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Insurance Contracts: Diverse Judicial Approaches for Determining Ambiguity in Missouri

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drafting will not guarantee absolute protection from the increased number of problems in this litigious era, it will reduce the likelihood of disputes.

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INSURANCE CONTRACTS: DIVERSE JUDICIAL APPROACHES FOR DETERMINING AMBIGUITY IN MISSOURI

Crim v. National Life & Accident Insurance Co.[1]

Crim v. National Life & Accident Insurance Co. indicates continuing ambivalence in Missouri's approach for determining ambiguity in insurance contracts. More pointedly, it suggests that an advocate who fails to recognize judicial uncertainty in this area may mistakenly base his case on a theory which the court finds irrelevant.

In 1975 plaintiff's right eye was severely injured in an accident. At the time, he was covered by a life, health, and accident policy issued by defendant insurance company. Under the policy, coverage included payment for accidental bodily injuries resulting in the loss of sight of one eye. "With respect to eyes," the policy specified, "'loss' means the entire and irrecoverable loss of sight."[2]

Before the accident, vision in plaintiff's eye was normal. Afterwards, maximum surgery and medical treatments restored unaided visual acuity to 2/200, *i.e.*, plaintiff must now move within two feet to see what is normally recognizable at 200 feet, and depth perception was completely absent. There was scant denial that plaintiff's loss of sight was "entire" under the terms of the policy.[3] Nonetheless, defendant withheld benefits. Even if

1. 605 S.W.2d 73 (Mo. En Banc 1980).

2. *Id.* at 74.

3. Without elaboration, the court declared, " 'Entire [. . .] loss' is not in issue," and so affirmed the trial court's finding that the phrase "entire loss of sight" does not restrict coverage to cases where no eyesight remains. *Id.* at 75. Although no authority was cited, the court relied apparently on Mulcahey v. Brotherhood of Ry. Trainmen, 229 Mo. App. 610, 79 S.W.2d 759 (K.C. 1934), cited by the Missouri Court of Appeals for the Western District in its opinion on the case. Crim v. National Life & Accid. Ins. Co., No. 30147, slip op. at 3 (Mo. App., W.D. Oct. 29, 1979). *See* note 7 *infra*. In *Mulcahey*, the court found that

the loss was "entire," claimed defendant, it was not "irrecoverable," since a corrective contact lens improved vision in plaintiff's eye to a near-normal 20/25.

Plaintiff argued, to the contrary, that the natural, unaided vision in his eye was irrecoverably lost. Since an artificial aid is not the same as one's "God-given faculties," corrected sight is not recovered sight.[4] At the very least, he emphasized, the policy language is reasonably susceptible of both interpretations.[5] A policy term which is reasonably susceptible of two interpretations is ambiguous and must be construed in favor of the insured.[6]

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the insured had failed to demonstrate "complete and permanent loss of . . . sight," 229 Mo. App. at 611, 79 S.W.2d at 760, but added:

> This does not mean that plaintiff cannot recover by the mere showing of retention of light perception, that is, the ability to distinguish daylight from dark, but there is no liability under the policy so long as plaintiff has the ability to see and recognize objects, and the retention of enough sight to be of some practical and useful benefit to him in connection with his needs and pleasures in everyday life.

Id. at 621, 79 S.W.2d at 765.

Therefore, the *Crim* decision establishes that a reduction in visual acuity from 20/20 to 2/200 combined with a complete loss of depth perception qualifies in Missouri as the "entire loss of sight." 605 S.W.2d at 74-75.

4. Brief of Respondent at 6-7.

5. *Id.* at 11.

6. Decisions applying the rule that ambiguous insurance language must be construed in favor of the insured are legion. For a partial list, see 13 J. APPLEMAN & J. APPLEMAN, INSURANCE LAW & PRACTICE § 7401 (1976 & Supp. 1980); 43 AM. JUR. 2d *Insurance* § 271 (1969 & Cum. Supp. 1980); 44 C.J.S. *Insurance* § 297 (1945 & Cum. Supp. 1980). Most likely, the rule is an adaption of the contract maxim *omnia praesumuntur contra proferentem*, which specifies that if a written contract contains a word or phrase which is susceptible of two reasonable meanings, the preferred interpretation will be that which is less favorable to the one who drafted the contract. RESTATEMENT (SECOND) OF CONTRACTS § 232 (Tent. Draft Nos. 1-7, 1973); Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 854 (1964). This maxim favors the party of lesser bargaining power who had little or no opportunity to choose the terms of the contract, but has not been limited exclusively to such cases. RESTATEMENT (SECOND) OF CONTRACTS § 232, Comment a (Tent. Draft Nos. 1-7, 1973); Patterson, *supra*, at 854.

It follows from *contra proferentem* that the rule requiring construction of ambiguous insurance terms in favor of the insured has no application where the policy has been prepared by the insured. 13 J. APPLEMAN & J. APPLEMAN, *supra*, § 7402, at 300. Similarly, the rule has been applied sparingly when relative parity of bargaining positions existed between the parties, *e.g.*, when the form of contract was insisted upon by the insured, when the contract was prepared by the insured's broker or by representatives of both parties, and when the parties to the contract were both large corporations. *Id.* § 7402, at 300-01. Where the plaintiff is a third person who was not a party to the insurance contract, the principle has also been held inapplicable. *Id.* § 7402, at 51 (Supp. 1980).

The trial court agreed with plaintiff and entered judgment in his behalf.[7] The Missouri Supreme Court reversed, holding that since sufficient vision was restored to plaintiff by the contact lens, he had not sustained "'irrecoverable loss of sight' of his right eye within the clear and unambiguous terms of the policy."[8]

The impact of the holding in this case will be relatively minor. Most likely, it will be restricted to similar claims arising from the same or substantively identical policy language. The method used by the court to reach its conclusion, however, is another matter. Insofar as it reveals judicial uncertainty as to the proper approach for interpreting insurance contracts, the case may well be relevant to every insurance dispute where ambiguity is an issue.

Dubiety in this area stems from application of two well-worn principles of insurance law: unequivocal language must be given its plain meaning though found in an insurance contract,[9] and, if policy language is reasonably susceptible of more than one interpretation, the ambiguity must be resolved in favor of the insured.[10] These precepts are often termed "well-settled," but in practice their application is far from uniform.[11] Over the years, two general approaches have emerged: the plain meaning approach and the reasonable interpretations approach.

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7. *Crim* was tried in the Circuit Court for Johnson County, Missouri. After judgment for plaintiff, the case was appealed to the Missouri Court of Appeals for the Western District. In a 4-3 decision, the court of appeals affirmed, Crim v. National Life & Accid. Ins. Co., No. 30147 (Mo. App., W.D. Oct. 29, 1979), but transferred the case to the Missouri Supreme Court for final determination.

8. 605 S.W.2d at 77. Clearly, the court in *Crim* held that lost sight is not "irrecoverable" to the extent it can be corrected by artificial lenses. Interestingly, however, the court's introductory declaration that " '[e]ntire [. . .] loss' is not an issue . . . [in this case]," *id.* at 75, indicates that loss of sight may be "entire," without regard to whether it is correctible by artificial lenses. *See* note 3 *supra*. Indeed, the majority opinion does not preclude an argument that loss of practical and useful sight, even for an instant and without regard to whether it is correctible by *any* means, qualifies as the "entire" loss of sight.

9. State Farm Mut. Auto. Ins. Co. v. Ward, 340 S.W.2d 635, 639 (Mo. 1960).

10. United States Fidelity & Guar. Co. v. Safeco Ins. Co. of America, 522 S.W.2d 809, 817 (Mo. En Banc 1975).

11. *See* cases cited notes 17, 47-49 *infra*. The uneven application of these principles may reflect the more general controversy among contract scholars regarding the correct approach to interpreting integrated agreements.

In the view of Professor Williston, terms in integrated agreements should be accorded the meaning which would be accorded by a reasonable man in the position of the parties. 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 610, at 511 (3d ed. 1961).

According to Professor Corbin, however, the primary function of the court in contract disputes is to determine the intention and understanding of the parties. 3

Under the plain meaning approach the words "plain" and "unambiguous" are virtually synonymous. A court following this approach will state the rules of construction somewhat as follows: "When the language of a contract is plain[12] and its meaning unmistakable, there is no ambiguity and no room for construction. . . . The court can only construe when the contract is reasonably or fairly susceptible of different constructions."[13] Judicial attention under this approach focuses first on determining whether the language in issue has a plain meaning. Most relevant to the court are such questions as whether on its face the language seems to have a plain meaning, whether other courts have determined the language to be plain, and whether the dictionary supports a view that the meaning is plain. If these questions are answered in the affirmative, further inquiry is unnecessary.[14]

A. CORBIN, CONTRACTS § 538 (1960). If they coincide, there is a contract. If they do not coincide, there is no agreement on the term in dispute unless one party knew or had reason to know of the meaning attached by the other. *Id.*

In practice, emphasis by courts following the Williston approach may well be on ascertaining the plain and ordinary meaning of a term, *i.e.*, that meaning which would be understood by a reasonable person in the position of the parties. Courts following the Corbin approach, on the other hand, are more likely to emphasize an analysis of each asserted meaning to ascertain if it was the meaning actually intended by either or both of the parties.

12. When the court in an insurance case declares that a term has a plain meaning it does not assert that the meaning of the term can never be indistinct. Rather, the court means that the meaning of the term plainly includes or excludes coverage for a particular event. This distinction was illustrated in State Farm Mut. Auto. Ins. Co. v. Ward, 340 S.W.2d 635 (Mo. 1960), where plaintiff unsuccessfully argued that because the meaning of a term might be indistinct in other contexts, it was ambiguous and should be construed in his favor. *Id.* at 639. Occasionally, courts blur the distinction between unambiguous meaning (not in issue) and unambiguous coverage (in issue). *See* Winterton v. Van Zandt, 351 S.W.2d 696, 700 (Mo. 1961), and Adams v. Covenant Security Ins. Co., 465 S.W.2d 32, 34 (Mo. App., St. L. 1971), in which the courts found that even though language had an unambiguous meaning, the meaning was sufficiently flexible to permit construction in favor of the insured. What these courts meant was that although there was a seemingly plain dictionary definition, its applicability to a particular event was uncertain. The fact that *Adams* and *Winterton* were cited by the majority in *Crim*, 605 S.W.2d at 76, indicates that this court too may have lost sight of the distinction between "meaning" and "coverage." Use of the term "plain coverage" would eliminate much confusion, but since "plain meaning" is the term used by the courts, it will be used throughout this Casenote.

13. Mutual Benefit Health & Accid. Ass'n v. Hobbs, 186 F.2d 321, 323 (8th Cir. 1951).

14. In cases where the court can find that the meaning of a term plainly includes or excludes coverage for the event in question, the plain meaning approach bears a striking resemblance to the approach advocated by Professor

A court using the reasonable interpretations approach concedes that plain and unambiguous language in an insurance contract must be given its ordinary meaning and effect, but stresses that ambiguity exists when the language used is reasonably susceptible of more than one interpretation.[15] Under this approach, the reasonableness of the insured's interpretation is the focus of judicial attention. Most relevant to the court are such considerations as whether the insured's interpretation seems reasonable and the extent to which other courts have acknowledged its reasonableness. If the results of this analysis are positive, the language can be considered ambiguous and construed in favor of the insured.[16]

Williston. *See* note 11 *supra*. In cases where the court is unable to find clear coverage or exclusion, the likeness seems to end.

Under Williston's theory, when the court is unable to determine the meaning which would have been understood by a reasonable man in the position of the parties, the language is ambiguous. 4 S. WILLISTON, *supra* note 11, § 609. In such event, the following rules apply: (A) where neither party knows or has reason to know of the ambiguity or where both parties have reason to know of the ambiguity it is given the meaning that each party intended it to bear. As a practical matter, this means that if the parties gave the ambiguous expression the same meaning there was agreement, but if they gave it a different meaning there was none; (B) where one party knows or has reason to know of the ambiguity and the other does not, it bears the meaning given to it by the latter. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 3-10, at 119 (2d ed. 1977).

In Missouri insurance cases, there is no overt consideration of the notion of fault. Once it is determined that language has no plain meaning, it is labeled uncertain or ambiguous and construed in favor of the insured. *See, e.g.*, Boling v. State Farm Mut. Auto. Ins. Co., 466 S.W.2d 696, 698 (Mo. 1971). *See* note 16 *infra*.

The plain meaning approach is not entirely inconsistent with the approach advocated by Professor Corbin. In the absence of extrinsic evidence to the contrary, a court using Corbin's approach may find the meaning of a term so plain and the interpretation now asserted by one of the parties so unreasonable that it concludes both parties intended the plain meaning of the term. 3 A. CORBIN, *supra* note 11, § 539, at 82.

To Williston, the finding of a plain meaning can end the inquiry. To Corbin, on the other hand, plain meaning is only evidence of the intent of the parties. To the extent it stifles inquiry beyond the plain meaning of a term, the plain meaning approach would be an anathema to him.

15. *E.g.*, Kyte v. Fireman's Fund Am. Ins. Cos., 549 S.W.2d 366, 367 (Mo. App., Spr. 1977).

16. The reasonable interpretations approach is consistent with the approach advocated by Professor Corbin. Under both, the content and reasonableness of each party's interpretation must be evaluated. Under both, a court may find the construction now asserted by one of the parties that both parties intended the reasonable construction of the term. 3 A. CORBIN, *supra* note 11, § 539, at 82.

According to Corbin, however, once it is determined that one party intended to purchase different coverage than the other party intended to provide, the

The difference between the plain meaning approach and the reasonable interpretations approach is really one of emphasis. Under the former, a term which has a plain and unambiguous meaning is not reasonably susceptible of more than one interpretation; under the latter, a term which is reasonably susceptible of two interpretations does not have a plain and unambiguous meaning.

In recent years the reasonable interpretations approach has received increasing approval among Missouri's courts of appeals.[17] *Crim* indicates, however, that the party who relies solely on this approach may do so at grave peril.

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agreement fails unless one party knew or had reason to know of the purpose of the other party. If one party knew or had reason to know of the purpose of the other party, the language is accorded the meaning understood by the party without fault.

In Missouri insurance cases, there is no overt consideration of the notion of fault. Once it is determined that the language in question is reasonably susceptible of more than one interpretation, it is ambiguous and construed in favor of the insured. *E.g.*, Kyte v. Fireman's Fund Am. Ins. Cos., 549 S.W.2d 366, 368 (Mo. App., Spr. 1977).

It may be that the courts in these cases accept impliedly the fiction that insurance companies have reason to know all reasonable meanings which may be attached to their language and, conversely, that most insureds have no reason to know the meaning, no matter how reasonable, intended by the insurer. Most likely, however, the reasonable interpretations approach is an outgrowth of Corbin's recognition that there may be cases in which all efforts to ascertain the intent of the parties fail. Insurance cases may be particularly appropriate for this classification because most often the insured himself doesn't know the specific nature of the protection he intended to buy. According to Corbin, after all efforts to ascertain the intent of the parties fail and two possible and reasonable interpretations remain, the rule of interpreting language against the draftsman may be applied. 3 A. CORBIN, *supra*, § 559, at 262.

17. *See generally* Aetna Life & Cas. Co. v. Western Fire Ins. Co., 570 S.W.2d 691 (Mo. App., K.C. 1978); Kyte v. Fireman's Fund Am. Ins. Cos., 549 S.W.2d 366 (Mo. App., Spr. 1977); Kay v. Metropolitan Life Ins. Co., 548 S.W.2d 629 (Mo. App., St. L. 1977); Bennett v. American Life & Accid. Ins. Co., 495 S.W.2d 753 (Mo. App., St. L. 1973); Reese v. Preferred Risk Mut. Ins. Co., 457 S.W.2d 205 (Mo. App., St. L. 1970); White v. Smith, 440 S.W.2d 497 (Mo. App., Spr. 1969); 95 West Corp. v. General Ins. Co. of America, 424 S.W.2d 350 (Mo. App., K.C. 1967); Union Elec. Co. v. Pacific Indem. Co., 422 S.W.2d 87 (Mo. App., St. L. 1967); Morris v. Western Cas. & Sur. Co., 421 S.W.2d 19 (Mo. App., Spr. 1967); Hammontree v. Central Mut. Ins. Co., 385 S.W.2d 661 (Mo. App., Spr. 1965); North Kansas City Memorial Hosp. v. Wiley, 385 S.W.2d 218 (Mo. App., K.C. 1964); Irelan v. Standard Mut. Ass'n, 379 S.W.2d 815 (Mo. App., Spr. 1964); Basore v. Allstate Ins. Co., 374 S.W.2d 626 (Mo. App., K.C. 1963); Hill v. Seaboard Fire & Marine Ins. Co., 374 S.W.2d 606 (Mo. App., K.C. 1963). *But see* Jordon v. United Equit. Life Ins. Co., 486 S.W.2d 664 (Mo. App., St. L. 1972); Eaglestein v. Pacific Nat'l Fire Ins. Co., 377 S.W.2d 540 (Mo. App., K.C. 1964).

Although the rules of construction applied in this case are nowhere set forth, the majority opinion indicates adherence to the plain meaning approach. Most indicative is its treatment of the authorities. Four cases were cited in support of plaintiff's interpretation of the policy language.[18] Three were dismissed on technical grounds.[19] Completely unmentioned by the court in its review of these cases was the endorsement in each of plaintiff's reasoning in the present case.[20] In all three cases the courts deemed it reasonable to believe that references to "sight" in insurance policies do not mean artificially assisted sight. These findings need not have been adopted by the court in *Crim*, but there is a quantum leap between disapproving a decision and finding it irrelevant. The peremptory dismissal of the cases suggests strongly that the reasonableness of the plaintiff's interpretation was not the predominant majority concern. Further analysis confirms this suspicion.

In *Knuckles v. Metropolitan Life Insurance Co.*, the Utah Supreme Court ruled that the language "total and irrecoverable loss of sight" was ambiguous as it applied to eyesight improved by artificial lenses.[21] Without ceremony, the majority in *Crim* pilloried this decision as "unsound and unsupported by authority."[22] Two reasons were given for the

18. Winegarden v. Peninsular Life Ins. Co., 363 So. 2d 1172 (Fla. Dist. Ct. App. 1978); Benson v. Grand Lodge of the Bhd. of Locomotive Firemen, 54 S.W. 132 (Tenn. Ch. App.), *aff'd orally*, 54 S.W. 132 (Tenn. 1899); Boone v. United Founders Life Ins. Co., 565 S.W.2d 380 (Tex. Civ. App. 1978); Knuckles v. Metropolitan Life Ins. Co., 25 Utah 2d 319, 480 P.2d 745 (1971).

19. *Winegarden* was labeled unconvincing, because in that case two policies covering loss of sight were considered, and the court took no particular notice of the words "irrecoverable loss of sight." 605 S.W.2d at 77. *Benson* was disregarded because the language interpreted was not the same as that in *Crim*. *Id.* at 76-77. *Boone* was cited but not discussed. *Id.* at 76.

20. *Winegarden* entailed consideration of two policies. One included coverage for "permanent loss of sight," and the other covered "entire and irrecoverable loss of sight." 363 So. 2d at 1172. Because neither policy indicated whether loss of vision meant loss of actual vision or loss of corrected vision, the court concluded *both* policies were ambiguous. *Id.* at 1173. In *Benson*, the insured was entitled to benefits if he became "totally blind." 54 S.W. at 134. When it was argued that payment could be denied if the insured's vision was improved by artificial lenses, the court replied: "To hold that the parties have in contemplation the use of lenses would be to add to the contract a term that isn't in it." *Id.* at 136. Finally, although *Boone* dealt with the recoverability of sight through a corneal transplant, the court therein expressed approval of the opinion in Knuckles v. Metropolitan Life Ins. Co., 25 Utah 2d 319, 480 P.2d 745 (1971), interpreting similar policy language: " 'It would seem that it would not be unreasonable to conclude that the purpose of the insurance was to compensate for a hand or a foot *or a sight once lost*, albeit the sight, like the hand, artificially may be made serviceable.' " 565 S.W.2d at 382-83 (quoting *Knuckles*, 25 Utah 2d at 322, 480 P.2d at 747) (emphasis added in *Boone*).

21. 25 Utah 2d 319, 323, 480 P.2d 745, 748 (1971).

22. 605 S.W.2d at 77.

court's scorn. First, the *Knuckles* court claimed a split of authority but cited no case in which the identical language was declared ambiguous,[23] and second, the decision relied on workmen's compensation cases which the Missouri court considered inapplicable to private insurance litigation.[24] Nowhere in the court's review was the reasoning advanced in *Knuckles, i.e.*, the purpose of the insurance was to compensate for sight once lost, albeit the sight artificially may be made serviceable,[25] described or evaluated. The court focused solely on undermining the authorities supporting the *Knuckles* conclusion.

On the other side, four cases were cited as having found the language "entire and irrecoverable loss of sight," or its equivalent, clear and unambiguous. Two of these cases, *Home Life Insurance Co. v. Stewart*[26] and *Wallace v. Insurance Co. of North America*,[27] were precisely in point. The other two, however, were entirely irrelevant to plaintiff's interpretation of the policy language.

In *Equitable Life Assurance Society of the United States v. Short*,[28] the Indiana Court of Appeals was concerned with the ambiguity of "total and irrecoverable loss of sight" as it related to restoration of sight through surgery. The plaintiff in *Crim*, however, posited a substantive distinction between medical treatment, including surgery, and artificial lenses, *i.e.*, vision of one's natural eye might be recovered through the former but not through the latter. Although the possibility of recovery through artificial lenses was not an issue in *Short*, the case was quoted by the court in *Crim* for its determination that the word "irrecoverable" is not ambiguous.[29]

In *Smith v. Great American Life Insurance Co.*, the Georgia Court of Appeals concluded that the insured, who had uncorrected vision in a range of 20/200 to 20/300 and corrected vision of 20/40 to 20/60, had not suffered "irrecoverable loss of the entire sight."[30] This decision, however, was based on an earlier Georgia Supreme Court decision, *State Farm Mutual Automobile Insurance Co. v. Sewell*,[31] which limited coverage under the term "entire and irrecoverable loss of sight" to cases where "no eyesight remains."[32] Since the plaintiff in *Smith* did not suffer "entire" loss

23. *Id.* at 76.
24. *Id.* at 77.
25. 25 Utah 2d at 322, 480 P.2d at 747.
26. 114 F.2d 516 (10th Cir. 1940).
27. 415 F.2d 542 (6th Cir. 1969).
28. 165 Ind. App. 338, 332 N.E.2d 273 (1975).
29. 605 S.W.2d at 75 (quoting *Equitable Life Assurance Soc'y of the United States*, 165 Ind. App. at 344, 332 N.E.2d at 277). Citation of this case may also indicate a failure by the court to distinguish between unambiguous meaning and unambiguous coverage. *See* note 12 *supra*.
30. 125 Ga. App. 587, 588, 188 S.E.2d 439, 440 (1972).
31. 223 Ga. 31, 153 S.E.2d 432 (1967).
32. *Id.* at 32, 153 S.E.2d at 433.

of sight under the *Sewell* test, there is no indication the possibility of "recovery" through glasses was a factor in the court's decision.

After quoting *Stewart* and *Short*, and citing *Smith* and *Wallace*, the majority in *Crim* declared:

> The logic of the holdings that vision which has been restored by the use of artificial lenses has not been irrecoverably lost is compelling. It is common knowledge such devices are frequently employed in order to avoid loss of sight. To say that one whose sight has been so restored has lost his sight ignores reality.[33]

Once again, the court failed to address plaintiff's contention. Plaintiff did not argue that one whose sight has been restored by artificial lenses has lost his sight. He maintained only that sight achieved through artificial lenses was not the sight he had lost.[34]

The court continued, reasoning that the word "irrecoverable" is not made ambiguous by the fact that recovery of sight may come about in several ways: naturally, through surgical and medical treatment, and by artificial means.[35] In other words, the majority assumed recovery can be achieved by artificial means without considering whether it is reasonable to believe otherwise.

Finally, the court's *coup de grace*:

> The term "irrecoverable loss of sight" has a plain, easily understood meaning. Webster's Third New International Dictionary defines "irrecoverable" as "not capable of being recovered, regained, remedied or rectified." The synonymous cross reference is: "IRREPARABLE."[36]

Like the court's previous discussion, this definition does little to contradict plaintiff's interpretation of the policy language. The Webster definition indicates "irrecoverable" may, on occasion, be used interchangeably with several terms. This does not mean that in every context the word "irrecoverable" is synonymous with all the terms listed. "Apparently, the shipwreck is irrecoverable," is not the same as, "Apparently, the shipwreck is irreparable," or " . . . is not capable of being remedied." It may in fact be that this "plain, easily understood meaning" is quite consistent with plaintiff's interpretation. To the extent that the natural, unaided sight of plaintiff's right eye was lost and not capable of being regained, it was "irrecoverable." In other words, artificially corrected sight may be a *substitute for* but is not a *recovery of* natural, unaided sight.

Again, the court might well have evaluated this argument and found it unreasonable. As it happened, however, plaintiff's interpretation of the policy language was never juxtaposed with its "plain, easily understood

33. 605 S.W.2d at 76.
34. Brief of Respondent at 6-7.
35. 605 S.W.2d at 76.
36. *Id.*

meaning." Indeed, the discovery of a plain meaning seemed to extinguish any need to inquire further.

Examination of the majority opinion seems to reveal a classic application of the plain meaning approach. Without evaluating the reasonableness of the plaintiff's interpretation of "irrecoverable loss of sight," the court was able to find a clear and unambiguous meaning which compelled a finding in favor of the defendant.[37]

Three members of the court entered a terse, yet strident, dissent.[38] "Each of the opposing constructions placed by the parties upon the word 'irrecoverable' is reasonable. . . . Inasmuch as the term is reasonably capable of being understood in either of two possible senses, it is ambiguous."[39] Clearly, the minority advocated a difference in approach as well as result. In the dissenters' view, a determination of ambiguity is the product of an appraisal of the reasonableness of each party's interpretation.

Ancillary to this argument, the minority posited that the very existence of different court rulings concerning a term in an insurance policy indicates strongly the existence of ambiguity.[40] Although this principle of insurance construction[41] has, apparently, never been adopted by the Missouri Supreme Court, it received approval from the Kansas City Court of Appeals as early as 1915.[42] In 1958 the Springfield Court of Appeals opined that judicial conflict on the meaning of a word is itself indicative that the word as so used is susceptible to more than one reasonable interpretation.[43]

The majority opinion in *Crim* seems to preclude adoption of this prin-

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37. *Id.* at 77.

38. *Id.* at 78 (Rendlen, J., dissenting). There were two dissenting opinions in this case. Three judges concurred in the dissent cited above. Two of these judges joined in another dissent, declaring that although there was sufficient evidence to support a finding of ambiguity, they did not regard the policy language as ambiguous. *Id.* at 78 (Bardgett, C.J., dissenting). The wording of the policy convinced these judges that the insured intended to purchase and the insurance company intended to sell a policy which provided coverage for this injury. *Id.* (Bardgett, C.J., dissenting). Because this opinion does not shed light on the approach followed or advocated by members of the court in this case, it is not discussed herein at length.

39. *Id.* at 79 (Rendlen, J., dissenting).

40. *Id.* (Rendlen, J., dissenting).

41. *See generally* 13 J. APPLEMAN & J. APPLEMAN, *supra* note 6, § 7404, at 334; 1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 15:83 (2d ed. Supp. 1979); 43 AM. JUR. 2d *Insurance* § 273 (1969 & Cum. Supp. 1980).

42. Schmol v. Travelers' Ins. Co., 177 S.W. 1108, 1111 (K.C.), *rev'd on other grounds*, 266 Mo. 580, 182 S.W. 740 (En Banc 1915).

43. Allstate Ins. Co. v. Hartford Accid. & Indem. Co., 311 S.W.2d 41, 47 (Mo. App., Spr. 1958).

ciple in its most extreme form, *i.e.*, conflicting judicial opinions *compel* a finding of ambiguity.[44] Nothing in the decision, however, prohibits recognition of conflicting judicial opinions as evidence of ambiguity, and courts in many other states have done so.[45] One court went so far as to cite conflicting opinions among different levels of the same court system as evidence of ambiguity.[46]

In the last twenty years the Missouri Supreme Court's approach to determining ambiguity in insurance contracts has been far from consistent. In a few cases, the court seemingly has recognized the reasonable interpretations approach.[47] In more cases, the court has seemed content to

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44. "If we say that language becomes ambiguous because some one contends it is ambiguous or some other concludes it is ambigous, we save ourselves much labor, but we have applied a test that scarcely will stand examination. Unless we can point out in language we are considering wherein it has a double meaning, we are not justified in saying it is ambiguous, however many learned judges and unlearned laymen have voted 'yes' upon the question, 'Is it ambiguous?' "

605 S.W.2d at 77 (quoting Orr v. Mutual Life Ins. Co., 57 F.2d 901, 903 (W.D. Mo. 1932), *aff'd*, 64 F.2d 561 (8th Cir. 1933)).

45. Like Missouri, Alabama and Oregon have expressly rejected the notion that conflicting judicial opinions compel a finding of ambiguity. Trinity Universal Ins. Co. v. Robert P. Stapp, Inc., 278 Ala. 209, 212, 177 So. 2d 102, 105 (1963); I-L Logging Co. v. Manufacturers & Wholesalers Indem. Exch., 202 Or. 277, 316-17, 275 P.2d 226, 230-31 (1954). In a number of states, conflicting judicial opinions have been recognized as evidence of ambiguity. *See* Federal Ins. Co. v. P.A.T. Homes, Inc., 113 Ariz. 136, 138, 547 P.2d 1050, 1052 (1976); Employers Mut. Liab. Ins. Co. v. Puryear Wood Prods. Co., 247 Ark. 673, 678, 447 S.W.2d 139, 142 (1969); Boston Ins. Co. v. Gable, 352 F.2d 368, 370 (5th Cir. 1965) (applying Georgia law); Alliance Life Ins. Co. v. Ulysses Vol. Fireman's Relief Ass'n, 215 Kan. 937, 948, 529 P.2d 171, 180 (1974); C & J Commercial Driveway, Inc. v. Fidelity & Guar. Fire Corp., 258 Mich. 624, 629, 242 N.W. 789, 790 (1932); Walker v. Fireman's Fund Ins. Co., 268 F. Supp. 899, 901 (D. Mont. 1967) (applying Montana law); Thomas v. Mutual Benefit Health & Accid. Ass'n., 123 F. Supp. 167, 171 (S.D.N.Y. 1954) (applying New York law), *aff'd*, 220 F.2d 17 (2d Cir. 1955); Gould Morris Elec. Co. v. Atlantic Fire Ins. Co., 229 N.C. 518, 521, 50 S.E.2d 295, 297 (1948); Equitable Life Ins. Co. v. Gerwick, 50 Ohio App. 277, 281, 197 N.E. 923, 925 (1934); Jones v. Insurance Co. of North America, 264 Or. 276, 282, 504 P.2d 130, 133 (1972); Alvis v. Mutual Benefit Health & Accid. Ass'n, 201 Tenn. 198, 204, 297 S.W.2d 643, 645 (1956).

46. Thomas v. Mutual Benefit Health & Accid. Ass'n, 123 F. Supp. 167, 171 (S.D.N.Y. 1954) (applying New York law), *aff'd*, 220 F.2d 17 (2d Cir. 1955).

47. *E.g.*, Moskowitz v. Equitable Life Assurance Soc'y of the United States, 544 S.W.2d 13, 16 (Mo. En Banc 1976) ("The language is brief and precise. . . . There is no room for any other reasonable interpretation of the language used."); Aetna Cas. & Sur. Co. v. Haas, 422 S.W.2d 316, 319 (Mo. 1968) ("The clause is uncertain as to its application, and as applied to the facts and circumstances is

determine whether the language has a plain, clear, certain, or unambiguous meaning without indicating how it reached this conclusion.[48] In several instances, the court has recited both principles without amplification as to where the emphasis should lie,[49] and on one particularly creative occasion the court found that, although the language was ambiguous, it also had a plain meaning.[50] These opinions suggest that the court itself may be irresolute about the proper approach to apply.

For the most part, this ambivalence makes little practical difference. If a court feels the interpretation proffered by either party is clearly unreasonable, or the interpretation asserted by the insured is more reasonable than that of the insurer, or that both interpretations are equally reasonable, its decision will be the same regardless of approach.[51] In a

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susceptible of more than one interpretation."); Meyer Jewelry Co. v. General Ins. Co. of America, 422 S.W.2d 617, 623 (Mo. 1968) ("We follow a construction favorable to the insured wherever the language of a policy is susceptible of two meanings, one favorable to the insured, the other to the insurer.").

48. *E.g.*, Swift & Co. v. Zurich Ins. Co., 511 S.W.2d 826, 830 (Mo. 1974); Boling v. State Farm Mut. Auto. Ins. Co., 466 S.W.2d 696, 698 (Mo. 1971) ("Since the language used is uncertain the well established rule applies that it will be construed against the insurer."); Gossett v. Larson, 457 S.W.2d 709, 712 (Mo. 1970) ("the language of the policy is not ambiguous, but, is clear and completely free of ambiguity"); State *ex rel.* State Dep't of Pub. Health & Welfare v. Hanover Ins. Co., 431 S.W.2d 141, 143 (Mo. 1968) (" 'The courts may resort to construction . . . of a contract of insurance only when the language of the contract, in its ordinary meaning, is indefinite, ambiguous, or equivocal; if the language employed is clear and unambiguous there is no occasion for construction or the exercise of a choice of interpretations.' ") (quoting 44 C.J.S. *Insurance* § 290, at 1139-40 (1945)); State Farm Mut. Auto. Ins. Co. v. Ward, 340 S.W.2d 635, 639 (Mo. 1960) ("Unequivocal language is to be given its plain meaning though found in an insurance contract.").

49. *See, e.g.*, U.S. Fidelity & Guar. Co. v. Safeco Ins. Co. of America, 522 S.W.2d 809 (Mo. En Banc 1975), where the court stated:

> It is true that plain language in an insurance policy is not to be used to create an ambiguity where in the context of the use and application of a term none exists, but it is also established beyond question that where an insurance policy is reasonably susceptible to two or more meanings, the ambiguity will be resolved in favor of the insured.

Id. at 817. *See also* Meyers v. Smith, 375 S.W.2d 9, 16-17 (Mo. 1964) ("Plain and unambiguous language must be given its plain meaning. The contract should be construed as a whole; but, insofar as open to different constructions, that most favorable to the insured must be adopted."); Pierce v. Businessmen's Assurance Co. of America, 333 S.W.2d 97, 100 (Mo. 1960) ("In construing an insurance contract the court should give to plain and unambiguous words their plain meaning; it should consider the policy as a whole and if it is open to different constructions, that which is most favorable to the insured should prevail . . . .").

50. English v. Old Am. Ins. Co., 426 S.W.2d 33, 38 (Mo. 1968).

51. In these cases, there are three possible determinations: (1) the policy language does not cover the event in question (advocated by insurer), (2) the

close case, however, where the court's first impression is that the interpretation offered by the insurer is more reasonable than that of the insured, the approach followed by the court may well determine the result.

As illustrated by *Crim*, a court applying the plain meaning approach can follow its first impression to a conclusion in favor of the insurer without evaluating, or even thoroughly understanding, the interpretation of the insured. It is quite possible, therefore, to find that policy language plainly denies coverage even though the insured's interpretation is reasonable, albeit perhaps seemingly less reasonable than that of the insurer. Under the reasonable interpretations approach such an outcome is not possible. Consideration begins with an evaluation of each party's interpretation. If both are found reasonable, whether or not one seems more reasonable, the language is ambiguous and necessitates a finding in favor of the insured.

The spirited dissent in *Crim* and widespread approval by the courts of appeals may indicate an impetus toward unequivocal adoption of the reasonable interpretations approach. Pending unanimity, however, the insurance claimant who is not certain the court will immediately find his interpretation at least as reasonable as that of the insurer had best include in his case an argument that the reasonable interpretations approach is the correct approach to apply.

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policy language does cover the event in question (advocated by insured), or (3) it is unclear whether the language covers the event in question (also advocated by the insured due to the rule that ambigious language must be construed in his favor).

If convinced there is only one reasonable interpretation of the policy language (*i.e.*, it covers or does not cover the event in question and any assertion to the contrary is unreasonable), all courts will find in favor of the only reasonable interpretation. A plain meaning court will find the plain meaning includes or excludes coverage, and a reasonable interpretations court will agree that language reasonably susceptible to only one interpretation must be accorded its plain meaning.

If convinced that the interpretation which includes coverage and the one which does not are equally reasonable, all courts will find the language ambiguous. A plain meaning court will be unable to find a plain meaning (*i.e.*, plain coverage), and the reasonable interpretations court will be compelled by the two reasonable interpretations to make a finding of ambiguity.

As the insured's assertion for coverage becomes more reasonable vis-à-vis that of the insurer, it becomes more likely the court will find the language unambiguous in his favor, but he is already assured of victory by establishing that his interpretation is equally reasonable and the language, therefore, is ambiguous.