Blank, Black, and Grey Holes in Insurance Contracts

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That insurance policies are unreadable is an old charge. Much of insurance interpretation jurisprudence is aimed at torturing a clause until it reluctantly yields a reading. This piece identifies three categories of clauses that courts are especially ill-equipped to decipher even under this aggressive regime. Encrusted clauses may form blank holes. Ancient clauses may form black holes. Acontextual clauses may form grey holes.

First, black holes are created by fossilized clauses with antiquated, limited usefulness—until a shiny new use is discovered, that is. The black hole candidate explored here is the Sue and Labor clause, first used in 17th century marine insurance. A typical modern clause provides:

> In case of actual or imminent loss or damage by peril insured against, it shall . . . be lawful and necessary for the insured . . . to sue, labor, and travel for in and about the defense, the safeguard, and the recovery of the property or any part thereof without prejudice to this insurance.

The "labor" portion of the original clause allowed compensation for the intentional destruction of a ship's cargo by heaving it overboard, *if* done to save the ship, crew, and remaining cargo.[1] What the clauses were doing in non-marine commercial property policies hundreds of years later is unclear. As insurance evolves, new policies are based on old ones. Insurers are reluctant to jettison language that has survived the test of time, in part because policy language is tied to past actuarial data. Clauses without much natural application may remain in print indefinitely without being relied upon or much litigated over.

One day, however, a clever lawyer notices that the abstract concept of the clause—as opposed to its original factual context—might support insurance payouts to companies spending large sums reworking their computer systems (heaving cargo overboard) to avoid the larger potential loss of a Y2K disaster (saving the ship). Historically, the necessary "imminent loss" would have been easy to spot on the high seas. But on dry land, what differentiates ordinary, uninsured upkeep from an insurable loss incurred to avoid a greater loss is more amorphous. Routine upkeep, if neglected, can indeed lead to losses, and all losses become "imminent" at some point. With Y2K litigation courts were able to avoid this black hole (under the black hole avoidance doctrine?) by relying on other clauses, but the hole remains.

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[1] For obvious reasons, one cannot usually collect on the intentional destruction of insured property. The "sue" portion refers to the need to sue for the recovery of salvaged or taken property, among other possibilities.

Second, insurance grey holes are formed by the rote use of standard clauses, although not necessarily ones are little used or encrusted by excessive redrafting. The "linguistic uncertainty" instead stems from terms that may still have an understood meaning in their original context but seem now to apply to a new risk or loss. For example, does coverage for loss from damage to "physical property," first drafted over a hundred years ago, apply to the loss of electronic data? Drafter intent, party intent, actuarial data, and plain English definition cannot answer this question cleanly. As with black holes, grey holes are grey to both insurer and insured. The policyholder hopes the original language encompasses the new risk, even as that risk was not anticipated ex ante. The insurer holds to the original function and actuarial calculation of the clause, neither of which encompass the new risk. Interpretation must proceed, acontextually, in the absence of any shared intent.

Third are the "blank holes" left by clauses that have a clear meaning to insurers and judges but no meaning to many policyholders, including moderately sophisticated commercial policyholders. Blank holes may be created by nature or nurture; courts struggle to interpret either. A natural blank hole is created when a clause that represents a sound actuarial decision cannot be written simply enough to be comprehensible to the layman. Nurtured blank holes are created by clauses that have gone through too many revisions in response to changes in fact and judicial opinion. Experts, including judges, can see in these layered clauses a world of subtle meaning—an insurance haiku where one turn of phrase references past clauses and cases. To the policyholder, the clause is incomprehensible—a blank spot in the contract where a term should be.

Courts tend to treat both types of blank holes as though they are ambiguous, unleashing all the insurance law tools that spring from ambiguity. But blank clauses do not have two or more meanings so much as one clear meaning to the drafter (and the court) and no meaning to the purchaser. It may be that the outcome in these cases should resemble the outcome in ambiguity cases but the question is worth considering.

I. BLACK HOLES AND BLANK HOLES IN INSURANCE CONTRACTS

Black and grey holes can leave "courts [] practicably incapable of devising a plausible meaning that was attached to the linguistic variations by the contracting parties at the time the contract was drafted."[2] The first difficulty, then, in grappling with black or grey holes in insurance is that courts are already in a realm where it may be implausible to identify any *specific*, *joint* intent held by the parties at the time of contracting, at least as to consumer insurance, and more so in commercial insurance than one might expect. Insurers tend to have a specific intent, largely but not entirely revealed in the insurance policy, while many policyholders have a vague intent, specific on a few points, and not necessarily mapped onto the policy.

[2] Stephen J. Choi, Mitu Gulati & Robert E. Scott, "The Black Hole Problem in Commercial Boilerplate," NYU School of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 16-40, at 2 (October 2016).

The second difficulty is that uncertainty plays a special role in insurance contracts, even commercial contracts between sophisticated parties. As Stephen Choi, Mitu Gulati, and Robert Scott (CGS, with apologies) state, under the standard interpretative regime, "courts will attempt to interpret *even ambiguous terms* in a manner *consistent with the ex ante intentions* of the contracting parties in so far as a court can recover those intentions from the contract or the surrounding context."[3] The default rule in insurance, however, is contra proferentem—interpret an ambiguity against the drafter. The drafter is the insurer and the contrary interpretation usually results in payment for the policyholder, potentially operating as a penalty default rule.[4]

Contra proferentem takes different forms.[5] Some jurisdictions have a "sophisticated policyholder" exemption to contra proferentem but far from the majority. Jurisdictions apply it at different times in the interpretive process.[6] But it all cases, once the court decides to apply it contra proferentem relieves a court from the burden of identifying a shared ex ante intent. Indeed, it is not required that the interpretation chosen reflect the original intent of *either* party. When an insurer and policyholder are in court, the usual posture is of a coverage-seeking policyholder versus a coverage-denying insurer. The policyholder may assert that the pro-coverage interpretation reflects his contractual intent but he need not prove it. The court may also be convinced by context, risk-spreading principles, and other evidence that the insurer did *not* intend coverage. Nonetheless, if the provision is open to two meanings, one of which provides coverage, the insurer loses.

This reveals the third difficulty in looking for insurance black holes, which is that on one level insurance policies are not *permitted* to have holes as to coverage questions. The holes are backfilled with a form of "the policyholder's preferred *ex post* position." This is related to contra proferentem but more expansive. Leaving aside all the other contractual issues that can arise in insurance—the insurer's defense obligations; the policyholder's notice and proof obligations; questions about numbers of occurrences and policy limits per occurrence; etc.—the basic agreement of most all-risk policies is that an outcome-risk is covered unless it is excluded. Once a court has construed the contract's grant of coverage and exclusions of coverage, there is an answer—not a hole. The policyholder bears the burden of proving coverage and the insurer bears the burden of proving an exclusion applies.[7] If either is ambiguous, contra proferentem will dictate coverage. As a gross oversimplification worthy of disbarment, then, we can say that an insurance black hole is plugged with coverage.[8]

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[3] *Id.* (emphasis added).
[4] *See generally* Michelle E. Boardman, *Penalty Default Rules in Insurance Law*, 40 FLORIDA STATE UNIVERSITY LAW REVIEW 305 (2013).
[5] *See* Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, __ (1996).
[6] *See* Boardman, *Penalty Default* at __.
[7] Which party must prove the notorious "exceptions to exclusions" varies by jurisdiction and not always consistently.
[8] I apologize for the mixed metaphor of black holes and dirt holes. Black holes can evaporate, theoretically, which is not the right analogy.

So, are there black holes in insurance policies? The bulk of this piece analyzes the possible black hole of the Sue and Labor clause. Here, I present examples of grey and blank holes.

Grey Holes

A grey hole in insurance results from litigating over terms that were not crafted to address the situation at hand, such that fights over the meaning of the word in context are useless, at least as to the ex ante intent of either party. For example, computers and electronic data did not exist when the words "property damage" and "physical property" were first penned in a property policy. Computers did exist by 1986, and were widespread in certain commercial fields, when a representative version of the standard Insurance Services Office (ISO) property policy defined "property damage" as:

> a. Physical injury to tangible property, including all resulting loss of use of that property; or
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> b. Loss of use of tangible property that is not physically injured.[9]

Not until the 2001 ISO policy was this limitation added:

> For the purposes of this insurance, *electronic data is not tangible property*. As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.[10]

Whether "physical injury to tangible property" under the many standard policies issued before 2001 includes electronic data cannot be answered by resort to the original contractual intent or to the ways in which the words "physical" and "tangible" have evolved over time in general English usage.[11] "Tangible property" "cannot excuse all possible meanings but the meaning . . . is incapable of providing a basis for making legal distinctions . . . " or at least the variation in court outcomes suggests so.[12] "Physical injury" might support coverage for electronic data loss if a computer were smashed but might not if it were invaded by a virus over the internet.

[9] There appears to have been some evolution from "physical property" to "tangible property" in the mid-1960s.
[10] *See* ISO Form CG 00 01 04 13 (2012), Section V, § 17, identical to 2001 exclusionary definition.
[11] This example shows something puzzling about insurance grey holes—they need not be at the periphery of the contract. [*See* section on black holes in collective drafting.]
[12] CGS, *Black Hole Problem* at 2 fn.3.

As claims for loss of electronic data increased, "most businesses seem to have assumed that their activities on the Internet [were] covered by their existing policies."[13] Insurers assumed otherwise, "insist[ing] that cyberlosses [were] not the intended underwritten risks of traditional insurance products.[14] When policyholders first started seeking coverage for damage to computer files, courts were at a loss.[15] Some courts found ambiguity but some found the language unambiguously supported the judge's individual sense of whether electronic data was tangible property. Some judges had a better understanding than others of the physical space (however miniscule) electronic data occupy, and these judges found the data to be tangible property. While reading the clause and applying it the bare language to a new context has some basis for support, it does require "tangible" to do work it was not selected to do; "tangible" property was meant to set apart intangible property, such as intellectual property. Like threats to intellectual property, threats to electronic data come from different sources. These threats require different risk calculations than threats to tangible property.

In the absence of evidence on the policyholder's intent, I have argued that courts in early days could have considered the insurer's intent, not as asserted but as shown by the actuarial data.[16] Insurers had not been counting electronic data in the tangible property loss statistics. They were not charging for the risk of loss to electronically stored materials. In other words, one of the parties had a specific intent about "tangible property" and relied on that intent in its initial performance under the contract. On the other hand, as time went by and claims for the loss of electronic data were known, it becomes less plausible for insurers to claim they were still "in the grey." At some point a court could take judicial notice of the fact that insurers knew policyholders either expected electronic data coverage or were confused about it, such that in the absence of a clause clarifying the question, "tangible" could now be read to include it, perhaps under contra proferentem. Note, however, that this way out of the grey hold is still not asking "tangible" to perform work, out of context, it was never intended to perform.

Blank holes

By far the largest number of objects in the insurance night sky is the blank hole—"provisions whose ~~shared~~ meaning *to the policyholder* is largely lost over time through repetition and the overlay of legal jargon." And these do "show up in standard-form contracts used on a ~~global~~ *national* scale," sold by many different sellers in each

[13] Greg Nelson, *Exposed on the Net: A Comparison of Internet Business Exposures with Standard Business Policies*, 53 CHARTERED PROP. & CASUALTY UNDERWRITERS J. 106 (July 2000), available at 2000 WL 19802210.
[14] Hazel Glenn Beh, *Physical Losses in Cyberspace*, 8 CONN. INS. L.J. 55, 63 (2002).
[15] *See, e.g.*, Computer Corner Inc. v. Fireman's Fund Ins., 46 P.3d 1264, 1266 (N.M. Ct. App. 2002) (accepting electronically stored data as "tangible property"); Am. Online, Inc. v. St. Paul Mercury Ins. Co., 207 F. Supp. 2d 459 (E.D. Va. 2002) (electronically stored data *not* "tangible property"). *See also* §126:40.Property damage—Application to loss of computer information, 9 COUCH ON INS. § 126:40.
[16] Michelle Boardman, *Risk Data in Insurance Interpretation*, 16 CONN. INS. L.J. 157, 181–82 (2009).

state.[17] Moreover, the coverage afforded by blank holes reaches a global scale, given the role of international reinsurers.

Two sources of blank incomprehensibility will be given briefly here, both stemming from the same clause. First, there are structural or architectural blank holes. Courts don't always refer to "structural ambiguity" but they do recognize that the organization of an insurance policy by itself can cause confusion, ambiguity, or a complete lack of comprehension. The structural problems with policies appear to stem both from encrustation over time and from the difficulty of writing a coherent order of statements meant to apply to thousands of perils and outcomes. An average policy will open with the insuring agreement (coverage), then list the many exclusions to coverage, some of which will have embedded "exceptions to the exclusions" to coverage. Notice requirements and other duties may follow. Definitions may come last, which sounds sensible but a definition can operate as an exclusion to coverage, just as defining "tangible property" to not include electronic data does.

Consider the Ensuing Loss provision common to homeowners policies, a portion of which provides: "Under 2b and c above, any ensuing loss to property described in Coverages A and B not precluded by any other provision in this policy is covered." As Daniel Schwarcz comments, "[t]he provision is completely hidden, 'ensuing loss' is not defined in the policy, and the provision requires readers to know what '2b' and 'c' refers to as well as what 'Coverages A and B' refer to." It might have been possible to create this cross-referencing thicket without a well-worn process of adding and inserting terms in lieu of drafting new sections but it seems unlikely.

Apart from structural confusion, the concept of ensuing loss has turned out to be difficult for both policyholders and courts to grasp.[18] A deceptively brief explanation is that if an excluded peril occurs, resulting in excluded property damage, which results in a covered peril, the ensuing loss from the covered peril is covered. Thus, if a mudslide (excluded peril) causes damage to a wall and gas line (excluded damage) that result in a fire (covered peril), the resulting fire damage is covered. Note that the Ensuing Loss provision grants coverage *back* to policyholder from what might otherwise have been an excluded loss. In other words, when it operates, it operates to the benefit of policyholders.

As will be explored in a later draft, the Ensuing Loss provisions were a fascinating response to the San Francisco earthquake of 1906 (an excluded peril) that

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[17] Original conference letter: "What we mean by black holes in the contractual sense are provisions whose shared meaning is largely lost over time through rote repetition and the overlay of legal jargon. And, in particular, we are interested in what happens when these black holes show up in standard-form contracts used on a global scale (although the cross-border context is by no means a necessity here)."

[18] Not explored here is the added structural difficulty of simultaneously construing the Ensuing Loss provision and what is known as the Anti-Concurrent Cause clause. Indeed, it takes an entire article to explore the interaction of the two. *See* Christopher C. French, *The "Ensuing Loss" Clause in Insurance Policies: The Forgotten and Misunderstood Antidote to Anti-Concurrent Causation Exclusions*, 13 NEV. L.J. 215, 216 (2012).

lead to vast fire damage (an otherwise covered peril) and the court rulings that followed.[19] Almost one hundred years later, the clause prompted a serious litigation following Hurricane Katrina, some of which was the result of opportunistic interpretation by judges in the face of a blank hole. For example, the famous/infamous decision by Judge Duval in the Eastern District of Louisiana held that man-made flood was a covered, ensuing loss.[20] The Firth Circuit reversed, which is the plausible outcome if a court means to finely interpret the language as opposed to construe the clause on public policy grounds.[21] Ensuing Loss provisions do not readily lend themselves to two interpretations—the choice is between understanding their application after careful study or having no clue.

While the current Ensuing Loss provisions are man-made blank holes, it may be that ensuing loss is almost a natural blank hole—one that courts should preserve for the benefit of both insurers and policyholders. The more costly courts make the provision for insurers by (a) construing it to add back excluded losses and (b) entertaining lengthy litigation when a summary judgment is due, the more likely insurers are to drop the exception altogether.

II. THE SUE AND LABOR CLAUSE BLACK HOLE

A policy can cover against loss caused by specific perils or against loss caused by multiple perils or "all perils," commonly called "all risk" today. Sue and Labor clauses appear to have been present at the birth of one of the earliest multi-peril policies, perhaps before the 1600s.[22] After the Great Fire of London in 1666, insurers introduced fire insurance in England, which protected against loss caused by fire only.[23] Marine insurance, by contrast, started with Lloyd's Coffee House in London, and covered many sea perils, in part because if an insured ship set out and never returned, identifying the cause of loss could be hopeless.[24]

> The sue and labor clause of marine insurance policies, as we know it today, developed in three principal stages—the first beginning sometime after 1527 and before 1623, the second beginning sometime after 1623 and before 1783, and the third beginning sometime after 1822 and before

[19] *See* French, *The "Ensuing Loss" Clause*, at 216; and James S. Harrington, *Lessons of the San Francisco Earthquake of 1906 Understanding Ensuing Loss in Property Insurance*, ABA SUM Brief, Summer 2008.
[20] In re Katrina Canal Breaches Consolidated Litigation, 466 F. Supp. 2d 729, 761 (E.D. La. 2006).
[21] 495 F.3d 191, 208-21 (5th Cir. 2007).
[22] George B. Hall Jr., An Historical Perspective on Attempted Recovery of Y2K Expenses Under Sue and Labor Clauses, 14 No. 4 MEALEY'S LITIG. REP.: INS. 25 (1999).
[23] Harold E. Raines, A HISTORY OF BRITISH INSURANCE 74 (1964). [note US fire insurance history]
[24] Both types of policies have exclusions to coverage, such as exclusions for "expected or intended loss" or loss caused by flood; all risk does not mean all coverage.

> 1855. Neither the Florentine policy of 1523, which is said to be the oldest marine policy, nor the Florentine policy of 1527, included a sue and labor clause. An early version of the sue and labor clause did appear, however, in the London policy of 1613.[25]

The first clauses placed a duty on the policyholder to take reasonable steps to prevent or avoid loss to insured property. The insurer obligation to compensate the policyholder for the cost of suing or laboring was added over the years from 1623 to 1783.[26] Modern courts take the "clause [to make] express the duty implied in law on the part of the insured to labor for the recovery and restitution of damaged or detained property, and it contemplates a correlative duty of reimbursement separate from and supplementary to the basic insurance contract."[27]

This example of a Sue and Labor clause was at issue in an 1813 Supreme Court case on a marine insurance policy: "[I]n case of any loss or damage, to sue labor and travel for, in and about the defence, safeguard and recovery of the goods, or any part thereof, to the charges whereof the assurers will contribute according to the amount of the sum insured."[28] The marine clauses meant that ships at sea could intentionally destroy insured cargo in order to save the ship, and that such loss would be covered if the averted destruction of the ship and remaining cargo would have been otherwise covered under the policy. If suit was necessary to regain possession of lost property salvaged by others at sea, the policyholder could be assured he should "sue," and likely "travel," to decrease the total insured loss. Thus, the smaller loss was accepted to avoid the greater as a rare exception to the fortuity principle, which holds that a loss can be covered by insurance only if it is "fortuitous," a concept explored below.

The Sue and Labor clause began in the sea but evolved, moving from Marine Property Policies to Inland Marine Policies to Multiple Perils Personal Property Policies,[29] and finally to the general property policy sold to commercial entities. Despite the problems raised below, the clause continues in multiple forms on both property and commercial liability policies, marine and non-marine alike.

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[25] "Construction and effect of 'sue and labor' clause of marine policy, 86 A.L.R.2D 1247 (Originally published in 1962) (internal citations removed).
[26] *Id.* at §5 fn.9.
[27] Young's Market Co. v. American Home Assur. Co., 481 P.2d 817 (Cal. 1971). "Its purpose is to encourage and bind the assured to take steps to prevent a threatened loss for which the underwriter would be liable if it occurred, and when a loss does occur to take steps to diminish the amount of the loss. Under this clause the assured recovers the whole of the sue and labor expense which he has incurred . . . and without regard to the amount of the loss or whether there has been a loss or whether there is salvage, and even though the underwriter may have paid a total loss under the main policy." White Star S.S. Co. v. North British & Merc. Ins., 48 F.Supp. 808, 813 (E.D.Mich. 1943).
[28] Biays v. Chesapeake Ins. Co., 11 U.S. 415, 419 (1813) (italics removed).
[29] "In case of actual or imminent loss or damage it shall be lawful and necessary for the insured, their factors, servants or assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance . . . ." Young's Market Co., 4 Cal.3d 309, 311 (1971).

Sue and Labor Like It's 1999

Beginning in the mid-1990s, businesses dependent upon complex computer systems began to test and evaluate their systems in preparation for the looming Y2K threat. (Remember the Millennial Bug? My millennial students don't.) Added to the initial significant testing costs were the far larger costs of actually remediating the systems. Large corporate policyholders sought insurance coverage for these investigative and corrective costs from their property insurers. To achieve this, policyholders rested their claims on the sleeping Sue and Labor clause. The insurance industry's initial response was sarcastic: "By all means. If insurers are resistant to pay, individual commercial insureds should go to court with whatever ancient loopholes they can dig up . . . and sue insurers to pay for the costly task of averting Millennial doom."[30]

Ancient loophole or no, in modern cases the Sue and Labor clause is read to mean that in the event of imminent loss, the policyholder is permitted, even required, to take steps, including intentionally destructive steps, to avert the greater loss.

Two typical sue and labor clauses:

> [1] In case of loss or damage or imminent loss or damage hereunder, it shall be lawful and necessary for the Assured, his, its or their factors, servants and assigns to sue, labor and travel for, in and about the defense, safeguard and recovery of the insured property, or any part thereof without prejudice to this insurance, nor shall the act of the Assured or the Underwriter in recovering, saving and/or preserving the insured property in case of disaster be considered a waiver or an acceptance of abandonment.
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> [2] To indemnify or pay on behalf of the insured any sum or sums which the insured may be obligated to pay or incurs as expenses, on account of: [a] sue and labor expense, to the extent reasonably incurred, arising from an occurrence covered hereunder . . . ."[31]

The Sue and Labor clause behind the Y2K dispute is found in commercial property policies, which is an "all risk" policy that "insure[s] against risk of direct loss to [covered] property . . . only if that loss is a physical loss to property."[32] The Sue and Labor clause takes different forms but an important background to the clause is that insurance does not usually cover either the intentional destruction of property or the ordinary costs of maintaining property, in part because neither is considered fortuitous.

Fortuity springs from the definition of insurance as an "arrangement for transferring and distributing *risks*."[33] An event that is not fortuitous, but known, foreseen, or intended, is not a risk; transferring the cost of a non-fortuitous event from

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[30] David M. Katz, "Sue and Labor Y2K Suits are Bad Management Risk," (Aug. 6, 1999) *at* http://www.propertycasualty360.com/1999/08/06/145sue-and-labor146-y2k-suits-are-bad-risk-managem.
[31] Shell Oil Co. v. Winterthur Swiss Ins., 12 Cal. App. 4th 715, 765, (Cal. Dist. 1993).
[32] *See* Alliance of American Insurers, Insurance Professionals' Policy Kit 182 (2000). [renew]
[33] Keeton & Widiss, INSURANCE LAW, 3 (1988) (emphasis added).

one party to another would not be considered "insurance."[34] "[V]irtually all modern insurance policies contain explicit language imposing some sort of fortuity requirement," but courts will apply the doctrine sua sponte as well.[35] The "requirement that loss be accidental is some sense in order to qualify as the occasion for liability of an insurer . . . is implicit when not expressed, because of the very nature of insurance."[36] This is important because although insurance law tends to favor the policyholder, it strongly disfavors an implicit or tacit relaxation of the fortuity doctrine.

During the Y2K fight, insurers denied their policyholders' claims under versions of this clause, relying on "design defect" exclusions and forms of the fortuity defense. In 1999, for example, Lloyd's of London was "informed that the Year 2000 problem [would] lead to litigation costing $1 trillion in the United States, where the first claims ha[d] already been filed."[37] Lloyd's answer: "Given the extensive global debate on the subject of Y2K computer problems it is clearly apparent the topic does not meet the criteria of a fortuity. Rather, it is a well-known, well-described business risk."[38]

By the summer of 1999, GTE Corporation sued five of its insurers in federal court for failure to provide coverage for Y2K-related prevention costs, seeking declaratory relief, damages, and punitive damages for bad faith refusal.[39] GTE calculated at the time of filing, before the year 2000, that is was due coverage for approximately $400 million in incurred and ongoing costs from testing and renovating its systems. Not waiting to be brought to court on the other side, an insurer of Xerox Corporation sought a declaratory judgment that it did not have to indemnify Xerox for Y2K remediation costs.[40] In addition to Xerox and GTE, Unysis, Nike, ITT, and the

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[34] "There is no single conception of insurance that is universally applicable for use in disputes involving questions of law," and the pursuit of one has proven futile. *See* R.E. Keeton, INSURANCE LAW § 5.4(a) (1971). The nature of specific types of insurance can be more effectively described.

[35] Robert H. Jerry, II, UNDERSTANDING INSURANCE LAW, § 63 (2d ed. 1996). Ken Abraham concludes that the fortuity doctrine causes confusion without contributing any value. *See* Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 Tort & Ins. L.J. 777 (2001). Abraham argues that the purported benefit of the fortuity doctrine is better achieved by several explicit policy provisions, such as the exclusion in property policies of coverage for intentionally destructive acts of the policyholder. His conclusion is probably correct, once his more narrow definition of fortuity is accepted. An "occurrence is fortuitous and insuring against it is unobjectionable," under Abraham's approach, "[i]n the absence of knowledge that an event, even an inevitable one, is substantially certain to occur." *Id*. at 792.

[36] R.E. Keeton, INSURANCE LAW § 5.4(a) (1971).

[37] Michael P. Murphy & Aidan M. McCormack, *Challenging Insurance Coverage for Year 2000 Computer Failure Claims*, 34 TORT & INS. L.J. 883, 884 (1999).

[38] Randy Parr & Jonathan Wallach, *Insurance for Y2K: Property Damage Under First Party and CGL Policies*, 561 PLI/PAT 1111, 1115 (1999). Lloyd's continued by noting similarities to other insurance doctrines that will be addressed in a later section: "This fortuity requirement is similar to the "known loss," "known risk," or "expected and intended" argument raised by the insurance industry under general liability policies." *Id*.

[39] GTE Corp. v. Allendale Mutual Insurance Co., D. N.J. (filed June 18, 1999). [update]

[40] American Guarantee and Liability Insurance Co. v. Xerox, Supreme Court, NY County (filed July 1, 1999) (update).

Port of Seattle, to name a few, all filed complaints seeking declaratory judgment that Y2K remediation expenses were compensable under the sue and labor clause.

How did the insurance industry respond? Many policies did eventually include Y2K exclusions, which might have been too late had the insurer needed to rely on the exclusions.[41] Insurers spent time and money arguing, litigation, and arbitrating with their policyholders over the claims, at times suing their own reinsurers. The insurers won the cases but not cheaply.

Case Outcomes for Sue and Labor Application to the Year 2000 Problems

GTE, a worldwide leader in telecommunications at the time, sought a declaratory judgment against multiple property insurers for compensation for the $400 million cost of remediating its computer systems to avoid Y2K-related problems.[42] GTE had became aware of a possible Y2K problem in 1994 and began an official remediation program in 1995. Unlike some policyholders, GTE did not have to litigate the question of whether damage to electronically stored data would count as property damage under its primary policies. These policies stated: "Physical loss or damage shall include any destruction, distortion or corruption of any computer data, coding, program or software except as hereinafter excluded."[43] Thus, the loss of computer data or programing caused by a Y2K malfunction was at least possibly covered, such that "laboring" to avoid that loss might trigger compensation under the Sue and Labor clause.

The federal district court concluded that GTE's remediation costs were not covered because the impending Y2K loss itself would not have been covered, citing

[41] A typical Y2K exclusion provides:
Notwithstanding any portion of this policy which may appear to the contrary, the Policy does not insure any loss, damage, cost, claim or expense, whether preventative, remedial or otherwise, directly or indirectly arising out of or relating to:
1. the recognition, interpretation, calculation, comparison, differentiation, sequencing or processing of data involving one or more dates or times, including the Year 2000, by any computer system, hardware, program or software, or any microchip, integrated circuit or similar device in computer equipment or non-computer equipment, whether the property of the Insured or not; or
2. any change, alteration, correction or modification involving one or more dates or times, including the Year 2000, to any such computer system, hardware, program or software, or any microchip, integrated circuit or similar device in computer equipment or non-computer equipment, whether the property of the Insured or not.
Except as provided in the next paragraph, this Electronic Data Recognition clause shall apply regardless of any other cause or event that contributes concurrently or in any sequence to the loss, damage, cost, claim or expense.
If direct physical loss or damage not otherwise excluded by this Policy results, then subject to all terms and conditions, this Policy shall be liable only on such resulting loss or damage . . . .
[42] GTE Corp. v. Allendale Mut. Ins. Co., 258 F. Supp. 2d 364, 367 (D.N.J. 2003), *aff'd,* 372 F.3d 598 (3d Cir. 2004).
[43] *Id.* at 370.

both the policies' design defect and inherent vice exclusions.[44] "The two-digit date designation was an imperfection in the design of the system that prevented it from operating properly," wrote the court, and GTE's system contained the "seeds of its own destruction" as opposed to an external threat.[45] In the end, therefore, the court described the Sue and Labor clause, briefly gave its history, but did not grapple with its interpretation.[46]

On appeal, the Third Circuit agreed with the lower court. On the Sue and Labor clause, it wrote:

> The purpose of a sue and labor clause is to encourage the prevention of loss that is the subject of the policy; that is, the clause is designed to allow reimbursement for measures taken by the insured to mitigate damages in order to reduce the insurer's obligation under the policy. While there is some dispute as to whether the covered loss has to *occur* to invoke coverage, it seems undisputed that the actions must at least be aimed at a covered loss.[47]

Other courts came to similar conclusions, based on similar exclusions in other policies. In addition to GTE, the State of Montana,[48] ITT Industries Inc.,[49] AFLAC Incorporated,[50] and Unisys Corporation (another global technology entity, estimating

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[44] The primary policies read, in part: This policy does not insure:

. . . . .

c. against the cost of making good defective design or specifications, faulty material, or faulty workmanship. This exclusion shall not apply to loss or damage resulting from such defective design or specifications, faulty material, or faulty workmanship; however any such resulting damage will be subject to all other exclusions in this Policy.

. . . . .

k. against unexplained loss, mysterious disappearance, loss or shortage disclosed on taking inventory, inherent vice or latent defect unless loss or damage from a peril insured herein ensues and then this policy shall cover for such ensuing loss or damage.

Id. at 370-71.

[45] *Id.* at 376 & 377.

[46] The primary Sue and Labor clause in GTE's insurance policies read:

"In the case of actual or imminent loss or damage by a peril insured against, it shall, without prejudice to this insurance, be lawful and necessary for the Insured, their factors, servants, or assigns to sue, labor, and travel for, in, and about the defense, the safeguard, and the recovery of the property or any part of the property insured hereunder, nor, in the event of loss or damage, shall the acts of the Insured or of this Company in recovering, saving, and preserving the insured property be considered a waiver or an acceptance of abandonment. This Company shall contribute to the expenses so incurred according to the rate and quantity of the sum herein insured. This provision does not increase any amounts or limits of insurance...." *GTE Corp.*, 372 F.3d at 606 (3d Cir. 2004).

[47] *Id.* at 618 (internal citations removed).

[48] State v. Allendale Mut. Ins. Co., 337 Mont. 49 (2007).

[49] ITT Indus., Inc. v. Factory Mut. Ins. Co., 756 N.Y.S.2d 188 (NY App.Div.1st 2003).

[50] AFLAC Inc. v. Chubb & Sons, Inc., 260 Ga. App. 306, 306, 581 S.E.2d 317, 318 (2003). [tconfirm status of Sue and Labor clause]

remediation costs at over $35 million) spent at least some time in court.[51] Other entities apparently raised the claim with their insurers but did not end up in court, such as CVS Pharmacy Inc. and J.P. Morgan.[52] Some of Y2K insurance disputes went to Alternative Dispute Resolution and are not public.

Understand, however, that *but for* the Sue and Labor clause, there would have been no litigation, as GTE and similar entities would have had no case at all. GTE did not suffer any property damage or business interruption losses (a form of limited coverage in property policies) due to the Y2K problem; it had no property losses for which it could be compensated. Having successfully avoided whatever losses it might have incurred had it not remediated its computer systems, GTE's only shot at insurance compensation was coverage for the costs of avoiding the loss.

That said, perhaps we should not necessarily expect insurers to redraft their Sue and Labor clauses after the Y2K cases. In fairness, insurers did not lose under the Sue and Labor clause but nor did they win because of it. They won on other grounds but were put on notice about possible future litigation over the scope of "imminent" loss.

Should Insurers Fix the Sue and Labor Hole?

One of the costs of Sue and Labor's rote reproduction is that the time element has not been appropriately crafted for ordinary property coverage as opposed to a sea voyage. The original marine policies would have been in force for the duration of a voyage, or longer, instead of issued yearly, thereby avoiding the absurd fate of the Port of Seattle. In 1998, the Port of Seattle sued nine insurers, including Names at Lloyd's of London, seeking coverage for remediation costs under the Sue and Labor clause of its property policies. (Given the language in its property policies, the Port had to argue that Y2K was a computer virus, an argument the court rejected; the Y2K deficiency could not replicate itself or spread as computer viruses do.) The court's treatment of the Sue and Labor clause found that it did not apply because the avoided losses would have occurred *after* the charged policies expired.[53] Remediation work done in 1998, for example, would not be covered under a 1998 policy because the "loss" of Y2K would not occur during 1998.

Similarly, the state of Montana undertook remediation efforts from 1996 to 1999. Each of those property policies expired before 12:01 a.m. on January 1, 2000.[54] (As it turns out, the date of Y2K damage was not necessarily January 1, 2000. "Actual

[51] *See*, e.g., Unisys Corp. v. Royal Indem. Co., No. CIV.A99C08055JOH, 2001 WL 845666, at *1 (Del. Super. Ct. May 25, 2001), one of three unpublished opinions on the discovery process that reveal the litigation involved both Sue and Labor clauses and non-fortuity defenses.
[52] *See* http://www.propertycasualty360.com/1999/09/03/y2k-sue-and-labor-claims-way-out-of-line.
[53] Port of Seattle, 111 Wash. App. at 914-15,
[54] "[B]ecause any expenses incurred by the State [of Montana] during the 1996-99 Allendale policy periods were to protect against a potential loss that would occur only after those policies expired, the PPP provision in those policies does not apply to provide coverage." Montana v. Allendale Mut. Ins. Co., 2005 WL 3604894 (Mont.), 21.

operational problems are anticipated prior to the arrival of 2000, especially on September 9, 1999, since 9/9/99 has been historically chosen by computer programmers to represent 'eternity' and entered into many computer programs."[55]) In dicta, the Montana supreme court found that the fact that the avoided losses would have occurred *after* the charged policies expired meant the Sue and Labor clause did not apply. If commercial policyholders want to purchase, and commercial property insurers want to sell, coverage for a long-unfolding process of avoiding non-immediate future risks, they have so far failed to achieve it. (This is hardly the only problem caused by the year-to-year policy structure of property insurance.)

This first problem is related to a second problem, which is the time element in the meaning of "imminent" on land as opposed to sea. The precariousness of marine travel, especially in the 17th and 18th centuries when the clause first appeared, would not have allowed for much of a gap between an imminent peril and a realized one. Cargo on fire, extremely rough seas, and boarding by pirates would make a new or larger loss imminent and immediate. The years-long "imminence" of the Y2K risk, on the other hand, reveals that outside of the sea the clause requires a more limiting definition of "imminent." Some have argued that if it will take two years to fix a problem that is two years away, the risk is imminent.[56] This may be but it also opens the door to expanding insurance coverage for delayed routine upkeep because property neglect will, eventually, lead to a loss. As one insurance industry group put it,

> There is no analogy between tossing overboard the cargo of a ship foundering at sea and a multi-year, meticulously planned effort to correct computer system defects. The costs of maintaining and upgrading the operating systems of a business—whether they be air conditioning, electrical wiring or computers—have always been assumed by the business itself, not its insurer.[57]

Complicating the "imminent" puzzle is the fact that the original marine clauses seem not to have explicitly provided for an impending loss so much as mitigating an ongoing one. For example, in 1813: "[I]n case *of any loss or damage*, to sue labor and travel for, in and about the defence, safeguard and recovery of the goods, or any part thereof, to the charges whereof the assurers will contribute according to the amount of the sum insured.[58] The English version embodied in the Marine Insurance Act of 1906 applied "in case of any *loss or misfortune* it shall be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises . . . ."[59] Some court opinions likewise

[55] Michael P. Murphy & Aidan M. McCormack, *Challenging Insurance Coverage for Year 2000 Computer Failure Claims*, 34 TORT & INS. L.J. 883, 883 (1999).
[56] *See* Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 TORT & INS. L.J. 777, 782 (2001).
[57] Robert P. Hartwig, http://www.propertycasualty360.com/1999/09/03/y2k-sue-and-labor-claims-way-out-of-line (Sept. 3, 1999).
[58] Biays v. Chesapeake Ins. Co., 11 U.S. 415, 419 (1813) (italics added).
[59] 86 A.L.R.2d 1247 (Originally published in 1962) "Taken from statutory form of marine insurance policy set out in 22 Halsbury's L of Eng, Appx A 3d ed, pp 444, 445." *Id.*

assume that the loss must have begun before the Sue and Labor clause binds either party.

By the 1990s, however, policies under which the Port of Seattle sued read, in part: “In case of *actual or imminent loss or damage* by a peril insured against, it shall, without prejudice to this insurance, be lawful and necessary for the Insured, their factors, servants, or assigns to sue, labor and travel for, in and about the defense, the safeguard and the recovery of the property or any part of the property Insured hereunder.”[60] I am trying to uncover when and why the “imminent” change took place, if indeed it was a meaningful change; it may be that the earlier marine insurers and courts applied the Sue and Labor clause to cases where damage had not yet befallen a ship but where the risk was imminent. After all, marine insurers had an incentive to encourage their policyholders to avoid loss from imminent risks as well as unfolding ones.

Some, perhaps many, property policies have retained older language that does not refer to imminent loss.[61] A 1999 case involved this marine insurance clause: “And in case of any Loss or Misfortune, it shall be lawful and necessary for the Assured, their factors, Servants and Assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the Vessel, or any part thereof[.]”[62] By necessity, only those policyholders with policies that included the “imminent” version of the Sue and Labor clause brought their Y2K remediation claims to court. Given the cost of litigating the issue, and the unclear benefit of adding “imminent” to the clause, one might have expected “imminent” to be removed from post-Y2K clauses. Thus far, I have not found evidence of any related redrafting or removal of the clause.

Another redrafting approach one might have anticipated speaks to notice. Where the “labor” portion of Sue and Labor clause applies to an unfolding loss, most policies also have a clause requiring policyholders to mitigate the costs of a loss that has already occurred.[63] A policyholder who wishes to be credited for mitigation efforts will need to gather proof of the pre-mitigation loss and, in many cases, collaborate with the insurer on an agreed path forward. While a marine insurer in the British Empire would not have demanded a telepathic communication from the ship’s captain before agreeing

[60] Port of Seattle, 111 Wash. App. at 913 (italics added).
[61] Lloyd’s of London, which might be expected to take a more flexible and sophisticated approach to clause redrafting, had a “standard” non-imminent loss Sue and Labor clause in the mid-1990s, which also included an “expenses to reduce loss” clause. “This policy covers such expenses as are necessarily incurred for the purpose of reducing any loss under this policy, though such expense may not exceed the amount which the loss under this policy is thereby reduced.” *Discussed in* Steuart Petroleum Co. v. Certain Underwriters at Lloyd's London, 696 So. 2d 376, 379 (Fla. Dist. Ct. App. 1997).
[62] Wolstein v. Yorkshire Ins. Co., 97 Wash.App. 201, 211–12, 985 P.2d 400 (1999).
[63] For example: “Your Duties After Loss. In case of a loss to which this insurance may apply, you must perform the following duties:
a. give prompt notice to us or our representative; [¶] ... [¶]
c. protect the property from further damage; . . . .”
Grebow v. Mercury Ins. Co., 241 Cal. App. 4th 564, 570, 194 Cal. Rptr. 3d 259, 263 (2015).

that burning cargo must be thrown into the sea, if the Sue and Labor clause is to apply to a project that takes years to plan and years to implement, insurers will demand notice. The lack of a notice requirement in the clause may be evidence that insurers do not so intend the clause or it may be a black hole failure.

III. THE INSURANCE MARKET RESPONSE TO THE MISINTERPRETATION OF CONTRACTUAL HOLES

In their empirical analysis of the *pari passu* clause, CGS find little evidence to support "the traditional conception of contracting," which they call the "Intelligent Design" model, and more reason to adopt the "Evolutionary" model.[64] We might think that insurance policy drafting is a perfect combination of both. It is evolutionary in that future contracts are based past contracts and standard forms persist across both time and insurers. The "past is prologue" effect is particularly strong in insurance, where the value of policy language is tied to the actuarial data that links contract terms to payment data. Changing contract language may require letting go of, or weakening the predictive power of, valuable actuarial data.

On the other hand, the deliberative, collective industry process of drafting sounds like Intelligent Design, or at least Design. At times this process is merely slow, albeit slow when a disaster is quickly unfolding. Other times the process appears to fail entirely to address known holes that cost hugs sums in litigation and unintended insurance payouts. The problems of Y2K remediation and "electronic data as tangible property" are two examples of a basic, widespread, and puzzling phenomenon in commercial property insurance: both parties remain silent about non-insurer-specific changes to the risks of the world, choosing instead to wrangle over the application of pre-existing provisions to the new situation than to adjust the renewed insurance contract to state the parties new understanding.

There are several possible reasons for this. First, the invitation to both the policyholder and the insured to argue over whether an existing policy covers a new risk is delivered by the nature of "all risk" property insurance. "All risk" property policies are decedents of "all peril" marine policies that provided coverage for "all the perils of the sea," as opposed to single-risk or named risk policies, like fire or traditional health insurance. When the "all risk" template evolved into coverage for general property protection on land, the universe of possible risks expanded from the unenumerated but bounded risks of the sea to the entire universe of risk. When "new" risks arise, insurer and insured lock in the continual battle over whether "all risk" should be read literally, using as clumsy weapons clauses and provisions that were originally drafted to address other concerns.

Second, a central question of insurance coverage that is often not answered by the insurance policy is who retains the risk for loss from entirely unexpected causes. It

[64] CGS, Black Hole Problems, at 35.

is not obvious who should bear the risk for causes or types of loss that are unanticipated by either side: from a contractual standpoint, the unknown risk was not allocated between the parties.

> Like other concepts based on probability, the concept of risk is a rational device for managing ignorance. Ignorance can be too profound for use of this device, however. In customary usage the concept of risk does not extend to a sequence of events, even though it is ineluctably leading to loss, if human observers do not know enough to recognize the possibility that loss of that type will occur. Pressing this point further (and using what is perhaps an unusual sense of the term "created"), some commentators speak of risk as being "created" by a change in human knowledge: "For example, the discovery of the relationship between smoking and lung cancer created a risk where none has previously existed. Losses may have occurred in the past as a result of excess smoking, but smoking involved no risk at that time because the relationship was not recognized; today we recognize the relationship, and risk does exist.'"[65]

As new risks or harms come to light, each party may believe it has more to gain from remaining contractually silent than from clarifying the coverage for that risk with the other. The insurance relationship is often an ongoing long-term one, but one that is built by one-year increments defined by each successive policy year. Fresh risks, however, do not arise neatly before the end of one policy period and the beginning of the next, allowing the parties to explicitly identify and assign the risk in the oncoming policy period. In liability insurance, for example, the discovery that asbestos causes asbestosis or that toxic wastes dumped into the ground do not harmlessly dissipate but instead might result in liability (under newly passed statutes and regulations) occurred over time with increasing certainty. "Discovered" risks like these arise from known and possibly intentional past actions that lead to newly recognized harm.

Moreover, insurers are generally unwilling to add specific exclusions in future policies if their position is that the previous policies did not cover the loss either. This unwillingness stems from the strong fear that courts will interpret a recently added exclusion as a change in coverage, and not a clarification. Even in cases where the insurer has attempted to state that the new exclusion is *a clarification in response to prior misinterpretations*, the insurer may lose.[66] If the risks announced themselves before becoming risks, the parties could assign the risk in the next policy. Once a risk becomes known, however, the nature of these emerging risks gives each party a stake in how the risk was covered in the *past*.

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[65] Keeton, INSURANCE LAW, § 1.3(b) n.1 (quoting Deneberg, et al., RISK AND INSURANCE (1964), at p. 4.
[66] The history of the "sudden and accidental" exception to the pollution exclusion bears this out.

Is Failing to Redraft Always a Failure?

When drafters choose not to redraft or remove a clause after it has been interpreted against their interests, and contrary to the market-supported meaning, can we assume the failure to redraft is indeed a failure? To confirm some sort of malfunction, "we would hope to see multiple courts across jurisdictions interpreting an encrusted boilerplate term in a particular way . . ., followed by numerous contracts written with the same unrevised term."[67] This happens in insurance policies all the time. Yet the insurance industry as a whole is a successful one, filled with sophisticated, repeat players.

I have argued elsewhere that insurers may choose not to redraft when (a) the courts' contra interpretation is actuarially viable, (b) the cost can be passed to future policyholders, (c) the interpretation will apply to each insurers' competitors, and (d) insurers have reason to believe courts will remain hostile to future attempts to write the coverage out.[68] This last is not necessarily required for insurers to keep a difficult clause.

This outcome is intentional but it may still a failure on two fronts. First, if the interpreted clause is truly ambiguous, it will continue to confuse policyholders in its un-redrafted from, some of whom will read it to not provide coverage. These policyholders may therefore be paying for coverage they do not realize they have and do not seek in a claim or in court. Second, if insurers originally resisted the courts' interpretation because the insurers believed policyholders did not value the coverage at cost—and the insurers are right—policyholders are now paying for coverage they do not wish to purchase.

IV. INTERPRETING HOLES IN INSURANCE CONTRACTS

What should courts to do when the evidence of shared intent has fallen irretrievably into a contractual hole? CGS argue that "[a]t a minimum, courts should be open to arguments that, as a matter of law, the clause in question has been emptied of meaning and functions as a black hole in the boilerplate."[69] The hurdles in insurance interpretation begin at this first step: courts do not currently seem open to admitting the existence of a black hole or, even, a blank hole. First, as discussed above, courts are usually addressing whether a loss falls within a grant of coverage and, if so, whether it then falls within an exclusion to coverage. The policyholder must prove that a loss falls within the scope of coverage but if the question is "unclear"—meaning either ambiguous or incomprehensible to the policyholder—contra proferentem directs coverage. Result: Hole covered. If there is coverage but the exclusion question is

[67] CSG at 13.
[68] Boardman, *Contra Proferentem*, at __.
[69] CGS, "Black Hole Problems," at 56.

"unclear," the insurer will fail to shoulder its burden of proving the exclusion applies. Result: No hole.

Perhaps contra proferentem is a brilliant solution to blank holes. After all, it is as CGS have proposed we need, "a shift in contract doctrine away from the futile and ultimately costly effort to discover a shared meaning that no longer exists."[70] Given what I argue is the promiscuous application of contra proferentem to terms that are *not ambiguous* but are instead *incomprehensible*, however, the "risk that courts may be persuaded to adopt an interpretation . . . that is antithetical to the efficient functioning of the market" is extremely high.[71] Complex language that has been extensively litigated, and redrafted—but *not* redrafted to expand coverage—is nearly by definition encrusted language that insurers retain because the market does not support including the coverage in policies.

In the case of blank holes, courts are left to chose between applying the insurers' market-supported intent (knowing that policyholders see a blank) or sidling up to contra proferentem as a gift to one policyholder (knowing that the term is not ambiguous and that a pro-coverage interpretation may harm future policyholders). As I have explored elsewhere, the collective drafting process of the insurance industry is slow and expensive.[72] Fixing a court's "mistake" may therefore be costly and delayed. If it is not fixed, policyholders may find themselves paying for coverage they do not value at cost. Worse, if the blank hole does not read to most policyholders as providing coverage, some insurers may pay only those who retain legal representation.

If courts fully acknowledge the existence of blank holes as a separate category, it may free them to reconsider using contra proferentem as a penalty. Unlike black holes, blank holes are blank to one party only—the policyholder. The insurer understands the purpose and desired effect of the clause. With some minimal effort, judges can come to understand these as well. Recall that blank holes are not ambiguous; they have one legally sophisticated meaning and are otherwise incomprehensible.

While ambiguous language may be a trap for the unwary, incomprehensible language puts the policyholder on notice that he does not understand. Blank holes cannot be used to lure policyholders in at the moment of contracting; if the policyholder notices the blank, it will register as a negative. This supports a different interpretive approach, particularly if the language cannot be reasonably perfected without changing its meaning. A naturally opaque clause should garner more respect than an encrusted blank one. Treating a blank as an ambiguity, and therefore construing the clause contra the insurer's intent, may take away a clause that policyholders value even though they cannot readily be made to understand it. If the clause cannot be made more simple, repeated "encouragement" to redraft it may result in removal.

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[70] CGS, "Black Hole Problem," at 5.
[71] *Id.* at 3.
[72] Boardman, *Contra Proferentem*, at __.

What happens if courts become willing to navigate a black hole? Assume for the moment that GTE had property coverage that would have covered its losses had it not addressed the Y2K problem in advance. The court next concludes that the parties had no shared intent as to the scope or meaning of "imminent loss" within the Sue and Labor clause.

Given this lack of shared intent, a court could consider several approaches before using contra proferentem at a true last resort.

- A textualist approach would give the language a "plain or standard dictionary meaning,"[73] within the context of the contract's purpose, but without regard for evidence of ex ante party intent. Predicted outcome: Insurer wins because the loss is not "imminent."
- An historical approach is possible if the court can determine the historic purpose and meaning of term, and that information informs how the clause should be applied to the facts at hand, accepting that the historic meaning does not prove either party held that meaning at the time of contracting. Depending on the advantage, policyholders argue for and against this use of history.[74] Predicted outcome: Insurer wins.
- An actuarial and "price" approach, under which the court determines if there is "credible evidence that the particular provision was priced at the original issue stage[.]"[75] (CGS pose this question; they are not suggesting it an interpretive or constructive approach, as I understand it.) This is in keeping with my earlier suggesting that actuarial data might prove at least one party's honest ex ante intent. Predicted outcome: Insurer wins because the risk and cost of remediation, or similar forms of updating, was not calculated in the insurance premiums.
- The reasonable expectations doctrine, less commonly accepted by courts than contra proferentem, would ask if the policyholder would reasonably have expected to be covered for Y2K remediation costs.[76] Predicted outcome: Insurer wins.

The "no agreement, no deal" approach is a nonstarter in insurance. Between two sophisticated international parties, courts may follow "the common law rule that if the parties have attached different meanings to a term neither party is bound by the

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[73] *Id.*
[74] "In the context of pollution exclusions, insureds have argued quite vigorously that so-called 'historical intent' (much of which seems of questionable reliability) dictate how courts should narrowly construe those exclusions and indeed ignore the very words used in favor of some suggested original historical purpose." George B. Hall Jr., *An Historical Perspective on Attempted Recovery of Y2K Expenses Under Sue and Labor Clauses*, 14 No. 4 MEALEY'S LITIG. REP.: INS. 25 (1999).
[75] *Id.* at 57.
[76] For the origins of the acknowledged reasonable expectations doctrine, *see* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970). Later drafts will consider at greater length the possible role of the reasonable expectations doctrine as an interpretative tool with contractual holes.

meaning unless" one party knew or had reason to know of the other party's meaning.[77] But here, is the court to conclude that GTE has no obligation to labor to avoid the loss and the insurer has no obligation to compensate GTE if they have so labored? Proving that the Sue and Labor clause applies is likely the responsibility of the policyholder but the court will not forget that the insurer drafted the clause. Even though GTE is a sophisticated policyholder, most jurisdictions do not make an exception to contra proferentem for sophisticated policyholders unless there is evidence that the clause in question was actively negotiated between the parties. A black hole, by definition, will not have been actively negotiated between the parties in the case at hand.

While contra proferentem does not strictly apply to a clause that (a) is not ambiguous but (b) is difficult to understand and (c) reveals no shared party intent, courts will be reluctant to abandon the principle that the insurer is responsible for drafting a clean policy and should bear the risk for failing to do so. If a court is willing to apply contra proferentem to the Sue and Labor clause because its meaning is uncertain, the outcome differs from all of those above: Policyholder wins. It is too early to generalize this result but with this particular black hole the "standard" approach leads to the wrong outcome.

[77] *Id.* at 57, referring in part to RESTATEMENT (SECOND) CONTRACTS § 201(3).