# "A Major New Move" in Contract Interpretation

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Omri Ben-Shahar and Lior Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, **U. of Chi. Coase-Sandor Inst. for L. & Tech.** Research Paper No. 791 (2017), available at SSRN.

Despite its practical importance, contract interpretation is the red-haired stepchild of the 1L classroom–the doctrine is infamously incoherent, rests on law/fact distinctions which even the Restatement elides, and testing meaning on a final exam can only succeed using artificially simple narratives. Many of us bring a rubber chicken to class at least once a semester because that fowl case is (at least) written-well and marches through alternative meanings, though the holding rests on a *deus ex machina* of burden shifting. It's a stewing mess.

Chicago's Omri Ben-Shahar and Lior Jacob Strahilevitz aim to free us of the burden of teaching both parole evidence and interpretation, and, along the way, reduce aggregate contract litigation costs and contract length, while improving readability and denying firms the ability to bully their opponents in court with expensive lawyers. If their forthcoming article, Interpreting Contracts via Survey and Experiments doesn't achieve all its ends, it still is undeniably (in their words) a "major new move" in the field. It will generate discussion in class and in the law reviews, and it's worth your time to read.

The pitch is titular. The authors assert that contract interpretation is inconsistent across jurisdictions, overly complex, and unpredictable. That's so in part because courts aren't themselves clear about what they ought to be doing (are they interpreting, gap-filling, gatekeeping, or creating), and in part because they haven't followed the approach of judges facing the problem of confusion in the trademark context and embraced survey methods. Contract litigation is bespoke, while it ought to be standardized.

Their proposal would outsource the problem of meaning to survey respondents (matched to the kind of individuals who sign the sort of contract in question). Thus, general samples of Americans for consumer contracts, lawyer samples for standard merchant contracts, and perhaps diamond dealers for diamond contracts. (The more particular the field, the smaller the population to be tested, but always one that is larger than the particular signatories.) Those individuals would be asked (either in surveys or in experiments testing different terms) about their understanding of terms in dispute: the contract's meaning would be, by and large, the majority's. The paper admirably provides a proof of concept through five examples– two in the insurance context, two employment disputes, and one consumer contract – where a national sample they recruited provided evidence of meaning that contradicted learned jurists'.

The authors acknowledge leaving many methodological questions open – i.e., how much context to provide, how to determine the percentage of respondents necessary to prevail, how to handle expert battles, what to do about demographic differences. But the basic idea is simple to grasp: parties should prefer interpretation-via-survey to interpretation-via-*Pacific-Gas.* Thus, even if hide-bound courts were not to immediately adopt the survey proposal *sua sponte*, at the very least well-counseled parties should begin to contract into survey interpretation though clauses analogous to common and well-accepted merger and no oral modification terms.

The Article is rich, learned and thoughtful and the brief summary above does it insufficient justice. Like

many significant pieces of scholarship, it provokes questions—both descriptive and theoretical.

The authors claim that interpretation is a serious problem for consumer contracts (and indeed, think their proposal fits best in such cases). But they might have spent more time providing evidence for the claim: aren't most consumer contract cases really about formation and defenses to obligation, not meaning? To the extent that the ratio of consumer-contract interpretation cases to merchant-contract cases is low, perhaps more time ought to have been spent exploring the complexities of surveys of the latter sorts of deals.

Second, and again focusing on consumer contracts, does it really make sense to simply pull meaning from language that no one – neither the drafters nor the adherents – expected to be read? The authors are ready for the question:

> The primary answer (albeit disappointingly simple) is: it's the law! This criterion—how an ordinary recipient of a contractual message would understand it—is a touchstone of contract law, used to determine the meaning of advertisements, offers, and contractual terms."

This is literally true as a statement of what students are supposed to say on the Bar Exam. But it's not realistic. Most of you will agree that the search for objective meaning in interpretation is a legal fiction – and that, therefore, there is something potentially externally invalid and perverse about survey respondents (who are motivated to read and pay attention) determining the meaning of terms that ordinary consumers are motivated to ignore.

Stepping back from these concerns, the best part of this paper is the invitation it offers to think about why we have the doctrine we do – what values are advanced through individualized, rather than aggregate, interpretation? Are the benefits worth the costs? Is the answer the same for all sorts of contracts? If Ben-Shahar and Strahilevitz have correctly identified a potential efficiency, perhaps firms will take up their invitation and customize the interpretation regime. At that point, courts will have to choose whether to permit this form of tailoring, or (as is the case in many areas where parties try to assert control over litigation) to work around it.

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