

THOUGHT LEADERSHIP

News

## FIFTH CIRCUIT REJECTS SOPHISTICATED-INSURED EXCEPTION TO DOCTRINE OF CONTRA PROFERENTUM

Newsbrief

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Last Wednesday, the Fifth Circuit Court of Appeals affirmed summary judgment in favor of insureds seeking coverage under a directors' and officers' liability policy for attorney fees and costs incurred in successfully defending criminal charges against them as employees of the Stanford Financial Group Company. In *Certain Underwriters at Lloyds London v. Perraud*, 2015 WL 4747318 (5th Cir. Tex. August 12, 2015), the trial court found that the policy exclusion Underwriters sought to apply to this case was ambiguous and interpreted the provision in favor of coverage applying the doctrine of *contra proferentum* ('if a policy is susceptible to more than one reasonable interpretation...Texas law requires an insurance policy to be construed against the insurer and in favor of the insured.'). And the trial court refused to apply a "sophisticated-insured exception" to the doctrine that some courts have applied when the insured is a sophisticated entity and actually negotiated or drafted applicable policy provisions.

On appeal, Underwriters did not challenge the ambiguity finding but only sought to overturn the judgment based on the sophisticated-insured exception. The Court observed the variety of approaches other courts have employed when applying the exception. But they also noted that no Texas court has ever recognized the exception and state's highest civil court recently declined the opportunity to do so on a certified question. So applying the well accepted doctrine of *contra proferentum*, and observing Texas's strong policy in favor of finding coverage, the Court affirmed summary judgment finding coverage under the policy.