuer Capital Corp.*, the Second Circuit found the trial court "properly admitted" testimony in which the defendant personally explained how she viewed the ambiguous phrase in question—"evidence of the parties' subjective intent," to help it resolve the meaning of a phrase it had already found ambiguous.¹¹⁵ But, instead of attacking the reasoning of the Third Department's trio of cases, which were just as susceptible to scrutiny for leaps in reasoning, Judge Kaplan undermined the Second Circuit's conclusion in *Walk-In* and argued the case "should not be given such a broad reading" in light of the cases on which it relied.¹¹⁶ For example, he dismissed *Walk-In's* reliance on *Paragon Resources, Inc. v. National Fuel Gas Distribution Corp.*, a Fifth Circuit case applying New York law, which provides "oral statements of the parties as to what they intended" are admissible when interpreting ambiguous contracts, because *Paragon* did not explicitly explain what such oral statements might entail.¹¹⁷ To be fair, the Third Department trio was more recent than *Walk-In*, and New York (not federal) case law, so more persuasive on issues of New York law.

¹¹³*Id.* at 302.

¹¹⁴*Id.* at 302 n. 37.

¹¹⁵*Id.* (quoting *Walk-In Med. Ctr., Inc. v. Breuer Capital Corp.*, 818 F.2d 260, 264 (2d Cir. 1987) (internal quotation marks omitted)).

¹¹⁶*Nycal Corp.*, 988 F. Supp. 296 at 302.

¹¹⁷*Id.* (citing *Paragon Resources, Inc. v. Nat'l Fuel Gas Distribution Corp.*, 695 F.2d 991, 996 (5th Cir. 1983) (applying New York law)) (explaining that, despite what the *Paragon* quotation provided implies, "there is nothing in *Paragon* to suggest that it [explicitly] approved the use of uncommunicated expressions of subjective intent." (emphasis added)). Judge Kaplan also objected to *Paragon's* citation to a Second Department case, which in turn quotes a Fourth Department case's suggestion that a party's own interpretation could be relevant to a court's resolution of an ambiguous contract. *Id.* (citing *Surlak v. Surlak*, 466 N.Y.S.2d 461, 466 (2d Dept. 1983) (quoting *Matter of Robinson v. Robinson*, 440 N.Y.S.2d 127, 129 (4th Dept. 1981) ("It is only on the determination of the meaning of an indefinite or ambiguous contract that the construction placed upon the contract by the parties themselves is to be considered by the court and is of importance in ascertaining the contract meaning."))). Judge Kaplan observed that, read in the context of *Robinson*, the quoted sentence from *Robinson* "does not authorize the wholesale introduction of subjective evidence, but is instead limited to the unremarkable assertion that the subsequent conduct of the parties is admissible to interpret an ambiguous contract." *Id.*

On appeal, the Second Circuit upheld the Judge Kaplan's ultimate interpretation of the contract in *Nycal* as the panel agreed with him that, when viewing the contract in the context of settlement negotiations between the parties and the particular claims at issue in those discussions, the losing party in this particular case failed to raise enough doubt about the interpretation favored by the district court.¹¹⁸ Nonetheless, the panel's opinion took care to specify that "the proposition of law that the district court drew from *Wells* . . . may not be as clearly settled in New York as the district court indicates."¹¹⁹ Like the dissent in *Hudson-Port*, the Second Circuit panel in *Nycal* agreed that "*Wells* does not . . . appear to address the admissibility of subjective evidence in cases such as this, in which the district court found the contract ambiguous and thus required extrinsic evidence to interpret the contract."¹²⁰

However, the panel could avoid deciding whether uncommunicated subjective intent evidence would be admissible under New York law because it could exclude the uncommunicated subject evidence at issue on other grounds.¹²¹ Given that *Nycal*'s former Chief Financial Officer and General Counsel, whose interpretation the appellant sought to credit, admitted at trial "that he had no personal knowledge of the parties' intent at the time the settlement was being negotiated and that [*Nycal*'s CEO] had not discussed the scope of the release with him," the Second Circuit found that his deposition concerning the "scope of the release [was] not relevant, competent, or admissible" due to these defects.¹²² Such flaws in the possibly admissible testimony in this case allowed the Second Circuit to avoid wading into the debate over the admissibility of relevant, firsthand uncommunicated subjective intent evidence—enabling *Nycal*'s misreading to fester.

¹¹⁸*Nycal Corp. v. Inoco PLC*, 166 F.3d 1201, 1998 WL 870192, at *3 (2d Cir. Dec. 9, 1998) ("To survive a motion for summary judgment, the non-movant 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 486 (1986)).

¹¹⁹*Id.* at *4 (citing *Wells v. Shearson Lehman/Am. Express*, 526 N.E.2d 8 (N.Y. 1988)).

¹²⁰*Id.* at *4 (citing *Hudson-Port Assocs., L.P. v. Kuo*, 566 N.Y.S.2d 774, 777 (App. Div. 3d Dep't), *aff'd*, 578 N.E.2d 774 (N.Y. 1991) (Yesawich and Harvey, JJ., dissenting).

¹²¹*Id.* at *3–4.

¹²²*Nycal Corp.*, 1998 WL 870192 at *3.

IV. THE MODERN DOCTRINE: THREE APPROACHES TO UNCOMMUNICATED SUBJECTIVE INTENT EVIDENCE UNDER NEW YORK LAW

In light of the mangled jurisprudence concerning uncommunicated subjective intent evidence, courts applying New York law have crafted three approaches to determining whether to admit such evidence: (A) disallow it entirely; (B) allow it, but only to help explain objective manifestations of intent; and (C) allow it as standalone evidence, but deem it less probative than other extrinsic evidence of intent, such as the parties' communications to each other.

A. Total Exclusion

As noted, many courts applying New York law have operated on the presumption that "unexpressed views have no proper bearing" when interpreting *ambiguous* contracts—even though binding precedent never explicitly holds that.¹²³ This absolute exclusion of uncommunicated subjective intent evidence offers the benefits of an easily administrable rule.¹²⁴ It also most clearly advances the policy goals supporting skepticism toward such evidence: after all, contracts are thought to reflect the *joint* intent of the parties—not their individual ambitions, and courts attempt to interpret contracts to effectuate that joint intent.¹²⁵ Thus, it may seem axiomatic that the uncommunicated desires of one party cannot somehow merge into a joint understanding if in fact the party harboring those desires never shared them with the counterparty.¹²⁶

If uncommunicated subjective intent evidence were permitted to be introduced unbridled by restrictions, it might seem parties could have

¹²³See, e.g., *Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 302–03 (S.D.N.Y. 1997); *Faulkner v. Nat'l Geographic Soc'y*, 294 F. Supp. 2d 523, 531 n. 30 (S.D.N.Y. 2003) ("statements of subjective intention uncommunicated to the other contracting party are immaterial in construing the terms of the contract."); see also *Faulkner v. Nat'l Geographic Soc'y*, 452 F. Supp. 2d 369, 377–78 (S.D.N.Y. 2006) (refusing to credit plaintiff photographers' testimony and affidavits concerning what they believed and intended their rights to be under the contracts at the time of signing).

¹²⁴But see *Chesapeake I*, 957 F. Supp. 2d at 342–43 and *Chesapeake II*, 773 F.3d at 120 (Failla, J., dissenting) (disagreeing whether the doctrine of unmanifested intent applies to the situation at hand).

¹²⁵E.g., *Evans v. Famous Music Corp.*, 807 N.E.2d 869, 872 (2004); *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2002).

¹²⁶See, e.g., *Chesapeake I*, 957 F. Supp. 2d at 341 ("The doctrine of unmanifested intent reflects the principle that the parties' objective manifestations of their intent—i.e., their words to each other and their deeds—are more probative in contract formation and interpretation." (citing *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010)).

an incentive to conceal their subjective motivations for the contract through negotiations, strive to contrive ambiguities in the resulting document, and argue for their own subjective interpretation once the judge asks them to help fill in the gaps. A ban on evidence of uncommunicated subjective intent acts as a protective shield against creative post-hoc rationalization of a contract's meaning.¹²⁷ While witnesses take an oath intended to guard against lies, it can be insufficient protection for unscrupulous litigants, who may concoct and testify to seemingly credible memories of their past intentions for the contract. Disallowing uncommunicated subjective intent evidence entirely compels contracting parties to be as straightforward as possible when hammering out the details of their deals to ensure that the parties share the same conception of the agreement and align their expectations accordingly.

B. Admission to Explain Other Evidence

But this bright-line ban has proved unsatisfactory and unhelpful for other courts. Instead of insisting on it, such courts have engaged in a well-intentioned, more nuanced struggle to balance competing desires to admit evidence that would seem to elucidate the intent of the parties when interpreting an ambiguous agreement, comply with New York precedent permitting such evidence, and also stave off the parade of horrors that could ensue should they pursue an overly permissive approach, as reflected in the policy reasons supporting a bright-line ban.

In *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., L.L.C.*, the Second Circuit validated admitting evidence of the parties' uncommunicated subjective intentions "to help explain the witness's own actions and statements" when a contract was formed.¹²⁸ Though it did not offer much more explanation, it seems the court was envisioning admitting such evidence as a sort of secondary or supporting class of evidence. It appears the *SR Int'l* court did not share a preoccupation with unearthing a singular intent of the parties that characterized earlier New York opinions and, as such, was willing to adopt this looser approach. The court stressed it should interpret contracts to reflect the parties'

¹²⁷*Chesapeake I*, 957 F. Supp. 2d at 341 (noting that barring uncommunicated subjective intent is justified to "prevent a party from concealing its understanding of the contract from a counterparty, only to reveal that understanding later or to invent a *post hoc* rationalization in aid of litigation position." (citing *Mercury Partners LLC v. Pac. Med. Bldgs., LP*, No. 02 Civ. 6005 (HBP), 2007 WL 2197830, at *14 (S.D.N.Y. July 31, 2007))).

¹²⁸ 467 F.3d 107, 126 (2d. Cir. 2006).

"intentions."¹²⁹ (Note the use of the plural "intensions.") The court said it views the parties' "reasonable expectations" as a proxy for such intentions,¹³⁰ and that it determines these reasonable expectations "based on an objective understanding of the 'attendant circumstances [in which the agreement was made], the situation of the parties, and the objectives they were striving to obtain."¹³¹ The *SR Int'l* court then surmised that uncommunicated subjective intent evidence might shed light on the circumstances surrounding the contract's formation and could therefore offer relevant evidence under Fed. R. Evid. 401.¹³² As the *SR'l Int'l* court explained, "Although a party's uncommunicated subjective intent cannot supply the ultimate meaning of an ambiguous contract, it is quite another thing to hold that such evidence is wholly irrelevant and inadmissible for other purposes,"¹³³ offering a view cited by other courts applying New York law support the admission of such evidence.¹³⁴

SR Int'l exhibits how such evidence might be used. The case concerned a dispute between the World Trade Center developer, Silverstein Properties, and its insurance companies over which insurance policy form governed when hijackers crashed airliners into each of the two Twin Towers on September 11, 2001.¹³⁵ A cohort of insurance companies insured the World Trade Center for about \$3.5 billion "per occurrence," so if the September 11 attacks were one occurrence, Silverstein would recover \$3.5 billion.¹³⁶ But if they were two occurrences, Silverstein could obtain double—\$7 billion—from his insurers.¹³⁷

Because Silverstein Properties had leased the buildings just a few months before and the parties were still negotiating their final insurance contracts, each insurer had issued interim binders that served as binding contracts in the meantime.¹³⁸ Critically, as it stood, the term "occurrence" remained undefined, so resolution of the ambiguity

¹²⁹*Id.* at 125 (quoting *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 135 (2d Cir. 1986)) (internal quotation marks omitted).

¹³⁰*Id.* (citing *Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 361 N.E.2d 999, 1001 (N.Y. 1977)).

¹³¹*Id.* (quoting *Brown Bros.*, 361 N.E.2d at 1001)

¹³²*Id.* ("evidence is relevant if it has 'any tendency to make the existence of *any* fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" (quoting FED. R. EVID. 401) (emphasis added in the case)).

¹³³*Id.*

¹³⁴*See, e.g., Chesapeake I*, 957 F. Supp. 2d at 121; *Credit Suisse Securities (USA) LLC v. Grand Circle LLC*, No. 11 Civ. 0232 (JGK), 2013 WL 5312511, at *11 (S.D.N.Y. Sept. 23, 2013).

¹³⁵*SR Int'l*, 467 F.3d at 113.

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸*Id.*

depended on "an individualized inquiry to determine what each pair of parties—the insured Silverstein Parties and each insurer—intended for the word 'occurrence' to mean in each binder."¹³⁹ While they were negotiating, the parties had exchanged policy forms supplying various definitions for "occurrence," so which form the parties intended to govern would help the court resolve the dispute.¹⁴⁰ Thus, the trial court admitted testimony from the insurance companies' representatives relating to which policy form they thought bound them for the interim period.¹⁴¹

On appeal, Silverstein argued that the trial court committed prejudicial error by admitting such testimony of uncommunicated subjective intent.¹⁴² However, the Second Circuit found the trial court did not err because—in light of its aforementioned emphasis on the likely relevance of such evidence—the court believed "the insurers' subjective understandings were relevant insofar as they provided the jury with an understanding of the state of the parties' negotiations and helped to explain the parties' overt actions."¹⁴³ As the *SR Int'l* court noted, evidence that an insurer thought that it was bound to a given form might help explain the changes it made to other sections of the operative contract.¹⁴⁴ Further, the Second Circuit believed the trial judge adequately cabined the jury's consideration of such evidence by instructing it that such evidence was received at trial only to "help explain the witness's own actions and statements," and that "only the intent indicated by words and acts that are made known to the other party may be considered" when ultimately determining which form the parties had intended to rule.¹⁴⁵

This approach may seem theoretically sound by balancing a desire to admit potentially relevant evidence in light of few—if any—other options for resolving the question at issue, while simultaneously trying to abide by the insistence of New York law that only objective manifestations of intent may ever be considered when interpreting an ambiguous contract. However, in practice, it seems difficult if not impossible for a judge or jury to restrict how such evidence is ultimately used. Further, this approach raises several additional questions, such as whether evidence of objective manifestations of intent is a prerequisite to consideration of subjective intent evidence (almost certainly yes), and

¹³⁹*SR Int'l*, 467 F.3d at 114.

¹⁴⁰*Id.* at 114–16.

¹⁴¹*Id.* at 125.

¹⁴²*Id.* at 124–25.

¹⁴³*SR Int'l*, 467 F.3d at 126.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

how a trier of fact is actually supposed to connect such ancillary evidence to the primary evidence of intent (and whether this is a requirement). It seems likely there would be little guard against the possibility that compelling subjective intent testimony would overpower what was actually communicated among the parties, aside perhaps advising the jury that it should be considered a step removed through a convoluted jury instruction.¹⁴⁶

C. Less Probative Among the General Mix of Evidence

Following *SR Int'l*, courts applying the case (as well as others) have adapted it into a simpler approach: when interpreting ambiguous contracts, they consider evidence of uncommunicated subjective intent among the general mix of evidence, but deem it "significantly" less probative than the other generally permissible evidence.¹⁴⁷ For example, in her dissent to *Chesapeake*, Judge Failla acknowledged that uncommunicated subjective intent evidence is "admissible and can provide some aid in interpreting the objective actions of a party," but she noted it is "not to be accorded decisive weight in interpreting ambiguous language."¹⁴⁸

In *Sumitomo Mitsui Banking Corp. v. Credit Suisse*, a trial court received deposition testimony in which the people who negotiated the contract had described their purposes heading into their discussions, as well as their recollections of the agreed-upon exchange.¹⁴⁹ The judge emphasized that the parties' actions and statements at contracting offered the most valuable evidence, but when resolving the dispute on summary judgment, he still factored such testimony into his interpretation of the

¹⁴⁶See Non-Confidential Brief for Plaintiff-Appellant, *EchoStar Satellite L.L.C. v. ESPN, Inc.*, No. 600282/08 9684 (N.Y. App. Div. 1st Dep't Sept. 4, 2012), <https://www.orrick.com/Events-and-Publications/Documents/EchoStar-ESPN-Inc-EchoStar-appbrief.pdf>, at 45–50 (describing the trial court's difficulty in communicating whether and, if so, how the jury should evaluate testimony concerning uncommunicated subjective intent received at trial).

¹⁴⁷*Sumitomo Mitsui Banking Corp. v. Credit Suisse*, No. 600898/2010, 2014 WL 4209247, at *6–8 (N.Y. Sup. Ct. 2014) (considering uncommunicated subjective intent evidence "significantly" less probative than "the parties' objective manifestations of their intent – namely, their words to each other and their deeds" at the time of contracting (quoting *Credit Suisse Securities (USA) LLC v. Grand Circle LLC*, No. 11 Civ. 0232 (JGK), 2013 WL 5312511, at *11 (S.D.N.Y. Sept. 23, 2013) (internal quotation marks omitted) (observing as well that uncommunicated subjective intent evidence "is relevant only as an indication of what the parties may have intended when they drafted the final version of the contract . . ."))).

¹⁴⁸*Chesapeake II*, 773 F.3d at 121 (Failla, J., dissenting) (citing *SR Int'l*, 467 F.3d at 126).

¹⁴⁹*Sumitomo*, 2014 WL 4209247, at *6–8.

contract alongside the more valuable documentary evidence of the parties' exchanges through the negotiations.¹⁵⁰

In *NFL Enterprises LLC v. Comcast Cable Communications LLC*, after finding the contract at issue ambiguous, the First Department reversed the motion court's grant of summary judgment and remanded for additional consideration of extrinsic evidence of the parties' intent.¹⁵¹ However, in remanding the case, the First Department did not indicate that the motion court could not continue to consider the only extrinsic evidence offered below—"each party's self-serving statements regarding its own understanding of the agreement."¹⁵² Rather, it only said that such affidavits concerning the uncommunicated subjective intents of the executives were insufficient to resolve the dispute on summary judgment given the ambiguities of their written agreement.¹⁵³ Thus, the First Department seemed to leave it to the trial court to weigh such evidence however it pleased alongside other evidence concerning the parties' intent. The risk of compelling witnesses or powerful ex-post arguments driving the resolution of the contract remains.

While admitting evidence of uncommunicated subjective intent to interpret an ambiguous contract appears technically permissible under the case law of the New York Court of Appeals, current law provides little guidance for how the finder of fact should evaluate and weigh such evidence when they do admit it. Litigants have no sense of how judges (or juries) will value such evidence other than that they will consider it less probative (or at least are supposed to do so). The law's lack of definition—its absence of structure—allows judges to embrace a case-by-case approach to admitting and valuing such evidence, and it similarly seems likely to facilitate or enable more persuasive witnesses to dictate resolution of the meaning of ambiguous contracts.

V. THE DELAWARE APPROACH

Delaware shares New York's objective theory of contracts and much of the same framework for interpreting agreements. Like their counterparts in New York, Delaware judges consider their "central task" when interpreting contracts to be determining the "shared intent," the "reasonable shared expectations" of the parties at the time of

¹⁵⁰ *Id.*

¹⁵¹ *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, 851 N.Y.S.2d 551, 557 (App. Div. 1st Dep't 2008); *see also id.* (noting the court's reluctance "to find a triable issue of fact concerning the terms of a written agreement between two sophisticated contracting parties," but that it had no option given the contract's ambiguities).

¹⁵² *Id.*

¹⁵³ *Id.*

contracting.¹⁵⁴ Delaware courts likewise view the plain text of the contract as "understood by an objective, reasonable third party"¹⁵⁵ as the best evidence of the parties' intent.¹⁵⁶ They evaluate extrinsic evidence only after deeming a contract ambiguous.¹⁵⁷ Further, as in New York,

¹⁵⁴*Hartley v. Consolidated Glass Holdings, Inc.*, C.A. No. 9360-VCN, 2015 WL 5774751, at *8 (Del. Ch. 2015) (citing *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008)); *U.S. West, Inc. v. Time Warner, Inc.*, Civ. A. No. 14555., 1996 WL 307445, at *9 (Del. Ch. June 6, 1996) (citing CORBIN ON CONTRACTS § 1 (1960); *Bell Atl. Meridian Sys. v. Ocel Commc'ns Corp.*, C.A. No. 14348, 1995 WL 707916 (Del. Ch. Nov. 28, 1995)).

¹⁵⁵*Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014) (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)) (internal quotation marks omitted).

¹⁵⁶*Salamone*, 106 A.3d at 370 (citing *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003); *ev3 v. Lesh*, 114 A.3d 527, 529 n. 3 (Del. 2014)); *Hartley*, 2015 WL 5774751, at *8 (citing *Eagle Indus., Inc. v. DeVibiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

¹⁵⁷As in New York, when confronting a dispute over the meaning of a contract, Delaware judges first determine whether the text of the contract is clear and unambiguous, without glancing beyond the words of the agreement. *See, e.g., Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354 (Del. 2013). If unambiguous, the contract is enforced according to that plain meaning. *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779, 783 (Del. 2012); *Hartley*, 2015 WL 5774751, at *8 (citing *Eagle Indus.*, 702 A.2d at 1232). However, if the court deems the contract ambiguous, it then reviews extrinsic evidence—such as statements made during the course of the negotiation, courses of prior dealings between the parties, and practices in the relevant trade or industry—in an effort to divine whether "only one meaning is objectively reasonable in the circumstances." *U.S. West*, 1996 WL 307445, *10; *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 834–35 (Del. Ch. 2007).

Though the general contours of their interpretive procedures are similar, Delaware's definition of ambiguity and other nuances stray slightly from New York's approach. For one, Delaware's conception of ambiguity seems more amenable to judges finding contracts ambiguous. "If a reasonable person in either party's position could only assign the disputed language one clear meaning, the court will enforce that meaning." *Hartley*, 2015 WL 5774751, at *8 (citing *Eagle Indus.*, 702 A.2d at 1232); *see also United Rentals*, 937 A.2d at 834 ("[When] provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity." (quoting *Eagle Indus.*, 702 A.2d at 1232 (internal quotation marks omitted))); *U.S. West*, 1996 WL 307445, at *9 ("The primary rule of construction is this: where the parties have created an unambiguous integrated written statement of their contract, the language of that contract (not as subjectively understood by either party but) as understood by a hypothetical reasonable third party will control." (citing *City Investing Co. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993))).

Otherwise, the contract is ambiguous, and "the court may broaden its search for common intent by looking beyond the four corners of the document and considering relevant outside facts" under the objective theory of contract interpretation, *Hartley*, 2015 WL 5774751, at *8 (citing *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010)), searching for the "shared intention of the parties." *United Rentals*, 937 A.2d at 834 (quoting *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, C.A. No. 2742-VCN, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007) (internal quotation marks omitted)).

Further, the party seeking enforcement of the contract bears the burden of persuading the trier of fact that its interpretation represents the "common understanding of the parties." *United Rentals*, 937 A.2d at 834, 845; *U.S. West*, 1996 WL 307445, at *10. It seems likely that, in certain situations, such subtle distinctions between New York's and Delaware's

Delaware courts insist that "the private, subjective feelings of the negotiators are irrelevant and unhelpful to the Court's consideration of a contract's meaning, because the meaning of a properly formed contract must be shared or common."¹⁵⁸ However, the Delaware approach is not as rigid as such a pronouncement might imply. Rather, Delaware courts recognize that in certain situations—when, after scrutinizing all the permissible objective evidence, the meaning of a contract remains ambiguous—subjective understandings may prove "instructive," as a tiebreaker of sorts.¹⁵⁹

Unlike New York, Delaware law more explicitly recognizes that uncommunicated subjective intent evidence can have a place within an otherwise objective approach to contract interpretation. Delaware law validates the usefulness of subjective intent through the forthright negotiator principle, which was likely created out of the Delaware judiciary's sense of equity and is deployed when there are seemingly few if any other options to resolving the contract's meaning, after objective evidence is unable to guide the court. In essence, the forthright negotiator principle provides that if, at the time of contracting, one party to a contract knew the other side had a different understanding of the agreement yet failed to correct it at the time of contracting, then the textually ambiguous agreement should be construed against the party that knew of the other side's misunderstanding yet allowed it to continue. Though not perfect, the forthright negotiator principle is an improvement over New York's lack of guidance. The forthright negotiator doctrine provides judges a clearer procedure to follow when grappling with the most complicated interpretive quagmires. Further, it promotes sound instrumental objectives by warning negotiating parties that they cannot rely on clever ambiguities to be resolved in their favor and, instead, prompts them to be forthcoming about their desires.

However, there are certain situations where—after deeming a contract ambiguous, Delaware courts will not entertain extrinsic evidence as in New York: in such scenarios, they simply construe contract *contra proferentem* and end the inquiry there. Delaware differs from New York's more reluctant approach to the doctrine of *contra proferentem*.¹⁶⁰ While judges applying New York law seem to strive to

formulations at these stages could facilitate different outcomes if the same contract were subject to examination by the judiciaries of both jurisdictions. While the consequences of these nuances merit further exploration, such analysis is beyond the scope of this paper.

¹⁵⁸ *United Rentals*, 937 A.2d at 835.

¹⁵⁹ *Id.*

¹⁶⁰ New York's resistance to *contra proferentem* appears to be a more recent phenomenon. After all, precedent from the Court of Appeals as old as 1865 (but still in force) appears to support wider application:

circumvent resorting to *contra proferentem* at all costs, Delaware jurists seem to appreciate how the doctrine provides not just a tiebreaker, but an incentivizer for clear drafting. As such, Delaware's series of default rules in the model of *contra proferentem* can anticipatorily avoid protracted disputes over seemingly contrived—perhaps even intentional—ambiguities, as exhibited by the cautionary tale of *Chesapeake*. Delaware's use of *contra proferentem* (as well as other presumptions) orders its courts' approach to contract interpretation—instilling an additional layer of predictability—and informs its use of the forthright negotiator doctrine when *contra proferentem* and presumptions are inapplicable.

A. Delaware's Embrace of *Contra Proferentem* and Presumptions

1. *Contra Proferentem*

Delaware invokes *contra proferentem* when a single party unilaterally composed the terms of the ambiguous agreement—whether that party be an insurance company, a corporate issuer, or a general partner of a limited partnership.¹⁶¹ This approach stands in contrast to its review of "negotiated bilateral agreement[s]," where extrinsic evidence may be admissible when the contract is ambiguous.¹⁶² As Chief Justice E. Norman Veasey noted in *Penn Mutual Life Insurance Co. v. Oglesby*, policy concerns support this default rule of construction for unilaterally

It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. It is also a familiar rule of law, that if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee.

Hoffman & Place v. Aetna Fire Ins. Co., 32 N.Y. 405, 412–13 (1865) (citations and emphasis in original omitted); *see also Alland v. Consumers Credit Corp.*, 476 F.2d 951, 956 (2d Cir. 1973) (citing *id.*).

¹⁶¹*See Penn Mut. Life. Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149–50 (Del. 1997) (applying *contra proferentem* to insurance contracts); *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 399 (Del. 1996) (noting "court must construe the [certificate of incorporation] to adhere to the reasonable expectations of the investors who purchased the security and thereby subjected themselves to the terms of the contract") (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)); *SI Mgmt. L.P. v. Winniger*, 707 A.2d 37, 43 (Del. 1998).

¹⁶²*SI Mgmt.*, 707 A.2d at 43 ("[U]nless extrinsic evidence can speak to the intent of all parties to a contract, it provides an incomplete guide with which to interpret contractual language. Thus, it is proper to consider evidence of bilateral negotiations when there is an ambiguous contract that was the product of those negotiations[.]").

composed contracts: *contra proferentem* is designed to push the "dominant party to make terms clear."¹⁶³ Insurers and issuers "control . . . the process of articulating the terms," so Delaware law believes "[c]onvolved or confusing terms are the problem of the insurer or issuer—not the insured or investor."¹⁶⁴ This rule applies to other such "take it or leave it" agreements, such as a proposal by a General Partner who did not afford the limit partners to a limited partnership agreement the opportunity for "meaningful individualized negotiations."¹⁶⁵ For such limited partnership agreements, the doctrine of *contra proferentem* operates just it does in the insurance context—and these agreements are construed against the General Partner.¹⁶⁶

Delaware law has also crafted a subspecies, or "specialized application of the *contra proferentem* doctrine"—termed the "'reasonable expectations of investors' principle"—for situations where parties on "only one side of the dispute" were the only ones who negotiated the challenged agreement, and those on the other side (the holders of rights in the related public securities) accordingly neither participated in the negotiations nor the drafting of the "'hopelessly ambiguous'" provision in question.¹⁶⁷ In such a scenario, the reviewing court similarly does not consider extrinsic evidence and construes the contract according to the "investors' reasonable expectation" because, after all, the issuer was in the position "to clarify unclear . . . contract terms in advance so as to avoid future disputes and therefore should bear the drafting burden that the *contra proferentem* principle would impose upon it."¹⁶⁸

2. Presumptions

Further, Delaware law has also developed certain presumptions that act as irreproachable, policy-minded tiebreakers for the sorts of situations that have bewildered New York courts—those situations

¹⁶³ 695 A.2d 1146, 1150 (Del. 1997).

¹⁶⁴ *Id.*

¹⁶⁵ *SI Mgmt.*, 707 A.2d at 44; *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 460 (Del. 2013).

¹⁶⁶ *SI Mgmt.*, 707 A.2d at 44; *Norton*, 67 A.3d at 460.

¹⁶⁷ *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539, 551–52 (Del. 2013) (quoting *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 397 (Del. 1996)).

¹⁶⁸ *Id.* at 552 (citing *Elliot Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 853 (Del. 1998); quoting *Kaiser*, 681 A.2d at 398–99; Dale B. Tauge, *Should Bonds Have More Fun? A Reexamination of the Debate Over Corporate Bondholder Rights*, 1989 COLUM. BUS. L. REV. 87, 89 (1989)) (internal quotation marks omitted). The Delaware Supreme Court emphasized that this doctrine should be sparingly used, but explained that it was proper in *Bank of N.Y. Mellon v. Commerzbank* "because the Defendants could have easily drafted the 'hopelessly ambiguous' Parity Securities definition in the LLC Agreement in a straightforward manner. Yet they did not." *Id.*

where, in contrast to *contra proferentem*, extrinsic evidence is admitted but nonetheless fails to aid in the contract's resolution. For example, when the document in question is a voting agreement whose terms the parties both negotiated, Delaware courts nonetheless apply the "presumption against disenfranchisement."¹⁶⁹ As the Court of Chancery applying this presumption explained of its utility, "[s]o long as this sort of clarity is required, there is less danger that an erroneous and therefore inequitable deprivation of core electoral rights will occur,"¹⁷⁰ as the parties will surely take steps to ensure any attempt to limit voting rights will be clearly set forth if that is what they desire.¹⁷¹

B. *The Forthright Negotiator Doctrine*

Where a contract is negotiated by both parties and Delaware law has not created a presumption for the type of contract at issue after extrinsic evidence has been evaluated (as it did for voting rights agreements, with the presumption against disenfranchisement), Delaware sanctions review of the parties' uncommunicated subjective intents and understandings to help courts resolve disputes through what is known as the forthright negotiator principle or doctrine.¹⁷² If one party knew or should have known of the understanding of the contract ascribed to it by the other party, then the contract should be construed according to the interpretation of the language known by both parties—i.e., against the first party aware of the other's understanding.¹⁷³ Limiting uncommunicated subjective intent evidence to this framework clarifies how judges should value it; aligns practice with longstanding doctrinal principles by ensuring there really is a contract;¹⁷⁴ and facilitates

¹⁶⁹*Salamone v. Gorman*, 106 A.3d 354, 371 (Del. 2014).

¹⁷⁰*Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 313 (Del. Ch. 2002).

¹⁷¹Additional such presumptions may exist in Delaware law, but are beyond the scope of this seminar paper. I use the "presumption against disenfranchisement" as one example.

¹⁷²*U.S. West, Inc. v. Time Warner, Inc.*, Civ. A. No. 14555., 1996 WL 307445, at *11 (Del. Ch. June 6, 1996); *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835–36 (Del. Ch. 2007); *United Rentals*, 937 A.2d at 835–36.

¹⁷³*United Rentals*, 937 A.2d at 835–45; *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003) (citing *U.S. West*, 1996 WL 307445, at *10); see *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 60–61 (Del. Ch. 2001) (applying New York Law) (noting that the forthright negotiator doctrine resembles the framework of RESTATEMENT (SECOND) OF CONTRACTS § 201(2)); see also *Abuy Dev., L.L.C. v. Yuba Motorsports, Inc.*, No. 5:06CV799SNL, 2008 WL 1777412, at *6 (E.D. Mo. Apr. 16, 2008).

¹⁷⁴*U.S. West*, 1996 WL 307445, at *10 ("Only an objectively reasonable interpretation that is in fact held by one side of the negotiation and which the other side *knew or had reason to know that the first party held* can be enforced as a contractual duty." (citing RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981); CORBIN ON CONTRACTS § 537 (1960); Bell Atl.

resolution of disputes according to the only meaning that might be considered a contract in light of the differing views of the contract's meaning being presently asserted. As Chancellor William Allen, who articulated this principle and coined its moniker in the *U.S. West v. Time Warner, Inc.* explained, "this principle is capable of resolving disputes arising from ambiguous contract language because it is logically impossible for a contracting party, operating in good faith, *both* to have a subjective interpretation of ambiguous language different from that of her counterparty *and* to know of her counterparty's differing interpretation."¹⁷⁵ In other words, there could be no meeting of the minds sufficient to form a valid contract if one party had reason to know the other party did not share its understanding of the ambiguous language and was unwilling to accept such understanding, but signed the contract nonetheless.

In calling it the forthright negotiator principle (instead of merely citing Restatement (Second) of Contracts § 201), the doctrine bestows a moral obligation on negotiating attorneys to be, well, *forthright*—or risk penalty—as Gregory M. Duhl has observed.¹⁷⁶

The forthright negotiator principle reasons that the contract should be construed against the party who apprehended the misunderstanding of the other party yet failed to stop it because that party was on notice that the contract could be construed in such fashion but assumed the risk by failing to act as a reasonable and forthright negotiator.¹⁷⁷ As such, it seems only fair to effectuate the meaning of the party who did not understand the provision could mean something else.

In *U.S. West*, Chancellor Allen conveniently divided the process for applying the forthright negotiator doctrine into four steps:

Meridian Sys. v. Octel Commc'ns Corp., C.A. No. 14348, 1995 WL 707916 (Del. Ch. Nov. 28, 1995)).

¹⁷⁵*U.S. West*, 1996 WL 307445, at *10 (emphasis in original); *See also* *Sodano v. Am. Stock Exch. LLC*, C.A. No. 3418-VCS, 2008 WL 2738583, at *12 n. 69 (Del. Ch. July 15, 2008). "The forthright negotiator principle applies with the most force when a negotiator drafts particular contractual language, clearly expresses to the other side what she believes the languages accomplishes, and the other side accepts the language into the contract without contradicting the drafter's meaning." (citing *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 60–61 (Del. Ch. 2001) (applying New York Law); *United Rentals*, 937 A.2d at 841–44)).

¹⁷⁶Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies*, 71 U. PITT. L. REV. 110, 111–12 (2010).

¹⁷⁷*See* *Vianix Del. LLC v. Nuance Commc'ns Inc.*, CA No. 3801-VCP, 2010 WL 3221898, at *17 (Del. Ch. Aug. 13, 2010) (Given that Nuance's representative described the disputed contract provision as "intentionally vague," V.C. Parsons reasoned "it was incumbent on Nuance to make sure Vianix shared its understanding of the reference to per seat licenses in the Cost/End User definition. Otherwise, it would risk having the term construed in accordance with Vianix's understanding of it." (citing *United Rentals*, 937 A.2d at 835–36)); *In re IBP*, 789 A.2d at 60–61; RESTATEMENT (SECOND) OF CONTRACTS § 201.

First, it is necessary to determine what one party (call it seller) to the ambiguous contract reasonably understood the term to mean. Second, it is necessary to answer the question whether the other party (call it buyer) knew or should have known of seller's reasonable understanding of seller's rights or obligations under the contract. If one concludes that buyer did know (or had good reason to know) of seller's understanding, the conditions for establishing a contract right have been established. But as a check on that analysis it will be helpful to go through the obverse process. That is to ask third, what in fact was the buyer's understanding of the relevant rights and obligations captured by the ambiguous language, and fourth, whether the seller knew or had reason to know of the buyer's understanding. If the analysis is sound these two path's [*sic*] will, of course, lead to consistent conclusions.¹⁷⁸

In practice, however—as demonstrated by Chancellor Allen's application of the principle in *U.S. West*—the forthright negotiator doctrine seems mind-numbingly complex, requiring comprehensive examination of exactly who knew what when and how, and permitting exactly the sort of free-floating testimony concerning subjective intentions that the ban on uncommunicated subjective intent is at least partially designed to guard against because it seems tough to limit in practice.¹⁷⁹

VI. A PROPOSED TWEAK: THE "EXPECTATION DEFAULT DOCTRINE"

A. Stage 1: *Expectation and Industry Default Analysis*

After reviewing cases where the forthright negotiator doctrine has been deployed, it seems there is a simpler option for scenarios unaccounted for by Delaware's presumptions, as when the forthright negotiator doctrine is used: construe the ambiguous contract according to the parties' last previously agreed upon understanding for such provision, or—if there was no previous agreement—according the industry

¹⁷⁸*U.S. West*, 1996 WL 307445, at *16.

¹⁷⁹*Id.* at *16–17.

expectations for it. In other words, the contract should be construed against the party seeking to enforce a meaning contrary to what the parties had last previously agreed that prior versions of the provision entailed. If absolutely no such agreement existed, the contract should then be construed according to what the industry would generally expect from provisions analogous to the one in dispute. Like the forthright negotiator doctrine, this "Expectation Default Doctrine" strives to gauge and enact the parties' reasonable expectations, in line with the goals of contract law.¹⁸⁰

Of course this rule might spawn debate over what the reasonable person familiar with the industry would expect from a given provision. But in every instance of ambiguity where the forthright negotiator doctrine has been applied, the provision in question had a clear expectation on which the court could have grounded its opinion. For example, in *U.S. West*, Chancellor Allen noted that, under the circumstances, one would expect clear limiting language if the contract were to be construed as *U.S. West* desired.¹⁸¹ After applying the forthright negotiator doctrine, Chancellor Allen ultimately construed the contract according to industry expectations and thus against *U.S. West*.¹⁸² In *United Rentals, Inc. v. RAM Holdings, Inc.*, United Rentals' counsel admitted at trial that the understanding of the provision he sought to enforce was "not 'market' relative to other recent LBO transactions."¹⁸³ After scrutinizing testimony concerning the parties' understandings and then determining what the parties knew and should have known in applying the forthright negotiator doctrine, Chancellor William Chandler similarly construed the contract as would be expected in the industry—i.e., at "market," barring specific performance.¹⁸⁴

The Expectation Default Doctrine relies on expectations for given provisions (even when ambiguously constructed) as a shortcut for intricate examination of what each party "knew or should have known," as is required under the forthright negotiator doctrine. The forthright negotiator doctrine's analysis of what each party knew or should have known entails judicial inquiry rife with the possibility of error thanks to faulty testimony, unavailable evidence, and other such pitfalls. The Expectation Default Doctrine seeks to avoid occasions for such error. In high-stakes negotiations, it can be assumed that each party knew of the

¹⁸⁰ See *id.* at *16.

¹⁸¹ *Id.* at *17.

¹⁸² *U.S. West*, 1996 WL 307445, at *20.

¹⁸³ *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 838 (Del. Ch. 2007).

¹⁸⁴ *Id.* 835–45.

expected or baseline meaning of the provision in question, and it should be construed accordingly when the parties fail to draft clearly.

To be clear, this Expectation Default Doctrine approach does not suggest the parties may never vary a contract from what would be expected in the industry. Indeed, sophisticated parties always adjust terms: that is how innovation happens. However, in order to institute such deviations, one must take extra care to be clear in the language used in the contract and in communications with counterparties: the Expectation Default Doctrine encourages parties to share up front their understandings of bespoke terms. Each party should clarify its understanding of perceptibly debatable terms in communications to each other, preferably in writing or even telephone. This creates objective manifestations of the parties' intent that would help ensure that the Expectation Default Doctrine will not need to be used—as *objective* manifestations of intent will likely become sufficient to resolve any ambiguities (which will also hopefully be avoided by such sharing, encouraging careful drafting). If the Expectation Default Doctrine is established as a baseline rule, the parties could no longer gamble through ambiguities. It also allows the parties to avoid negotiating over every detail if they are comfortable with what was previously agreed upon, promoting efficiency and cost-savings.

B. Stage 2: Evidence-Based Expectation Testimony

It seems the one situation where this rule might not help would be where—after hearing permissible testimony concerning expectations for such agreements—there is no discernible, consensus expectation for the provision such as the one in question.¹⁸⁵ To protect against gridlock, when the proceedings arrive at this situation, each party may point to objective evidence it *received* from the *other* party—whether it be a letter, email, sequence of redline edits, or the like—that might persuade the trier of fact by a preponderance of evidence that its interpretation must be correct. Here, each party may explain why the evidence received from the other party led it to believe that the other party shared its understanding of the agreement—i.e. why what the testifying party received from the other party led the testifying party to believe that its expectation for the agreement was correct and should be ascribed to the ambiguous language in question. Such testimony concerning perceived

¹⁸⁵In other words, in such circumstances, the expert testimony on industry expectations supports both sides such that it would be unreasonable for the trier of fact to favor one party's position. (The evidence does not need to be in complete equipoise for the judge to find such circumstances exist.)

expectations derived from communications from the other party—"evidence-based expectation testimony"—would be the only form of uncommunicated subjective intent evidence allowed.

Limiting testimony in this way tethers the uncommunicated subjective intent evidence to objective evidence guaranteed to be known by the other party. It also protects against a party testifying why *its own* changes to the contract or communications to the other party led it to believe the contract had a certain meaning. Such alternative (and impermissible) form of uncommunicated subjective intent evidence is worthless, or even damaging because there is no way of knowing that the other side received such communications and digested them in a world when lawyers are barraged by endless streams of emails and a dizzying number of attachments of redline versions. It might seem simple, but current law in New York (and it seems Delaware) does not clearly enough explain what *type* of uncommunicated subjective intent evidence maybe be considered when it can be considered in interpreting an ambiguous contract.

C. Stage Three: The Unambiguous Precedent Default

As a last resort, if such testimony is impossible because there are no such communications from the other party in which to ground permissible "evidence-based expectation testimony," then the unambiguous meaning of the provision in the precedential contract will govern as a proxy for the parties' reasonable expectation. (It is unlikely a court would ever get to this point when examining truly bespoke contracts as parties surely traded correspondence in these circumstances.) This final default works because parties rarely draw contracts from scratch. Rather corporate law firm associates often begin with precedent for similar such agreements. As the precedent is near certainly unambiguous, its meaning will default as long as consistent with the understanding asserted by one of the parties. In these situations, *contra proferentem* is inapplicable because there is no single drafter (as the precedent likely was also a team effort).

If the contract remains impossible to resolve after these backstops, only then may the judge contemplate the possibility that there is no contract at all—and if there are remedies, that they may be found the law of tort or restitution.¹⁸⁶ To be sure, this option is remote and unlikely to occur.

¹⁸⁶See *U.S. West, Inc. v. Time Warner, Inc.*, Civ. A. No. 14555, 1996 WL 307445, at *11 (Del. Ch. June 6, 1996) (noting that if the forthright negotiator doctrine fails to resolve the meaning of the contract, "no contractual rights and duties have been created"; "What rights

D. *Applying the "Expectation Default Doctrine"
to the Chesapeake Scenario*

The Expectation Default Doctrine is a preliminary proposal based on my research thus far—untested in the real world. But if it is to work and prove worthwhile, it must streamline resolution of contract disputes where current doctrine fails. As the *Chesapeake* case highlighted the flaws in existing doctrine, I use its facts to illustrate how the Expectation Default Doctrine would work in practice and examine whether it would actually improve the interpretive process.

Assuming the negotiation and drafting of the Supplemental Indenture in *Chesapeake* was really a bilateral, arm's-length process so as to make the doctrine applicable,¹⁸⁷ it indeed seems the Expectation Default Doctrine would have facilitated an easier resolution of the dispute than existing procedures.¹⁸⁸ The record reveals the parties agreed that provisions such as the one in question were ordinarily read according to BNY Mellon's understanding; experts called by both *Chesapeake* and BNY Mellon to testify about industry custom and usage confirmed that BNY Mellon's understanding reflected industry consensus.¹⁸⁹ According to Stephen Burns, BAML's lawyer for the offering at Cravath, *Chesapeake* was seeking to "change what had otherwise been a customary redemption mechanic" in favor of a "unique term" that Burns had never seen before.¹⁹⁰ The evidence presented at trial showed that *Chesapeake*, BAML, and their representatives who created the Supplemental Indenture were cognizant of the prevailing expectation for the language included; deliberated over how the provision should read; and debated whether its new meaning was sufficiently clear in light of what would be expected.¹⁹¹ Cravath's Burns even mentioned that the feature in question should be clearly spelled out in the "box summary" toward the top of the Prospectus Supplement to ensure investors noticed and comprehended this feature.¹⁹² The evidence showed that at least some among *Chesapeake*'s representatives had

and duties may arise in such a circumstance . . . present a complex question of the law of tort or of restitution, but the remedies will not strictly speaking be contractual.") (internal citations omitted).

¹⁸⁷ See *Chesapeake I*, 957 F. Supp. 2d at 343.

¹⁸⁸ Even better, the Expectation Default Doctrine would have likely forestalled the conflict altogether if it were in place when the negotiations over the Supplemental Indenture occurred because its information-forcing qualities would have incentivized clarity.

¹⁸⁹ *Chesapeake I*, 957 F. Supp. 2d at 347 n. 30.

¹⁹⁰ *Id.* at 351.

¹⁹¹ *Id.*

¹⁹² *Id.* at 351–52.

doubts about the provision's comprehensibility and also sought to add language that might offer "'belt and suspenders' clarity."¹⁹³ But the additional clarifying language was later excised because another Cravath lawyer thought the language was already sufficiently clear, and the Chesapeake lawyer from Bracewell advocating the revision obliged.¹⁹⁴

These exchanges showcase the Chesapeake negotiators' consciousness of the likely default meaning under the Expectation Default Doctrine. If the doctrine were in place, such consciousness should have—and likely would have—put the Chesapeake and BAML negotiators on notice of the need to take extra care to clarify the meaning of the provision they sought to introduce. If not, they risked that the provision be construed against them—according to BNY Mellon's understanding (i.e., the clear expectation of the parties and industry), requiring Chesapeake pay the "Make-Whole Price" if it decided to give a March 15 notice of redemption, as it actually did in *Chesapeake*. Cognizance of the Expectation Default Doctrine and its clear applicability would likely have avoided this nearly \$400 million mishap.¹⁹⁵

However, it is likely that *Chesapeake* is a scenario where the Expectation Default Doctrine (just like the forthright negotiator doctrine) should not even apply because it was not a bilateral negotiation. The Expectation Default Doctrine is designed to operate in tandem with existing presumptions under Delaware law, and thus the *Chesapeake* scenario would fall under the "reasonable expectations of investors principle" as the fact pattern evokes the situation that the reasonable expectations of investors principle was designed to target: where the parties on one side of the dispute (i.e., Chesapeake, BAML, and its representatives) were the only ones who participated in negotiating and drafting the agreement, and they had clear power to avoid ambiguity.¹⁹⁶ Thus, recognizing the applicability, the court would avoid considering extrinsic evidence altogether (except perhaps expert testimony) and construe the agreement according to the reasonable expectation of investors, which would reach the same result, but through less headache—i.e., against Chesapeake without the expedited discovery, trial, and all that occurred in *Chesapeake*. By more efficiently reaching the right results (and the interpretation eventually found by the Second

¹⁹³ *Chesapeake I*, 957 F. Supp. 2d at 353–54.

¹⁹⁴ *Id.* at 354.

¹⁹⁵ See *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, No. 13 CIV. 1582 (PAE), 2015 WL 4191419, at *18 (S.D.N.Y. July 10, 2015) (requiring that Chesapeake pay the 2019 noteholders the Make-Whole Amount of \$379,650,133.21 plus interest).

¹⁹⁶ See, e.g., *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539, 551–52 (Del. 2013).

Circuit), the Expectation Default Doctrine should count as an improvement.

VII. CONCLUSION

As this study reveals, the existing precedent's ambivalence concerning the admissibility of uncommunicated subjective intent evidence in New York and elsewhere offer the unique opportunity to reform and reorder what might seem one of the last frontiers of contract interpretation. By tracing and analyzing the doctrine in New York (and Delaware), I have attempted to illustrate where there is room for scholars and jurists to meld philosophy with practicality and offer predictable, worthwhile frameworks for resolving difficult contracts—and preventing their creation in the first place. After comparing New York's approach to that of its jurisprudential first-cousin, Delaware, I created the Expectation Default Doctrine—which I believe offers some promise for instilling predictability and efficiency to judicial resolution—permitting some uncommunicated subjective intent evidence where necessary, while supporting New York's and Delaware's instinctive resistance to such evidence and appropriately restricting its use.

The Expectation Default Doctrine is just one proposal at the beginning of what I can envision becoming a larger discussion about taming the Wild West of contract interpretation and resolving whether, in fact, uncommunicated subjective intent should be admitted. As Professor Donald Langevoort has observed,¹⁹⁷ the Restatement (Second) of Contracts appears to value uncommunicated subjective intent—even suggesting that it could and should govern over the words on the page: this would imply that the sort of analysis embodied in the forthright negotiator doctrine should precede or displace the strict textual analysis of New York and Delaware.¹⁹⁸ If this is the case, then perhaps New York and Delaware are outliers in their largely hardline, dismissive attitude toward uncommunicated subjective intent evidence. I have not yet scrutinized the approaches of other jurisdictions, but there is surely value in studying how the approach has worked in practice, and

¹⁹⁷ Conversation with the author.

¹⁹⁸ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 20, 201 (1981). Section 201, comment (c) observes that "[t]he objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding: 'the courts do not make a contract for the parties.' Ordinarily, therefore, the mutual understanding of the parties prevails even where the contractual term has been defined differently by statute or administrative regulation." In addition to § 201(2)—a clear expression of what has been embodied in the the forthright negotiator doctrine—this suggests that uncommunicated subjective intent could possibly be very relevant.

comparative analysis could help inform and fine-tune my quest for the ideal approach. I also believe applying the Expectation Default Doctrine to fact patterns beyond *Chesapeake* will help reveal whether it is worthwhile, where it falters, and suggest how it might be improved. Future scholarship and application will suggest if it really is the solution for helping judges, jurists, and drafters conquer the last frontier of contract interpretation.
