



VOLUME 101 NUMBER 3 AUTUMN 2017

# JUDICATURE

Published by the Duke Law Center for Judicial Studies. Reprinted with permission. © 2017 Duke University School of Law. All rights reserved. [JUDICIALSTUDIES.DUKE.EDU/JUDICATURE](http://JUDICIALSTUDIES.DUKE.EDU/JUDICATURE)

# NICE

## WHEN CONTRACTS SEEK TO PREEMPT JUDICIAL DISCRETION

BY J. TRAVIS LASTER AND  
KENNETH A. ADAMS

**C**ontracts can lead to litigation. It's standard for drafters to anticipate litigation by including in a contract rules for interpreting it. That's why contracts usually specify a governing law.<sup>1</sup> And a contract might replace default rules governing a claim for breach, for example, by reducing the period for bringing claims.<sup>2</sup>

But drafters also use the following four techniques to try to control how a court interprets a contract:

- stating that a judicial rule of interpretation doesn't apply
- stating an internal rule of interpretation
- stating how a court is to act in a given context
- stating that a particular standard applies

Each of these techniques seeks to preempt judicial discretion. The first three operate by steering a court to a

desired conclusion. Imagine a rule of judicial interpretation that "up means down." A contract could employ the first technique by saying "The up-means-down rule does not apply." It could use the second technique by saying "Up means only up." Or it could use the third technique to say "Up is to be interpreted to mean only up." By contrast, the fourth technique characterizes a situation as the parties see fit, whether or not that's justified by the facts.

Commentators have paid little attention to these techniques. This article considers each technique and how courts have reacted or might react.

This article uses examples from contracts filed by public companies on the U.S. Securities and Exchange Commission's EDGAR system. In this article, those examples are highlighted in sans serif text and set off by horizontal lines. We didn't select examples for the quality of the drafting, and we certainly

don't propose them as models. They simply illustrate points we address.

### STATING THAT A JUDICIAL RULE OF INTERPRETATION DOESN'T APPLY

In contract disputes, courts invoke rules of interpretation to attribute meaning to confusing or disputed contract language. Judicial rules of interpretation are generalized notions, pieced together by courts and commentators over time, about the most likely meaning that writers express, and readers derive, in a given context. Courts use rules of interpretation as an alternative to the messy and often impossible task of determining what meaning the parties to a contract had actually intended. In this sense, rules of interpretation are arbitrary. That perhaps explains why they are also called, more grandly, "canons of construction."<sup>3</sup> *Canon* means a rule that has been accepted as fundamental<sup>4</sup> so presumably those who wield the term "canons of construction" think it connotes that sort of solidity and not the expediency that actually underlies use of judicial rules of interpretation.

Judicial rules of interpretation have their supporters, notably Antonin Scalia and Bryan Garner, coauthors of *Reading Law: The Interpretation of Legal Texts*.<sup>5</sup> But judicial rules of interpretation also have their critics. For example, consider the shortcomings of one rule of interpretation, the rule of the last antecedent.<sup>6</sup>

# TRY.

... if two businesses, each represented by counsel, enter into a contract, then arguably both sides should be considered responsible for how it's worded.

Scalia and Garner identify 37 “canons” that they say apply to all texts, including contracts.<sup>7</sup> Contract drafters appear wary of two in particular, as suggested by contracts on EDGAR stating that one or the other, or both, don't apply.

#### *Stating That Ambiguities Are Not to Be Construed Against the Drafter*

The first of the disfavored rules is known by the Latin name *contra proferentem*, meaning “against the offeror.”<sup>8</sup> According to this rule, if a contract provision is ambiguous, the preferred meaning should be the one that works against the interests of the party that provided the wording.

Here's how the *Restatement (Second) of Contracts* states it:

In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.<sup>9</sup>

But if two businesses, each represented by counsel, enter into a contract, then arguably both sides should be considered responsible for how it's worded. That's presumably why some drafters include in contracts a version of the following provision:

---

The rule of construction that provides that ambiguities in a contract shall be construed against the drafter shall not apply to this Settlement Agreement because each Party drafted its terms, and all Parties waive applicability of such rule of construction in interpreting this Settlement Agreement.

---

Are such provisions enforceable? The Delaware Court of Chancery has held that

they are.<sup>10</sup> That's not surprising, in that the Delaware Court of Chancery has also held that *contra proferentem* is best applied to standardized contracts and when the drafting party has the stronger bargaining position.<sup>11</sup> It follows that courts shouldn't object if contract parties who negotiate a transaction from a position of comparative equality elect to make it explicit that *contra proferentem* doesn't apply.

#### *Stating That Ejusdem Generis Doesn't Apply*

The second disfavored rule of interpretation is known by the Latin name *ejusdem generis*. Here's how Scalia and Garner express it:

Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class.<sup>12</sup>

In other words, in a reference to *dogs, cats, horses, cattle, and other animals*, this rule of interpretation “implies the addition of *similar* after the word *other*,” so *other animals* doesn't mean any animal, it means other similar animals.<sup>13</sup>

Applying *ejusdem generis* is fraught with uncertainty,<sup>14</sup> so some drafters seek to neutralize it. Here's an example of how one contract attempts to accomplish that:

---

[T]he rule of *ejusdem generis* shall not be applicable to limit a general statement, followed by or referable to an enumeration of specific matters, to matters similar to those specifically mentioned . . .

---

In contrast to provisions neutralizing the rule of *contra proferentem*, which operate indirectly by establishing a general rule based on the sophisticated nature of the parties, this provision seeks to influ-

ence directly how part of a contract is interpreted.

We haven't found caselaw on whether provisions that purport to neutralize *ejusdem generis* are enforceable, but we suspect that some courts would be skeptical. For one thing, courts are partial to invoking *ejusdem generis*.<sup>15</sup> For another, a court might be confused about how far to go when applying such a provision: does it preclude ever limiting a general statement, or does it just preclude rote application of *ejusdem generis*? If the latter, a court could still limit a general statement if the context suggests that's what the parties intended.

So as not to give a court an excuse to apply *ejusdem generis*, and to avoid any risk involved in attempting to neutralize *ejusdem generis*, specify an appropriate general class and rely on it — don't also list members of the general class.<sup>16</sup>

#### STATING AN INTERNAL RULE OF INTERPRETATION

In addition to or instead of seeking to exclude judicial rules of interpretation, drafters also include in contracts their own rules of interpretation — what we call “internal” rules of interpretation. You find them stated in separate sections or gathered together in one section, often under the heading *Interpretation*. Some internal rules of interpretation track judicial rules of interpretation, for example *ejusdem generis* and *contra proferentem*, whereas others seek to negate judicial rules of interpretation.

#### *Stating That Headings Don't Affect Meaning*

An example of an internal rule of interpretation that seeks to negate a judicial rule of interpretation is the headings-for-convenience provision. Here's an example:

---

The headings in this Agreement are included for convenience and will not affect the meaning or interpretation of this Agreement.

---

The utility of this statement, however drafters word it, has been explained as follows, using the word *captions* instead of *headings*:

[T]he content of the captions all too often diverges from the substance of the contract. In part, this is because captions are an extremely truncated description of complex text. However, divergences also may arise because captions are not drafted or reviewed with the same care and scrutiny as the text, or because time pressures do not afford the opportunity to conform captions to last-minute changes to the text.<sup>17</sup>

Incorporating a headings-for-convenience provision counters what Scalia and Garner call the “title-and-headings canon,” which holds that “[t]he title and headings are permissible indicators of meaning.”<sup>18</sup>

A 2016 Second Circuit opinion addressed a headings-for-convenience provision.<sup>19</sup> The parties to a reinsurance contract disagreed over which arbitration provision governed their dispute, one in the reinsurance certification or another in an endorsement. First Mutual sought to compel its reinsurer, Infrassure, to submit to arbitration governed by the endorsement, but that arbitration provision contained the heading “LONDON ARBITRATION AND GOVERNING LAW (UK AND BERMUDA INSURERS ONLY).” Because Infrassure, a Swiss company, wasn’t a United Kingdom or Bermuda insurer, it argued that the endorsement provision didn’t apply. In response, First Mutual pointed to the following headings-for-convenience provision in the endorsement, which the court referred to as the “Titles Clause”: “The several titles of the various paragraphs of this Certificate (and endorsements . . . attached hereto) are inserted solely for convenience of reference and will not be deemed in any way to limit or affect the provisions to which they relate.”<sup>20</sup>

First Mutual argued that the parenthetical “(UK AND BERMUDA INSURERS ONLY)” was part of the endorsement’s title, and by operation of the headings-for-convenience provision, the title did not limit the endorsement to insurers of those countries. The court disagreed, calling it a “thin argument” and saying, “The purpose of the Titles Clause is not to strip away an express indication as to the context in which a particular provision is operative, but to ensure that the text of a provision is not discounted or altered by the words of its heading.”<sup>21</sup>

If it’s clear that because of careless drafting a heading doesn’t match what’s in the related provision, a headings-for-convenience provision would accomplish only what a court would likely do anyway. If it’s arguable that a unique component of a heading reflects the intended scope of the related provision, then a court might ignore a headings-for-convenience provision, just as the Second Circuit did. That makes headings-for-convenience provisions of questionable use to drafters.

#### *Stating That Examples Introduced by Including Don’t Limit the General Class*

Consider the following example of an internal rule:

---

As used in this Loan Agreement, the term “including” means “including, but not limited to” or “including, without limitation,” and is for example only and not a limitation.

---

Adding this rule, however it’s expressed, is a more concise alternative to always using *including but not limited to*, *including without limitation*, or *including without limiting the generality of the foregoing* instead of just *including*.

On Twitter<sup>22</sup> and on his blog,<sup>23</sup> Bryan Garner has recommended that to ensure that *including* isn’t interpreted as introducing an exhaustive list, including should be defined to mean *including but not limited to*. In other words, the definition would preclude the phrase *fruit, including oranges, lemons, and grapefruit* from being interpreted so that fruit means **only** oranges, lemons, and grapefruit. As such, this

internal rule reinforces the judicial rule of interpretation Scalia and Garner call the “presumption of nonexclusive ‘including’” — “The verb *to include* introduces examples, not an exhaustive list.”<sup>24</sup> Using the internal rule also allows you to “rigorously avoid the cumbersome phrasing each time you want to introduce examples.”<sup>25</sup>

But elsewhere, Garner says that the phrases *including but not limited to*, *including without limitation*, and *including without limiting the generality of the foregoing* serve a different function: they’re “intended to defeat three canons of construction: *expressio unius est exclusio alterius* (‘to express one thing is to exclude the other’), *nosci-tur a sociis* (‘it is known by its associates’), and *ejusdem generis* (‘of the same class or nature’).”<sup>26</sup>

Without considering whether, and how, each of those three judicial rules of interpretation relates to this issue, it’s clear that Garner has in mind avoiding, for example, having the phrase *fruit, including oranges, lemons, and grapefruit* interpreted so that *fruit* means only fruit similar to those listed, namely citrus fruit.

It’s easy to reconcile Garner’s conflicting rationales: the internal rule of interpretation could logically be intended to preclude attributing any limiting effect to items following *including*, whether that limiting effect consists of interpreting those items to be an exhaustive list or requiring the class in question to consist only of items similar to the listed items.

Regarding whether courts would respect his proposed internal rule, Garner says, “Will judges take such a definition seriously? Generally, yes. I defy anyone to produce a case in which this definition hasn’t worked, so that *including* defined in this way has nevertheless been held to introduce an exhaustive listing.”<sup>27</sup>

We won’t take Garner up on his challenge, as it seems unlikely that a court would deem a list exhaustive even if it’s introduced as not being limited. More relevant are those cases in which courts endorse the notion that a group followed by a list of items introduced by *including but not limited to* is limited to items similar to the listed items.<sup>28</sup> That interpretation is less limiting ▶

than holding that a list is exhaustive, but it's nevertheless limiting, and in a way that drafters might not expect. So because it ignores the real threat, Garner's challenge is too narrow to be meaningful.

That some courts disregard *but not limited to* shouldn't come as a surprise. A court handling a contract dispute will want to determine the meaning intended by the drafter. In the process, it might elect to disregard any language unrelated to that. Given that it's routine for drafters to add *without limitation* or *but not limited to* to each instance of *including* (*and without limitation* or *but is not limited to* to each instance of *includes*), a court could conclude that such phrases are essentially meaningless. It could equally conclude that an internal rule of interpretation that has the same effect is irrelevant too.

After all, drafters sometimes misuse *including* to mean "namely," which would make the list of examples exhaustive.<sup>29</sup> Or drafters might use an overbroad noun before *includes* or *including*, so that the narrow list that follows *including* better expresses the intended meaning (as in, conceivably, *fruit, including oranges, lemons, and grapefruit*). If a court believes that either of those circumstances applies to the contract language at issue in a dispute, the court might be disinclined to reach a different interpretation based on an across-the-board gloss on *including* that drafters apply by rote.

Another problem with relying on an internal rule of interpretation that *including* means *including but not limited to* is that it's an awkward fix for the potential confusion that results from following a general word with a list of obvious examples. By saying *fruit, including oranges, lemons, and grapefruit*, you invite a court to conclude that fruit consists of only citrus fruit, and not apples or bananas. Eliminating such lists shouldn't pose a problem — everyone knows that oranges, lemons, and grapefruit are fruit. (This recommendation is consistent with our advice for not falling afoul of *eiusdem generis*.)<sup>30</sup>

Instead, drafters should use *includes* or *including* only to make it clear that the general class in fact includes something

that otherwise might not fall within its scope — *fruit, including tomatoes*. (Are tomatoes a fruit or a vegetable? Your answer might depend on whether you're a botanist or a cook.) Doing so leaves little possibility for mischief. Because *tomatoes* lurks at the margins of *fruit*, a court couldn't reasonably conclude that *fruit* in fact means only tomatoes or tomato-like produce.

If a client's needs in a transaction leave you no choice but to include a list of obvious members of a class, put the general class after the list and modify the general class to block any implication that the items in the list limit the general class — *oranges, lemons, grapefruit, and other fruit, whether or not citrus*. As a way to make it clear that the examples cited aren't the whole story, that's more effective than using *including but not limited to* and its variants.

#### STATING HOW A COURT IS TO CONDUCT ITSELF

Drafters also seek to preempt judicial discretion by specifying in a contract what a court may do, is not authorized to do, or must do.

Various verb structures are used to ostensibly grant a court discretion. Here's an incomplete list, with *interpret* used as a placeholder for different verbs, *interpret* and *construe* being the most common:

- *the court may interpret*
- *the court will / shall have the right to interpret*
- *the court will / shall be entitled to interpret*
- *the court will / shall be allowed to interpret*
- *the court will / shall have the power to interpret*

That drafters have so many different ways of saying the same thing is due to the chaotic state of verb structures in traditional contract drafting.<sup>31</sup>

Here's an example that uses one of these structures:

---

The courts *shall be entitled to modify* the duration and scope of any restriction contained herein to the extent such restriction would otherwise be unenforceable, and such restriction as modified shall be enforceable.

---

To show that the above list is incomplete, here's an example that uses a different verb structure to say that a court has the authority to rule on the law and facts of a lawsuit:

---

Each party hereby agrees that any such court *shall have in personam jurisdiction over it and consents to service of process in any manner authorized by Nevada law*.

---

Similarly, various verb structures aim to prohibit a court from doing something:

- *the court shall / may not construe*
- *no court shall / may construe*
- *X shall / may not be construed as*
- *neither X nor Y is to be construed as*
- *X is not to be construed as*
- *nothing in this agreement is to be construed as*

And there are other ways to say that a court is prohibited from doing something. Here are two examples, with the latter having the same effect as an internal rule of interpretation meant to neutralize *eiusdem generis*.<sup>32</sup>

---

No prior drafts of this Agreement or any negotiations regarding the terms contained in those drafts *shall be admissible in any court to vary or interpret the terms of this Agreement*.

---



---

The principle of *eiusdem generis* *shall not be used* to limit the scope of the category of things illustrated by the items mentioned in a clause introduced by the word "including."

---

A range of verb structures aim to say that a court must do something:

- *the court shall construe*
- *the court will be required to construe*
- *X is to be construed*
- *X shall be construed*

That list, too, is incomplete. Here's an example of a different structure used to say that a court must act a certain way:

---

The Service Provider agrees that in the event of such violation Kelso *will, in addition to any other rights and remedies, be entitled to equi-*

---



*table relief* by way of temporary or permanent injunction and to such other remedy as any court of competent jurisdiction may deem just and proper.

Upon encountering this sort of provision, a judge is likely to think, “Says who!” Contract parties have no basis for telling a court how to act, and a court might well ignore or explicitly reject anything that suggests as much. A 2016 case before the Delaware Court of Chancery<sup>33</sup> provides an example of a court doing just that. A party to a contract sought a preliminary injunction, basing its claim in part on the following provision:

The parties hereto agree that any party by whom this Agreement is enforceable shall be entitled to specific performance in addition to any other appropriate relief or remedy. Such party may . . . apply to a court of competent jurisdiction for . . . injunctive or such other relief as such court may deem just and proper in order to enforce this Agreement or prevent any violation hereof and, to the extent permitted by applicable law, each party waives any objection to the imposition of such relief.

This in effect requires that a court grant specific performance. The Delaware Court of Chancery denied the motion for summary judgment, offering the following explanation:

Parties, however, cannot in advance agree to assure themselves (and thereby impair the Court’s exercise of its well-established discretionary role in the context of assessing the reasonableness of interim injunctive relief) the benefit of expedited judicial review through the use of a simple contractual stipulation that a breach of that contract would constitute irreparable harm.<sup>34</sup>

Drafters can aim for the same result without appearing to boss the court around. For example, instead of saying in a severability provision that a court must interpret the contract in a certain way if it holds that part of the contract is unenforceable, you could introduce the severability provision as follows:

The parties acknowledge that in a dispute between the parties arising out of this agreement or the subject matter of this agreement, they would want the court to interpret this agreement as follows:

This approach has the benefit of putting the focus on the parties, not on the court.

#### STATING THAT A GIVEN STANDARD APPLIES

A contract might state that a particular legal standard applies. We consider three examples.

##### *Stating That a Consultant Is an Independent Contractor*

Consulting agreements typically state that the consultant is an independent contractor. But saying that doesn’t make it so. If a consultant’s status as an independent contractor were challenged by, for example, a government agency that thinks it’s owed payroll taxes, a court might well ignore what the contract says and determine whether the consultant was an independent contractor based on the nature of the relationship after the contract was signed.

A contract would reflect more accurately the relationship between a company and a consultant if it were to say that the parties *intend* that the consultant will be an independent contractor. And such a statement would serve a purpose — in a close case, a court might find relevant what the parties had intended at the outset of the relationship,

particularly in a dispute between the sophisticated parties.

One could argue that if a company isn’t penalized for inaccurately characterizing in a contract its relationship with a contractor, then the company might as well retain the inaccurate statement, particularly if it leaves the consultant thinking that the consultant is unquestionably an independent contractor. But as a general matter, it’s best for contracts to reflect reality, so the parties understand what they’re getting into. In particular, companies so routinely mischaracterize employees that there’s a benefit to using contract language to signal to all concerned that simply declaring that a consultant is an independent contractor doesn’t make it so.

This approach could conceivably be applied in other contexts. For example, a court might decide that the choice of governing law in a contract is unenforceable.<sup>35</sup> Drafters could acknowledge as much by having governing-law provisions state that the parties intend that the agreement is governed by the law in question. But it would seem pedantic to insist on that — it’s not often that courts decline to enforce the governing-law provision in a contract. But if the alternative outcomes are more subtle than whether a provision is enforceable or unenforceable, or if the risk of an alternative outcome is significant, it makes more sense to acknowledge the role of courts.

##### *Stating That a Power of Attorney Is Coupled with an Interest*

A power of attorney — which is a kind of contract — might use the phrase *coupled with an interest* to describe the nature of the power. It’s likely that many drafters who use this phrase don’t know what it means, having copied it unthinkingly from a form or precedent. ▶

Upon encountering this sort of provision, a judge is likely to think, “Says who!”

The phrase *coupled with an interest* means that the power of attorney is not revocable by act or death of the principal before the interest expires. But for a power to be irrevocable because it's coupled with an interest, the interest must be in the subject matter of the power and not in proceeds arising from exercise of the power. In many powers of attorney, the drafter might well have given no thought as to whether the agent had an interest in the subject matter. In other words, use of the phrase might be inconsistent with the facts.<sup>36</sup>

Recognizing this, courts don't take the phrase *coupled with an interest* at face value. Instead, they determine whether a power is irrevocable by looking at the parties' entire agreement and the circumstances of their relationship.

The best way to ensure that the phrase is used in a way that makes sense would be to explain in the contract what the phrase means and what the parties hope to achieve. Here's how we would accomplish that:

[The principal] acknowledges that this power of attorney is coupled with an interest, because [the agent] has an interest in [refer to the subject of the power]. It follows that in addition to any other consequences under law, this power is irrevocable and will survive [the principal's] death or incompetence.

This formulation violates a basic rule of contract drafting, in that it says the same thing twice<sup>37</sup> — first using a term of art, then more simply. But it's the least bad alternative. Because the term of art *coupled with an interest* is so entrenched, many would likely find disconcerting use of just the simpler version.

### *Stating That Text Is Conspicuous*

Some statutes say that certain statements must be “conspicuous.” For example, section

2-316(2) of the Uniform Commercial Code (UCC) states that a disclaimer of the implied warranty of merchantability must be “conspicuous.” Section 1-201(10) of the UCC says that “conspicuous” means “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it,” and it includes examples of the attributes of conspicuous terms. Because this is a vague standard, fights over what constitutes conspicuous text have given rise to caselaw on the subject.<sup>38</sup>

The lack of specific guidelines has resulted in drafters trying to establish by contract that certain text is in fact conspicuous:

---

OPCO AND FINANCECO ACKNOWLEDGE  
THAT THIS STATEMENT CONSTITUTES  
CONSPICUOUS NOTICE.

---

Such statements might appear unobjectionable — if a party subject to a contract provision acknowledges that it's conspicuous, that might reassure a court that the party had in fact noticed that provision. But invariably such acknowledgments are found in the provision at issue. If that provision is in fact inconspicuous, the acknowledgement would be inconspicuous too. So as a matter of logic, the acknowledgement would be of value only if the provision is conspicuous. That defeats the purpose of the acknowledgment.

### CONCLUSION

This brief exploration of how contracts seek to preempt judicial discretion suggests the following general observations:

- A court might be less likely to accept a statement that a judicial rule of interpretation doesn't apply if that statement could be seen as interfering with the natural reading of a contract.

- Like judicial rules of interpretation, internal rules of interpretation are arbitrary, so a court is likely to ignore an internal rule of interpretation if the context suggests a meaning different from one arrived by applying the internal rule.
- Telling a court how to act doesn't make sense, because contract parties have no power to determine how a court handles a particular issue. Instead, drafters should have the parties acknowledge that a particular outcome is appropriate or that they would want the court to interpret the contract in a specified way.
- If a contract provision stating that a given legal standard applies doesn't match the facts, a court might well hold that the provision is unenforceable.

But relying on these general observations is less helpful than being alert to the ways that drafters seek to preempt court discretion and considering in a particular context the best way to achieve the desired goal. ♦



**J. TRAVIS LASTER** is a vice chancellor of the Court of Chancery of the State of Delaware.



**KENNETH A. ADAMS** is president of Adams Contracts Consulting LLC and author of *A Manual of Style for Contract Drafting* (4th ed. 2017).

<sup>1</sup> See NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE § 6.02 (Tina L. Stark ed. 2003) [*hereinafter* STARK].

<sup>2</sup> See B.H. Glenn, Annotation, *Validity of Contractual Time Period, Shorter than Statute of Limitations, for Bringing Action*, 6 A.L.R.3d 1197 (originally published in 1966) (noting “the general rule that in the absence of a controlling statute a contract

provision limiting the time for bringing an action thereon is valid if the stipulated period of time is reasonable”).


<sup>3</sup> See BLACK'S LAW DICTIONARY (10th ed. 2014) (defining canon of construction as “A rule used in construing legal instruments, esp. contracts and statutes; a rule that guides the interpreter of a text”).

<sup>4</sup> *Id.*

<sup>5</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

<sup>6</sup> Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in Barnhart, Why Both Are Weak, and How Textualism Postures*, 16 SCRIBES J. LEGAL WRITING 5 (2015); Kenneth A. Adams, *Bamboozled by a Comma: The Second Circuit's Misdiagnosis of Ambiguity*

- in American International Group, Inc. v. Bank of America Corp.*, 16 SCRIBES J. LEGAL WRITING 45 (2015) (discussing the judicial rule of interpretation — a variant of the rule of the last antecedent — that whether a closing modifier is preceded by a comma determines what that modifier applies to).
- <sup>7</sup> See SCALIA & GARNER, *supra* note 5, at xi–xvi.
- <sup>8</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).
- <sup>9</sup> RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).
- <sup>10</sup> See *Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC*, No. CIV.A. 4586-CS, 2013 WL 1955012, at \*26 (Del. Ch. May 13, 2013) (“The doctrine of the construction of a contract against the drafter would typically preclude the interpretation that CalPERS now adopts. . . . But, CalPERS’ form drafters were canny, and the LLC Agreement contains a provision waiving ‘any rule of law . . . that would require interpretation of any ambiguities in this Agreement against the party that has drafted it.’”).
- <sup>11</sup> See, e.g., *Zimmerman v. Crotball*, 62 A.3d 676, 698 (Del. Ch. 2013) (stating that *contra proferentem* “is less likely to be appropriate where knowledgeable and experienced parties to a contract engaged in a series of negotiations”).
- <sup>12</sup> SCALIA & GARNER, *supra* note 5, at 199.
- <sup>13</sup> *Id.*
- <sup>14</sup> Joseph Kimble, *Ejusdem Generis: What Is It Good For?*, 100 JUDICATURE, Summer 2016, at 48.
- <sup>15</sup> See *id.* at 50.
- <sup>16</sup> See *id.* at 55.
- <sup>17</sup> STARK, *supra* note 1, at 599.
- <sup>18</sup> SCALIA & GARNER, *supra* note 5, at 221.
- <sup>19</sup> *Infrassure, Ltd. v. First Mut. Transp. Assurance Co.*, 842 F.3d 174 (2d Cir. 2016).
- <sup>20</sup> *Id.* at 176.
- <sup>21</sup> *Id.*
- <sup>22</sup> Bryan A. Garner (@BryanAGarner), Twitter (Aug. 20, 2015), <https://twitter.com/bryanagarner/status/634425867372879872> (“Every contract should define ‘including’ as meaning ‘including but not limited to.’ Then never use longer phr.”).
- <sup>23</sup> Bryan A. Garner, *LawProse Lesson #226: “including but not limited to”*, LAWPROSE BLOG (Sept. 2, 2015), <http://www.lawprose.org/lawprose-lesson-226-including-but-not-limited-to/>.
- <sup>24</sup> SCALIA & GARNER, *supra* note 5, at 132.
- <sup>25</sup> *Id.*
- <sup>26</sup> BRYAN A. GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 439–40 (3d ed. 2011).
- <sup>27</sup> Garner, *supra* note 23.
- <sup>28</sup> See *Shelby County State Bank v. Van Diest Supply Co.*, 303 F.3d 832 (7th Cir. 2002); *In re Clark*, 910 A.2d 1198, 1200 (N.H. 2006), *Holy Angels Academy v. Hartford Ins. Group*, 127 Misc. 2d 1024, 487 N.Y.S.2d 1005 (Sup. Ct. 1985); *Horse Cave State Bank v. Nolin Production Credit Ass’n*, 672 S.W.2d 66 (Ky. Ct. App. 1984).
- <sup>29</sup> GARNER, *supra* note 26, at 439–40.
- <sup>30</sup> See *supra* text accompanying note 16.
- <sup>31</sup> See KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING ch. 3 (4th ed. 2017).
- <sup>32</sup> See *supra* text accompany note 14.
- <sup>33</sup> *AM Gen. Holdings LLC v. Renco Grp., Inc.*, No. CV 7639-VCN, 2015 WL 9487922, at \*3 (Del. Ch. Dec. 29, 2015), reargument denied sub nom. *AM Gen. Holdings LLC v. The Renco Grp., Inc.*, No. CV 7639-VCN, 2016 WL 787929 (Del. Ch. Feb. 19, 2016).
- <sup>34</sup> *Id.*
- <sup>35</sup> STARK, *supra* note 1, at 114–16.
- <sup>36</sup> See ADAMS, *supra* note 31, ¶¶ 13.199–209.
- <sup>37</sup> See *id.* ¶ 1.62.
- <sup>38</sup> See, e.g., *American General Finance, Inc. v. Bassett (In re Bassett)*, 285 F.3d 882, 887 (9th Cir. 2002) (using the Uniform Commercial Code’s definition of “conspicuous” to construe a Bankruptcy Code requirement that a contract contain a “clear and conspicuous” statement).



Huntington Bank  
is a proud sponsor  
of Judicature.



huntington.com