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Hard Truths: Cracking Open the Case of Whether Hard Seltzer Is Beer

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NOTES

Hard Truths: Cracking Open the Case of Whether Hard Seltzer Is Beer

SCOTT FRASER*

Following the line of cases asking questions such as what is a chicken, and is a burrito a sandwich, comes the next deep legal issue, what is beer? How do we determine this seemingly simple question? Do we simply know it when we see (or taste) it? Does it require a mix of specific ingredients or certain processes? Or, if we should rely on definitions, do we look to the dictionary, history, or statutes? In a dispute in the United States District Court for the Southern District of New York, the court is asked to resolve this question. Courts have long used tools of contractual interpretation to determine the meaning of terms to which the parties involved have agreed. Sometimes though, it is not always so easy to determine what the parties meant, even when they provide definitions in the contract. This is further confused when the terms in controversy have historical, scientific, social, industrial, and legal definitions. Through the history and science of beer, principles of judicial contract interpretation, and judicial contract interpretation case law we will explore

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how the courts determine these issues, and whether there are better ways to answer life's hard questions.

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INTRODUCTION

After a long day in court, two opposing lawyers walk into a bar, turn to the bartender, and order an ice cold beer. The bartender nods, fills a mug with ale from the tap behind him and hands it to the first lawyer. Next, he ducks behind the counter, pulls out a hard seltzer

from the fridge, and slides it over to the second lawyer. No, this is not the setup to a bad joke, this is an illustration of the issue presented in Modelo's current lawsuit in the United States District Court for the Southern District of New York against Constellation Brands.[1] This Article will tackle the questions of whether hard seltzer is beer, what is beer, and what are the tools and limits to contractual interpretation by the courts.

In 2013, Modelo, a Mexican brewery well-known for its popular brands such as Corona, Modelo, and Pacifico, entered into a merger with the largest beer company in the world, Anheuser-Busch InBev SA/NV.[2] Soon after the merger, the U.S. Department of Justice ("DOJ") filed suit, claiming that the merger had created a monopoly.[3] In order to allay the DOJ's concerns, Modelo sold the rights to several assets and certain intellectual property related to its U.S. beer business in a $4.75 billion sublicensing agreement with Constellation Brands, a Delaware corporation with its principal place of business in Switzerland that manufactures beverages including wine, spirits, and beer.[4]

This agreement granted Constellation the exclusive license to use the Corona brand name, Modelo's most popular and valuable brand in the U.S. market, for beer products.[5] Further, the sublicense defines "Beer" as "beer, ale, porter, stout, malt beverages, and any other versions or combination of the foregoing, including non-alcoholic versions of any of the foregoing."[6] On February 15, 2021, Modelo filed suit in the United States District Court for the Southern District of New York against Constellation for violation of the sublicense,[7] followed by a second amended complaint on December 15,

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[1] Philip Blenkinsop, *AB InBev Takes Constellation to U.S. Court Over Corona Brand Name*, REUTERS (Feb. 15, 2021, 10:30 AM), https://www.reuters.com/business/media-telecom/ab-inbev-takes-constellation-us-court-over-corona-brand-name-2021-02-15/.

[2] Second Amended Complaint at 5, 7, Cerveceria Modelo De Mexico v. CB Brand Strategies, LLC, No. 1:21-CV-01317-LAK (S.D.N.Y. filed Dec. 15, 2021).

[3] *Id.* at 7.

[4] *Id.* at 5, 8.

[5] *Id.* at 9–10.

[6] *Id.* at 10.

[7] Complaint at 1, Cerveceria Modelo De Mexico v. CB Brand Strategies, LLC, No. 1:21-CV-01317-LAK (S.D.N.Y. filed Feb. 15, 2021).

2021.[8] Modelo alleged that Constellation had breached their sublicensing agreement when Constellation began selling a hard seltzer product in the U.S., under the Corona brand name.[9]

Constellation responded in its answer that it was not in breach of the agreement because its Corona Hard Seltzer product falls within the definition of "Beer" under the license agreement, and it requested in its prayer for relief that the court declare as such.[10] Although this case is ongoing at the time of publication, and there are other claims and defenses in this case,[11] this Article will focus on the specific issue of whether, under the agreement, hard seltzer qualifies as beer. First, Part I will explore the idea of what is beer and hard seltzer from a historical, scientific, and legal perspective.[12] Then, Part II will analyze the theoretical principles of judicial contract interpretation and how the courts apply those principles in practice.[13] Next, Part III will connect the conception of what beer is and the rules of judicial contract interpretation to determine how the Southern District of New York should decide the current case of *Modelo v. Constellation Brands*.[14] Finally, the Conclusion will address the importance of creating standards of interpretation and how legislators and courts, particularly in New York, should approach contract interpretation.[15]

I. WHAT IS BEER?

A. *From Myth to Mouth: A Not-So-Short History of Beer*

Two hundred years ago, Jean Anthelme Brillat-Savarin, a French lawyer and politician, remarked that "two significant characteristics differentiate us from the beasts: fear of the future, and

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[8] Second Amended Complaint, *supra* note 2, at 1.

[9] *Id.* at 22–23.

[10] Answer and Defenses to Second Amended Complaint at 32–33, Cerveceria Modelo De Mexico v. CB Brand Strategies, LLC, No. 1:21-CV-01317-LAK (S.D.N.Y. filed Dec. 28, 2021).

[11] Second Amended Complaint, *supra* note 2, at 21–23; Answer and Defenses, *supra* note 10, at 26–32.

[12] *See infra* Section I.

[13] *See infra* Section II.

[14] *See infra* Section III.

[15] *See infra* Conclusion.

desire for fermented liquors."[16] Although he may have been mistaken that humans alone enjoy a good inebriating beverage,[17] he was not alone, nor the first, in believing beer and other alcoholic beverages to be a defining characteristic of humanity and civilization.[18] In one of human civilizations oldest written stories from over 4,000 years ago, the Sumerian epic poem Gilgamesh, the titular hero befriends his adversary Enkidu, a wild man who lives and acts like a primitive beast.[19] In order to transform Enkidu into a civilized man, a young woman introduces him to what makes man and beast different in ancient Mesopotamia:

> They served him bread and ale, but Enkidu only knew
> How to suck milk from wild animals. He gaped
> And fumbled about, unsure how to eat the bread
> Or drink the strong ale. The woman said:
>
> "Enkidu, eat the bread; it is the staff of life.
> Drink the ale; it is the custom of the land."
>
> So Enkidu ate until he was full, and he drank
> Seven cups of strong ale. He became cheery,
> His heart soared, and his face was radiant.
> He rubbed down his matted hair and skin with oil.
> Enkidu had turned into a man . . . .[20]

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[16] ROB DESALLE & IAN TATTERSALL, A NATURAL HISTORY OF BEER 9 (2019).

[17] See *id.* at 4–8. The pen-tailed tree shrew has been observed feeding on the fermented nectar of the bertam palm in Malaysia, though they seem to avoid drunken behavior. *Id.* at 4. In Panama, howler monkeys have also been known to drink fermented palm nectar but, unlike the pen-tail tree shrew, the howler monkey does appear to become intoxicated. *Id.* at 5. Our closest primate cousin, the chimpanzee, similarly has been reported to drink the fermented palm sap of raffia palms in Guinea. *Id.* at 8. Still, it is not just our primate cousins that have been noted to indulge, as stories have been told of elephants, moose, and even the cedar waxwing bird drinking fermented fruit. *Id.* at 7.

[18] *See id.* at 14–15, 20; *see also* TOM STANDAGE, A HISTORY OF THE WORLD IN 6 GLASSES 26–30 (2nd ed. 2006).

[19] STANDAGE, *supra* note 18, at 26.

[20] GILGAMESH 12 (Stanley Lombardo trans., Hackett Publishing Company, Inc. 2019).

Enkidu's metamorphosis from beast to human illustrates that beer has long held a place in the human psyche as a vital marker of what makes us civilized and separates us from the wild.[21]

This connection makes sense when you consider that beer and brewing coincided with the shift from a hunter-gatherer lifestyle to the agricultural revolution.[22] Much like the chicken and the egg argument (we will get back to chicken later on)[23], there is a question of whether beer or the agricultural revolution came first, but it is clear that they go hand in hand.[24] Beer benefitted from permanent settlement because it takes time to brew the perfect batch.[25] Similarly, humans in an agricultural setting benefitted from beer in several aspects.[26]

First, beer was considered "liquid bread,"[27] not only because it holds many of the same nutritional properties, but the brewing and addition of yeast adds proteins and vitamins, replacing those lost from a more varied hunter-gatherer diet.[28] Furthermore, because beer requires boiled water, it was often safer to drink than water

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21 *See* STANDAGE, *supra* note 18, at 27.

22 *See id.* at 20 (dating the move from gathering grains to purposeful cultivation in the ancient world to 9000 BCE); DESALLE & TATTERSALL, *supra* note 16, at 15 (noting evidence at ancient Syrian sites of a shift from a hunter-gatherer lifestyle in 11,500 BCE to increased farming and grain-focused diets in 9,000 BCE); *see also* Christopher J. Fraga, Note, *A Room with a Brew: A Comparative Look at Homebrewing Laws in Japan & the United States*, 72 U. MIA. L. REV. 1239, 1243 (2018) (explaining ancient peoples gave up a nomadic lifestyle as they began to cultivate wild grasses into domesticated grain).

23 *Infra* Section II.E.1; *see* STANDAGE, *supra* note 18, at 20–21 (explaining the theory that farming was adopted in part to help maintain an ample supply of beer).

24 *See* Fraga, *supra* note 22, at 1243 (connecting the cultivation and domestication of wild grasses into grain for bread to the fermentation of those same grains); *see also* DESALLE & TATTERSALL, *supra* note 16, at 22–23 (showing the discovery of fermented rice-based beverages in a sophisticated Chinese village dating to 9,000–7,600 BCE).

25 *See* STANDAGE, *supra* note 18, at 20–21.

26 *See id.* at 21–22 (discussing the nutritional and food safety benefits of beer in the ancient setting).

27 DESALLE & TATTERSALL, *supra* note 16, at 9.

28 STANDAGE, *supra* note 18, at 33. Analysis of ancient Mesopotamian ration texts show that the mix of dates containing vitamin A, beer containing vitamin B, and onions containing vitamin C provided a balanced nutritious diet of 3,500 to 4,000 calories. *Id.*

sources near human settlement, which without treatment often became contaminated.[29] Beer was so essential to life in ancient Egypt that the ancient Egyptians who built the pyramids around 2,500 BCE were paid in bread and beer.[30] Beer became such an integral staple of nutrition that the phrase "bread and beer" came to be used as a greeting, similar to wishing someone good luck or good health.[31]

Outside of supporting ancient civilization and health, beer held special social significance.[32] In the political realm, a Sumerian king's formal meeting with another king or high official would be recorded as "when the king drank beer at the house of so-and-so."[33] In religion, beer was long considered both a gift from the gods themselves,[34] and was used all across the ancient world—Sumer, Egypt, South America, and China—as a religious offering.[35]

On a more personal level, beer often brought people together in a social setting.[36] Whether it was the original sharing of a beer amongst all classes of society in a communal vat through straws in

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[29] *Id.* at 22; *see also* Fraga, *supra* note 22, at 1246.

[30] STANDAGE, *supra* note 18, at 36–37; DESALLE & TATTERSALL, *supra* note 16, at 20.

[31] STANDAGE, *supra* note 18, at 37.

[32] *See id.* at 37–38.

[33] *Id.* at 29.

[34] *See* DESALLE & TATTERSALL, *supra* note 16, at 17; STANDAGE, *supra* note 18, at 28–29. Sumerians credited the Goddess Ninkasi with creating beer. DESALLE & TATTERSALL, *supra* note 16, at 17. An ancient clay inscription, the Hymn to Nankasi, reads not only as a mythic origin of beer, but as a recipe walkthrough on how to make it. *Id.* Egyptian mythology credited beer for saving human civilization. STANDAGE, *supra* note 18, at 28–29. In one myth, after learning that humans were conspiring against him, Ra the sun god unleashed the goddess Hathor on mankind to punish them. *Id.* Regretting his decision, he then dyed a large vat of beer red, disguising it as blood. *Id.* When Hathor encountered the brew, she drank deeply, fell asleep, and forgot about her mission of destruction. *Id.*

[35] STANDAGE, *supra* note 18, at 19.

[36] DESALLE & TATTERSALL, *supra* note 16, at 19.

ancient civilizations,[37] gathering at a public house in medieval England,[38] industrial workers pouring out of their factory shifts in turn-of-the-century England[39] and Australia,[40] or grabbing a beer at the ballpark in modern day America,[41] beer has long fostered social connections in society.[42]

Although this may seem unimportant in an article analyzing a contract dispute, this backdrop matters in helping to frame the common understanding of what the normal person considers to be beer, and how ingrained those ideas have become in society. Beer and civilization have been intertwined since the beginning, and directly or indirectly it has helped shape the human experience.[43]

B. *Brew Science: The Process of Making Beer*

Most experts agree that beer was not so much invented, as it was discovered.[44] In many of the ancient civilizations of the Near East

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[37] *Id.* In Sumer, members of all strata of society would meet at the communal fermenting tubs to drink using long straws to avoid debris floating atop the brew. *Id.* Despite this seemingly egalitarian mixing of social classes, distinctions could still be made, with members of the lower class using reed straws, while those of higher standing used straws of bronze, silver, and gold. *Id.*

[38] *Id.* at 48. In medieval England, because beer was brewed at home, it was considered a domestic task left to the realm of women. *Id.* From their homes these alewives would serve the community, often creating an area for social and business exchanges to take place. *Id.* As time progressed, the name of these establishments, public houses, was shortened to the modern pub. *Id.*

[39] *See id.* at 49.

[40] *Id.* at 40–41.

[41] *See* Courtney Mifsud, *Why Beer Is the World's Most Beloved Drink*, TIME (Oct. 1, 2018, 10:02 AM), https://time.com/5407072/why-beer-is-most-popular-drink-world/; *see also* Niall McCarthy, *Alcohol & Sport: A Match Made In Heaven?[Infographic]*, FORBES (Oct. 27, 2016, 8:33 AM), https://www.forbes.com/sites/niallmccarthy/2016/10/27/alcohol -sport-a-match-made-in-heaven-infographic-2/?sh=160f928e484b (finding as many as 70-80% of Americans watching sporting events live or on television do so while drinking alcohol).

[42] STANDAGE, *supra* note 18, at 18.

[43] *See* DESALLE & TATTERSALL, *supra* note 16, at 9.

[44] STANDAGE, *supra* note 18, at 11; Fraga, *supra* note 22, at 1243–44. Although a date for the first intentional fermentation of beverages is unknown, it is believed that stone containers at the Gobekli Tepe site in modern Turkey dating to around 11,600 BCE may have contained a drink fermented from undomesticated grains. DESALLE & TATTERSALL, *supra* note 16, at 16. The earliest scientific

we have discussed, barley was a staple crop and a key ingredient in food like bread.[45] People soon discovered, likely by accident, that when wetted and dried barley begins to germinate and creates malted barley, which is sweeter tasting, more nutritious, and less susceptible to spoilage.[46] This happens because once the water starts the germination process, the barley thinks it is time to begin growing and releases an enzyme that begins to convert long chains of starch molecules into smaller, more easily usable short sugar molecules like maltose.[47] Eventually, someone would leave their malted barley porridge out too long, or bread made with malted barley out in the rain, and miraculously days later returned to find it, bubbling, fizzy, and intoxicating.[48]

Even once this was discovered, it took thousands of years to realize how the process of fermentation works.[49] Ancient beers were made with water, all types of fermentable sugars,[50] and unbeknownst to the brewers, yeast.[51] As history moved along, the essential ingredient list began to solidify around four major ingredients: (1) water, (2) malted grain, (3) hops, and (4) yeast.[52] In regard to water, all we need to know is that it is the main component of beer,

evidence for barley-based beer come from chemical deposits in pottery from the Sumerian site Godin Tepe in Iran, dating to around 3,000 BCE. *Id.*

[45] DESALLE & TATTERSALL, *supra* note 16, at 15.

[46] CHARLIE PAPAZIAN, THE COMPLETE JOY OF HOME BREWING 5 (3d ed. 2003); Fraga, *supra* note 22, at 1243; STANDAGE, *supra* note 18, at 14–15.

[47] JOHN J. PALMER, HOW TO BREW 30 (3rd ed. 2006).

[48] PAPAZIAN, *supra* note 46, at 5–6; STANDAGE, *supra* note 18, at 14–15.

[49] DESALLE & TATTERSALL, *supra* note 16, at 29 (Explaining that although people knew something was going on, the process of fermentation through the yeast bacteria was not discovered until the nineteenth century).

[50] STANDANGE, *supra* note 18, at 19. Among the many global versions of beer, Incans drank beer made of maize called chicha, Aztecs made an agave beer called pulque, and the Chinese used millet and rice for their beers. *Id.*

[51] *See* PALMER, *supra* note 47, at 61; STANDAGE, *supra* note 18, at 16. Although yeast was undiscovered officially until the 1860's, brewers had long known something was happening beyond their perception. PALMER, *supra* note 47, at 61. Viking families each had a brewing stick, handed down from generation to generation, that they believed helped them to create their beer, but not realizing it was because of tiny organisms clinging to the stick. *Id.* The Egyptian and Mesopotamian followed the practice of reusing the same containers repeatedly for brewing, unknowingly culturing yeast. STANDAGE, *supra* note 18, at 16.

[52] PAPAZIAN, *supra* note 46, at 12–13; DESALLE & TATTERSALL, *supra* note 16, at 30.

usually making up ninety-five percent of the final product.[53] The second ingredient, malted grain, is generally represented by malted barley due to the historical shortage of wheat used in breadmaking.[54] Still, today many commercial brewers substitute barley in part or whole with other grains like corn, rice, wheat, and rye.[55] The third ingredient, a conical green flower called hops, not only gives modern beer its bitter taste and floral aroma, but also works as a natural preservative.[56] Prior to the introduction and popularization of hops in beer in the ninth century, other herbs and berries were often added for flavor.[57]

The last and most important ingredient of yeast was only recognized in the nineteenth century by the famous French chemist Louis Pasteur.[58] Brewer's yeast, or more specifically, *saccharomyces cerevisiae*, is a single-celled eukaryote in the fungi kingdom.[59] These microscopic organisms are unusual in that they can live both with and without oxygen, the latter through a process called fermentation.[60] During fermentation, yeast are able to sustain themselves and reproduce asexually by consuming simple sugars, like maltose, and in the process releasing alcohol and carbon dioxide as waste products.[61]

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53 DESALLE & TATTERSALL, *supra* note 16, at 173.

54 *Id.* at 30.

55 PAPAZIAN, *supra* note 46, at 12.

56 *Id.* at 13; *see* DESALLE & TATTERSALL, *supra* note 16, at 34. As the British Empire began to expand into India, it found it had a problem. DESALLE & TATTERSALL, *supra* note 16, at 34. The hot climate of India makes brewing beer extremely difficult, and the normal English ales would spoil before the boats carrying them to India even arrived. *Id.* To solve this problem the English created a new beer with higher alcohol content and a much greater amount of hops as a preservative. *Id.* The extra hops created a bright, fruity, and bitter beer still popular today: the IPA or India pale ale. *Id.*

57 DESALLE & TATTERSALL, *supra* note 16, at 26. Middle Age monks of Europe were known to experiment with the flavor and aroma of their beers by adding gruit, a mix of herbs including "burdock, yarrow, wormwood, sage, mugwort, horehound, or juniper berries." *Id.*

58 *Id.* at 29.

59 *Id.* at 98–99.

60 PALMER, *supra* note 47, at 62.

61 *Id.*; PAPAZIAN, *supra* note 46, at 13–14; DESALLE & TATTERSALL, *supra* note 16, at 128.

C. *Codifying a Cold One: The Legal History of Beer*

Because of beer's longstanding connection with human civilization, it has either directly or indirectly been a part of legal history for thousands of years.[62] During the reign of Hammurabi in the late eighteenth century BCE, a uniform code of laws was created and displayed for all subjects.[63] These codes were the first indirect appearance of beer in the law under the auspices of consumer protection, when the punishment of drowning is laid upon any tavern-keeper who shortchanged their patrons or failed to report conspiracies overheard at their establishments.[64]

Much later in 1040 CE, we begin to see the age-old connection between beer and taxes[65] morph into a more formal legal practice when the Bavarian town of Freising granted the monks of the Benedictine Weihenstephan Abbey a license to brew, creating the longest continuously operating brewery in the world today.[66] The famous Irish stout, Guinness, illustrates how legal implications can shape how beer is made.[67] Because Ireland taxes beer by alcohol content, the local brew is a mere three percent alcohol, while the "export stout," sold abroad and taxed at a lower rate, has a significantly higher alcohol content.[68]

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[62] DESALLE & TATTERSALL, *supra* note 16, at 19 (finding a growing connection between the consumption of beer and the law as early as 5,000 years ago).

[63] *Id.*; SUSAN WISE BAUER, THE HISTORY OF THE ANCIENT WORLD 173–75 (2007).

[64] DESALLE & TATTERSALL, *supra* note 16, at 19.

[65] *See* STANDAGE, *supra* note 18, at 30–32. The connection between beer and taxes goes back so far that some of the earliest examples of writing are Sumerian cuneiform wage lists and tax receipts, in which the symbol for beer is among the most used. *Id.* Later on, we see a shift from using beer to pay tax to taxes on beer when the legendary Queen of Egypt, Cleopatra, VII needed to raise funds for her wars with Rome. DESALLE & TATTERSALL, *supra* note 16, at 21.

[66] DESALLE & TATTERSALL, *supra* note 16, at 27.

[67] PAPAZIAN, *supra* note 46, at 7–8. Legal factors also had a role in Guinness cementing itself as the world leader in the darker stout style of beer when the British banned the heavy roasting of malt necessary to create a dark beer in order to save energy during World War I, leaving the Irish brewer with few competitors. DESALLE & TATTERSALL, *supra* note 16, at 35.

[68] PAPAZIAN, *supra* note 46, at 7–8.

The legal world of beer would change forever in 1487 when Munich instituted the Reinheitsgebot, or Beer Purity Laws.[69] These laws were the first to move from a legal focus on the taxation of beer to providing a legal framework for how to assess the proper ingredients of beer.[70] The impact of these laws not only stifled new experimentation with beer,[71] but also lead to the disappearance of gruit beers of monastic Germany that had used herbs instead of hops for hundreds of years.[72]

America has long dealt with laws implicating the beer industry such as the colonial Duke's Laws,[73] the Prohibition of the Eighteenth Amendment,[74] and the Volstead Act[75] in the 1920s.[76] Still, the modern Internal Revenue Code ("IRC"), which codifies all federal tax laws,[77] is the current source for the legal definition of beer: "the term beer means beer, ale, porter, stout, and other similar fermented beverages (including sake or similar products) of any name or description containing one-half of 1 percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute therefor."[78]

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[69] DESALLE & TATTERSALL, *supra* note 16, at 30. The Reinheitsgebot was further instituted throughout Bavaria in 1516. *Id.* Beer and its purity became such a strong source of pride for the Bavarians that they refused to join the Weimar Republic in 1919 unless the law was adopted across Germany. *Id.*

[70] *See id.* The original Reinheitsgebot limited the legally permissible ingredients in beer to water, malted barley, and hops. *Id.* Later iterations of the Reinheitsgebot included our most important ingredient, yeast, which as discussed earlier was unknown to beermakers for another four hundred years. *Id.*

[71] *Id.* at 212.

[72] *Id.* at 114.

[73] *See* Fraga, *supra* note 22, at 1252–53 (New York's Duke's Laws of 1664 limited brewing to only those with mastery of the process and created a cause of action for selling inferior beer).

[74] *See* U.S. Const. amend. XVIII, *repealed by* U.S. Const. amend. XXI, §1 (prohibiting the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States").

[75] *See* The National Prohibition Act, Pub. L. No. 66-66, tit. 2, § 1, 41 Stat. 305, 307–08 (1919) *repealed by* U.S. Const. amend. XXI, §1 (specifying beverages included in, enforcement procedures, and penalties under the Eighteenth Amendment).

[76] Fraga, *supra* note 22, at 1252–55.

[77] *See generally* I.R.C.

[78] I.R.C. § 5052(a) (West, Westlaw through P.L. 117-166).

Unlike the strict list of the Reinheitsgebot,[79] this statute allows for almost unlimited variation and ambiguity in terms of what ingredients are necessary to classify a product as beer.[80] The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") which regulates alcohol products,[81] further clarified what materials are appropriate in the production of beer through regulation:

> (a) Beer must be brewed from malt or from substitutes for malt. Only rice, grain of any kind, bran, glucose, sugar, and molasses are substitutes for malt. In addition, you may also use the following materials as adjuncts in fermenting beer: honey, fruit, fruit juice, fruit concentrate, herbs, spices, and other food materials.
>
> (b) You may use flavors and other nonbeverage ingredients containing alcohol in producing beer . . . .[82]

While the IRC may be ambiguous in terms of what constitutes similar fermented beverages,[83] the ATF's list of acceptable alternatives makes clear that just about any grain or sugar will suffice as the main building block of a brew.[84]

D. *New Kid on the Block: What Is Hard Seltzer?*

Hard seltzer, carbonated water mixed with alcohol, has long existed in one capacity or another but, starting in 2013, it burst onto the scene as a major player in the alcoholic beverage space.[85] Hard

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[79] DESALLE & TATTERSALL, *supra* note 16, at 30.

[80] *See* I.R.C. § 5052(a) (Westlaw) (including grain substitutes, similar products, and non-traditional beer products like sake in the definition).

[81] *What We Do*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/alcohol-tobacco (last visited Jan. 2, 2022).

[82] 27 C.F.R. § 25.15 (West, Westlaw through Aug. 12, 2022, 87 FR 49772, except for 40 CFR § 52.220, which is current through July 28, 2022).

[83] *See* I.R.C. § 5052(a) (Westlaw).

[84] *See* 27 C.F.R. § 25.15 (Westlaw).

[85] Rebecca Jennings, *Hard Seltzer Is Here to Stay*, VOX (Aug. 20, 2019, 9:40 AM), https://www.vox.com/the-goods/2019/8/20/20812814/white-claw-truly-hard-seltzer-explained. Although it would take a few years for brands like White Claw to popularize hard seltzers, the current trend began in 2013 with SpikedSeltzer, which has since rebranded under Imbev to Bon & Viv. *Id.*

seltzer is the fastest growing product in the alcoholic beverage market, quadrupling its $1 billion in sales from 2019 to $4.5 billion in 2020.[86] If you were to ask a person what constitutes hard seltzer, many people would say something along the lines of a vodka and soda.[87] Understanding this connection, Constellation Brands even first attempted to market a hard seltzer product under the Svedka vodka brand name.[88]

Despite this belief, hard seltzers such as White Claw are often flavored malt beverages[89] or, as in the case of Corona Hard Seltzer, simply fermented from cane sugar.[90] This distinction is extremely important as liquors like vodka are created through distillation, a vastly different process than the brewing process of beer.[91] Although brewed and fermented, using many of the same techniques and processes as what a lay person would consider a beer product, flavored malt beverages are then stripped of their malt character to create a clear and flavorless beverage, and then mixed with other flavorings.[92] Hard Seltzer brewed straight from sugar or corn starch not only takes out the step of stripping the malt character, but allows for a low calorie, gluten-free finished product.[93]

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[86] Second Amended Complaint, *supra* note 2, at 12.

[87] Colleen Graham, *What Is Hard Seltzer?*, THE SPRUCE EATS (July 27, 2021), https://www.thespruceeats.com/what-is-spiked-seltzer-4773117.

[88] Second Amended Complaint, *supra* note 2, at 13.

[89] Audrey Quinn, *Ain't No Laws When You're Producing Claws: How Inadequate Labeling of Alcoholic Beverages Puts Consumers with Allergies at Risk*, 31 HEALTH MATRIX 477, 486 (2021).

[90] Jennings, *supra* note 85.

[91] *See* STANDAGE, *supra* note 18, at 94–95. The distillation process is best explained as vaporizing a fermented liquid into vapor and then condensing it back into liquid form in order to purify and strengthen the alcoholic content. *Id.*

[92] Quinn, *supra* note 89, at 484.

[93] Josh Weikert, *Hard Seltzer: We Can Do This the Easy Way, Or We Can Do It the Hard Way*, CRAFT BEER & BREWING (Jan. 7, 2021), https://beerandbrewing.com/hard-seltzer-we-can-do-this-the-easy-way-or-we-can-do-it-the-hard-way/.

II. DETERMINING MEANING IN CONTRACTS

A. *Interpretation and Construction*

When a court reviews a contract dispute, its goal is to determine the meaning of the contract, or in other words, the intent of the parties involved.[94] Ironically, the idea of meaning itself can be seen as the ultimate example of ambiguity, as it is not always clear how to ascertain that true intent.[95] When there is a clear "meeting of the minds," the court has a duty to discern that shared intention, even if unreasonable.[96] Unfortunately, either party may intend different things, even while using the same words or expressions.[97] In these situations, the courts must determine the most justifiable expectation between the two parties.[98] In making this determination, there are two main principles that a court may use: interpretation and construction.[99] The distinction between these two principles is subtle and often confused, but it is essential in determining the scope of review available to the courts.[100]

Interpretation can best be explained as the deciphering of words, symbols, or expressions of a party to a contract.[101] This determination is generally a factual determination and, although it may determine a legal outcome, it is derived independent of that outcome.[102]

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[94] Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 833 (1964).

[95] *See* E. Allan Farnsworth, "*Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 940–41 (1967) (meaning in this sense refers to the subjective meaning of the parties and not a single objective "correct usage").

[96] *Id.* at 951.

[97] *Id.*

[98] *Id.*

[99] Patterson, *supra* note 94, at 833. *Compare* Ross v. Thomas, 728 F. Supp. 2d 274, 281 (S.D.N.Y. 2010) (finding ambiguity to be resolved by discerning a reasonable and objective meaning), *with* Cooper Laboratories, Inc. v. Int'l Surplus Lines Ins., 802 F.2d 667, 671 (3d Cir. 1986) (explaining construction as the court filling in of gaps not contemplated by the parties in dispute for the purpose of a specific legal effect).

[100] Patterson, *supra* note 94, at 833–35.

[101] *Id.* at 833.

[102] *See id.* at 834 ("For example, if *S*, a farmer, has agreed for a stated price to sell and deliver to *B*, a grocer, four dozen eggplants, and on the appointed day *S* tenders as his performance to *B* four dozen eggs, an objective observer could, without formulating any *general* conception of the genus and species of 'egg-

Construction on the other hand attempts to create legal consequences that flow from the context of the contract.[103] Although more of a question of law, construction may be used in conjunction with interpretation in order to determine context, but may also be used to elicit a desired result when interpretation fails.[104]

B. *Textualism v. Contextualism*

Even when focusing on the meaning of the words themselves, there are two competing schools of thought: textualism and contextualism.[105] Textualist jurisdictions, such as New York, are more formalistic, preferring to rely on what is within the four corners of the agreement as the definitive source of interpretation.[106] The underlying theory to this approach is that it is impossible to get into the mind of the drafters of the agreement, and the only way to determine the intent of the parties is instead through the plain meaning of the text alone.[107]

According to the plain meaning rule, extrinsic evidence may not be admitted in order to interpret terms that are unambiguous on their face.[108] A strict reading of the plain meaning rule requires that a court rely on the common usage of the word, usually as defined by

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plant,' give a *particular* interpretation that the tender was not within the terms of the contract; and this interpretation might well support a *particular* legal evaluation that *B* was under no duty to accept the eggs in performance, and possibly that *S* has breached his contractual duty.").

103 *Id.* at 835.

104 *Id.* ("An action is brought by *P* upon a contract which contains an unconscionable condition of *D's* contractual duty or an unconscionable limitation or extension of the measure of damages for a breach by *D*. In such a case the court may, under exceptional circumstances, and in direct denial of the meaning that interpretation properly would give, construe the unconscionable term to be unenforceable in this action and in this sense 'void.' Here construction overrides interpretation. Such uses of construction are exceptional.").

105 Shahar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519, 521 (2017).

106 Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1478 (2010); *e.g.*, Kranze v. Cinecolor Corp., 96 F. Supp. 728, 729 (S.D.N.Y. 1951) (holding that when intention is unambiguous within the four corners of the agreement, extrinsic evidence is inadmissible).

107 *See* Lifshitz & Finkelstein, *supra* note 105, at 532; *see also* Patterson, *supra* note 94, at 838.

108 Aaron D. Goldstein, *The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation*, 53 SANTA CLARA L. REV. 73, 81 (2013).

a dictionary.[109] If a textualist court does determine that there is ambiguity in the agreement and the meaning cannot be construed from the text, extrinsic evidence will be admitted.[110] Courts that follow the plain meaning rule do so in order to determine what they think is the objective meaning of the contract.[111] Courts believe that, by applying an objective meaning, they are encouraging stability and eschewing subjectivity, in particular by attempting to avoid issues with untruthful statements and faulty memory.[112]

There are some major drawbacks though to applying this rule.[113] First, strict adherence to the plain meaning rule assumes that there can be a single unambiguous meaning to a word or terms in a contract.[114] Second, it skews the power dynamic to the more sophisticated party who is writing the contract.[115] Finally, in making the determination of whether a term or clause is ambiguous or not, the court simply shifts the subjectivity from that of the parties that actually agreed to the contract to that of a judge who may not have the expertise or experience in the area involved.[116]

Contextualism pushes back against the formalistic rigidity of the textual approach.[117] Instead of sticking to the four corners of the contract, this approach, encouraged in the Uniform Commercial

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[109] Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 16–17 (2008). There is great irony in this strict textualist reading of the plain meaning rule, because in order to restrict their understanding of the terms to the four corners of the contract the judge consults a dictionary—a source outside of the contract itself. *See id.* Perhaps a true reading of the plain meaning rule should apply only when the judge finds the terms so clearly known from common usage that no outside source is needed to confirm that belief. Goldstein, *supra* note 108, at 109–10.

[110] Goldstein, *supra* note 108, at 86.

[111] *See* Florestal, *supra* note 109, at 14.

[112] Goldstein, *supra* note 108, at 85.

[113] *Id.* at 86–94.

[114] *Id.* at 86–87 (noting that meaning of a word can change depending on the context).

[115] *Id.* at 87 (a sophisticated party drafting a contract can gain safe harbor by using terms that the other party may not read or understand when entering the agreement).

[116] *Id.* at 90.

[117] *See* Ronald J. Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 27 (2014).

Code[118] and Restatement of Contracts,[119] assumes that the court is able to determine a commercial context within which the contract was written and a subjective reasoning of what the parties intended.[120] This approach supposes that more evidence leads to a clearer indication of the subjective intent of the parties to the agreement.[121] Although there is a clear distinction in these views on a philosophical level, courts that follow the more textual approach often have created judicial precedent where certain types of contextual sources are allowed in making an interpretation.[122]

C. *Merger Clauses and The Parol Evidence Rule*

In order for a court to determine what, if any, extrinsic evidence can be used to decipher the meaning of a contract, they must first determine whether the agreement is completely or partially integrated.[123] An agreement is completely integrated when the written contract is the full, final, and complete expression of the parties.[124] Although in more conservative contract law jurisdictions, like New York, contracts are presumed to be integrated if the contract appears final on its face,[125] parties are also able to expressly stipulate integration through merger or complete agreement clauses.[126] These distinctions are meaningful because when an agreement is only partially integrated, a party may offer parol evidence—prior or contemporaneous oral or written evidence of the meaning of the contract.[127]

When the contract is found to be integrated, courts follow the parol evidence rule and must ignore such evidence, instead focusing within the four corners of the agreement itself.[128] While more contextualist jurisdictions such as California use a "soft" parol evidence

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[118] U.C.C. § 1-205 (West, Westlaw through 2021 ann. meetings of the Nat'l Conf. of Comm'r on Unif. State l. and Am. L. Inst.).
[119] RESTATEMENT (SECOND) OF CONTRACTS § 202 (AM. L. INST. 1981).
[120] Florestal, *supra* note 109, at 51.
[121] Gilson et al., *supra* note 117, at 37–39.
[122] Patterson, *supra* note 94, at 841.
[123] RESTATEMENT (SECOND) OF CONTRACTS § 209 (AM. L. INST. 1981).
[124] Patterson, *supra* note 94, at 845–46; Miller, *supra* note 106, at 1506.
[125] Gilson et al., *supra* note 117, at 35.
[126] Miller, *supra* note 106, at 1507.
[127] Patterson, *supra* note 94, at 846–47.
[128] Miller, *supra* note 106, at 1506.

rule that is more flexible and thought of more as guidance,[129] textualist jurisdictions like New York favor the "hard" parol evidence rule that bars any extrinsic evidence unless the contract itself is ambiguous and could be subject to more than one interpretation.[130]

D. *Trade Usage and Custom*

When the terms of the contract are unambiguous, the interpretation is left to the judge as a question of law.[131] But, when the term is found to be ambiguous it becomes a question of fact as to what the parties meant, and the job of clarifying the meaning falls to the fact finder, which may be either the judge or a jury.[132] There are several categories of evidence from which courts seek context in order to determine the meaning of ambiguous language,[133] including the parties' course of dealing, course of performance, and trade usage.[134]

Trade usage is language that, although it may not be the popular prevailing understanding of a word or phrase, is used regularly in specific industries, locales, or groups.[135] Under New York law, courts are permitted to use trade usage evidence, even where textualist restraints may otherwise apply, when the parties involved are sophisticated commercial entities and the trade usage is well established and known by the parties.[136] Although this would seemingly go against the four corners approach, formalist courts allow this extrinsic evidence and other evidence it may require, such as proving

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[129] *Id.* at 1507–08.

[130] *Id.* at 1506–07; Gilson et al., *supra* note 117, at 34–36; Farnsworth, *supra* note 95, at 959.

[131] Florestal, *supra* note 109, at 16.

[132] *Id.*

[133] Goldstein, *supra* note 108, at 114.

[134] *Id.*

[135] *Id.* at 115. To stick with the theme of the article, "[f]or instance, in an action by *S*, the seller, for buyer's breach of contract to buy from *S* at market price a quantity of hops 'well and cleanly picked,' the buyer's rejection was based upon the phrase quoted; the seller was allowed to prove a trade usage ('custom') that eight per cent leaf and stem was normal and that for each one per cent excess a reduction in price of one cent per pound was made. Upon the proof of this usage by two witnesses, as required by a statute of the state of Oregon where the contract was made, the seller was allowed to recover substantial damages." Patterson, *supra* note 94, at 840 (citing John I. Haas, Inc. v. Wellman, 186 F.2d 862 (9th Cir. 1951)).

[136] Gilson et al., *supra* note 117, at 90–91.

that the parties are members of a specific group, because they believe it gives strong guidance on the objective, reasonable expectations of the parties.[137]

E. *Case Law for $800: What Is Blank?*

The discussion of judicial contract interpretation in the previous sections explains the general principles and theories that contract law is based upon. However, these ideas are often altered by the state through legislation and individual courts through precedent.[138] For these reasons it is instructive to look at the case law on this subject. Through these analyses, we will hone in on how courts attack these issues, preparing us to solve the issue of what is beer.

1. CRYING FOWL: *FRIGALIMENT V. BNS INTERNATIONAL*, AND THE QUESTION OF WHAT IS CHICKEN?

In the first year Contracts classic,[139] *Frigaliment*, Judge Friendly of the United States District Court for the Southern District of New York was asked to determine the important issue of "what is chicken? Plaintiff says 'chicken' means a young chicken, suitable for broiling and frying. Defendant says 'chicken' means any bird of that genus that meets contract specifications on weight and quality, including what it calls 'stewing chicken' and plaintiff pejoratively terms 'fowl.'"[140] The contract itself called for, "US Fresh Frozen Chicken, Grade A . . . ."[141] Frigaliment, a Swiss purchaser of frozen chicken, had entered into the chicken contract with an American supplier, BNS.[142] Although much of the negotiations between the two parties were conducted in German, the English word of chicken was used to indicate the product sought.[143]

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137 *See* Florestal, *supra* note 109, at 18–19.

138 *See* Patterson, *supra* note 94, at 841 (contrasting the dicta that plain meaning cannot be explained by trade usage with judicial precedent indicating otherwise); *e.g.,* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 119 (S.D.N.Y. 1960) (weighing evidence of a broader use of the term chicken in the poultry industry despite finding the normal definition to mean young chickens).

139 *See* Florestal, *supra* note 109, at 4.

140 *Frigaliment*, 190 F. Supp. at 117.

141 *Id.*

142 *Id.*

143 *Id.* at 118.

In a noteworthy finding, Judge Friendly was quick to determine that the term chicken was clearly ambiguous.[144] This matters because, as we have established, New York is a more formalist jurisdiction that avoids construction, and even limits interpretation to cases where it is clearly necessary.[145] Although some dictionary definitions make note that chicken often refers to younger members of the species,[146] the common usage is generally much more vague.[147] Therefore, this finding is of consequence because it shows that when formalist courts apply the plain meaning rule focusing on the four corners on the agreement, they are not completely disregarding context in interpreting the terms.[148]

It is also crucial to understand that in this challenge to the interpretation of a contract, the plaintiff carries the burden of persuading the court to adopt its reading of the terms.[149] Judge Friendly decided this burden of proof because the plaintiff was attempting to constrict and narrow the meaning of the word chicken, over the defendant's more broad definition.[150] In addition, the general rule is that ambiguity in a contract will be interpreted against the drafter.[151] This helps to illustrate the idea that when a New York court interprets a term in a contract, it is attempting to uncover the objectively reasonable view, and the claimant shoulders the burden of proving a more subjective use.[152]

Furthermore, *Frigaliment* helps us understand the way New York determines whether to apply trade usage of a term in an interpretation.[153] The principle of trade usage requires that if a party is not a part of the specialized group or industry, it must be proven that

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[144] Florestal, *supra* note 109, at 18.

[145] *See* Miller, *supra* note 106, at 1478–79.

[146] *Chicken*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/chicken (last visited Jan. 2, 2022).

[147] Farnsworth, *supra* note 95, at 953.

[148] *See* Goldstein, *supra* note 108, at 109–10; Patterson, *supra* note 94, at 841.

[149] Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960).

[150] *Id.*

[151] Florestal, *supra* note 109, at 9. *E.g.,* Revson v. Cinque & Cinque, P.C., 221 F.3d 59, 67 (2d Cir. 2000) ("Under New York law, equivocal contract provisions are generally to be construed against the drafter.").

[152] *See Frigaliment*, 190 F. Supp. at 121.

[153] *See id.* at 119.

they either had knowledge of how the term was used in that industry, or that the usage was so universal and established that they should have known.[154] Here, the defendant claimed that it had only recently entered into the poultry business and was not aware of the usage.[155] Although both parties introduced witnesses and other documentary evidence to show the usage, the court found that these contradictory uses throughout the industry did not indicate a universally established trade usage.[156]

There are two other interesting arguments brought by the defendant that are worth noting.[157] First, the defendant claims that in referencing "Grade A" chickens, the contract itself had incorporated the Department of Agriculture's regulation from which that language arose.[158] It argued that the regulation defines chickens in the more broad manner, and therefore, that meaning should be ascribed to the contract.[159] The court found this line of reasoning persuasive despite there being no express linking of the regulation and the contract.[160] Second, the defendant argued that the price of the contract was incongruent with the plaintiff's arguments.[161] They argue that the price agreed to by the parties would have been impossible if, as the plaintiff contends, both parties were sophisticated industry actors and the contract was for the more narrowly defined type of chicken.[162]

Judge Friendly ultimately concluded that the defendant entered into the contract believing the term had the more broad definition.[163] In his analysis, he was careful to make the key distinction that their individual intent itself does not settle the issue, but instead the fact that defendant's intent coincided with an objective meaning of the term.[164] Although the plaintiffs' claims also had some supporting evidence, other than the issue of the purchase price in the contract,

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[154] *Id.*
[155] *Id.*
[156] *Id.* at 119–20.
[157] *See id.* at 120.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 120–21.
[161] *Id.* at 120.
[162] *Id.*
[163] *Id.* at 121.
[164] *Id.*

the court found the burden of proof was not met and that the broader meaning of chicken would be upheld.[165]

2. BREAD PRECEDENTS: *WHITE CITY V. PR RESTAURANTS*, AND THE QUESTION OF WHAT IS A SANDWICH?

White City Shopping Center was the landlord of a shopping center in Massachusetts that had leased space to the defendant, the operator of twenty-two Panera Bread franchises in New England.[166] In this lease agreement, the parties had stipulated that White City would not lease to any tenant for the purpose of, "a bakery or restaurant reasonably expected to have annual sales of *sandwiches* greater than ten percent (10%) of its total sales."[167] After entering into this agreement, White City proceeded to sign a lease with another tenant, Qdoba, a Mexican chain restaurant that specializes in tacos, quesadillas, and burritos.[168] When the defendant learned of this new tenant, it inquired with White City as to whether it was in breach of the agreement.[169] White City promptly filed suit, seeking a declaratory judgment that it was not in breach because Qdoba sold burritos, and burritos are not a sandwiches.[170]

First, it is important to note that this is a Massachusetts case and the courts are able to take a much more contextual reading of the term in dispute, as the goal is "to construe the contract as a whole in a reasonable and practical way, consistent with its language, background and purpose."[171] Yet, Massachusetts is still a plain meaning jurisdiction, and if there is no ambiguity in the term the courts here must still adhere to the plain and ordinary meaning of the words in the contract.[172]

What is most interesting in *White City* is that the court determines that there is no ambiguity in the term sandwich, while also

[165] *Id.*
[166] White City Shopping Ctr., LP v. PR Rests., LLC, No. 2006196313, 2006 WL 3292641, at *1 (Mass. Super. Ct. Oct. 31, 2006).
[167] *Id.*
[168] *Id.* at *1–2
[169] *Id.* at *2.
[170] *Id.*
[171] *See id.* at *3 (quoting USM Corp. v. Arthur D. Little Sys., Inc., 546 N.E.2d 888, 893 (Mass. App. Ct. 1989)).
[172] *Id.*; Florestal, *supra* note 109, at 16.

simultaneously pointing out that several contradictory dictionary entries were admitted to the court stating otherwise.[173] Unlike in the previous case of *Frigaliment*, where the court acknowledged that the language was ambiguous because there was contradictory dictionary evidence,[174] here, the court claimed that common sense overrides any other reading of the contract.[175] Because of this common sense reading of the term, the court found the narrower definition to be correct.[176] This strict adherence to an objective and common understanding is even more surprising because it was unnecessary.[177] The court indicated that even if there were some ambiguity, the defendant would still fail in proving the broader definition applied due to its failure to draft specific language into the lease.[178]

Even after making the finding that the language was unambiguous, the court went on to point out other flaws in the defendant's arguments.[179] First, the court stated that it must adhere to a strict objective meaning because there was no indication that the defendant even had the subjective intent that burritos be included in the term sandwiches.[180] The court argued that if such intent existed the defendant would have evidence of such during the negotiations, or it would have included an explicit and broad definition within the agreement.[181] Furthermore, the court found that the defendant was aware of Qdoba and other Mexican chain restaurants in the area.[182] For this reason, the court found that the defendant should have known tenants of this type were a possibility in the shopping center, and a reasonable party attempting to protect against competition from the types of foods those restaurants sold would need to expressly protect against them in the agreement.[183]

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173 *White City*, 2006 WL 3292641, at *3 n.3.
174 Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117–18 (S.D.N.Y. 1960).
175 *White City*, 2006 WL 3292641, at *3–4; Florestal, *supra* note 109, at 5.
176 *White City*, 2006 WL 3292641, at *3; Florestal, *supra* note 109, at 6.
177 *See White City*, 2006 WL 3292641, at *4.
178 *Id.*; Florestal, *supra* note 109, at 59.
179 *White City*, 2006 WL 3292641, at *3.
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*

Finally, although it may seem odd that the defendant, with a broader definition than the plaintiff, loses in this case, the judge points out that the defendant was the one who wrote the exclusivity agreement.[184] As the sole drafter of the agreement, the burden falls upon the defendant to prove a court should interpret a term outside of the common usage.[185] This principle is meant to promote fairness when one party holds more power in forming the terms of an agreement.[186]

Although the court's initial reading of the term may not hold up in other cases and other jurisdictions,[187] the court's step-by-step reasoning gives great insight into how to approach interpreting a contract.[188] Here, lack of clear subjective intent, knowledge of the impact of not expressly defining the term, and having had a stronger bargaining position as sole drafter led the court to determine that the defendant should be bound to the express terms of the contract as they would commonly be understood.[189]

3. COMMON SENSE: *LAW DEBENTURE TRUST V. MAVERICK TUBE*, AND THE QUESTION OF WHAT IS COMMON STOCK?

In 2003, Maverick Tube Corporation, a company that manufactures tubing for the gas and oil industry, raised funds by issuing debt securities.[190] The next year, Maverick solicited those creditors to exchange the 2003 debt securities for new convertible securities.[191] The indenture agreement for the new convertible securities stated that "[s]ubject to the procedures set forth in the Indenture, a Holder may convert Notes into cash and, if applicable, shares of Common

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[184] *Id.*

[185] Florestal, *supra* note 109, at 59.

[186] *Id.*; Patterson, *supra* note 94, at 854; Gilson et al. *supra* note 117, at 81–82.

[187] *See* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 118 (S.D.N.Y. 1960) (a textualist court weighing trade usage and dictionary definitions rather than common sense).

[188] *See White City*, 2006 WL 3292641, at *3.

[189] *Id.*

[190] Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 462 (2d Cir. 2010).

[191] *Id.*

Stock . . . after the occurrence of a Public Acquirer Change of Control."[192] The indenture agreement further defined a Public Acquirer:

> means a Person who (i) acquires the Company or all or substantially all of the Company's assets in a consolidation, merger, share exchange, sale of all or substantially all of the Company's assets or other similar transaction and (ii) *has a class of common stock traded on a United States national securities exchange* . . . .[193]

In 2006, Maverick announced it was merging with Tenaris, a joint stock corporation based in Belgium, which would acquire all of its common stock.[194] Although Tenaris does issue common shares, they are not directly traded on a United States securities exchange.[195] Instead, as is required of foreign corporations, Tenaris has contracted with a United States bank to deposit its common stock with the bank in exchange for an American Depository Receipt ("ADR"), evidencing an American Depository Share ("ADS").[196] Although similar in many respects, ADSs also differ from common stock, and are considered a separate entity from the underlying security.[197]

When Maverick filed a report with the Securities and Exchange Commission ("SEC") stating that Tenaris did not trigger the Public Acquirer Change of Control provision ("PACC"), the plaintiff Trustee filed suit representing the convertible debt holders.[198] The court

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[192] *Id.*
[193] *Id.*
[194] *Id.* at 462–63.
[195] *See id.*
[196] *Id.*
[197] *Id.* at 464, 470. Similarities include being tradeable in the same manner, being listed on major exchanges and available over the counter, and being subject to federal securities law. *Id.* at 464. The main difference is that the holder of an ADS is not the title holder of the underlying asset, but only the ADS itself. *Id.* These differences, while seemingly slight, can have huge repercussions: different voting rights, no requirement for notice or distribution of proxy information, and the depositories have discretion whether or not to pass through non-cash distributions. *Id.* at 470.
[198] *Id.* at 463.

was then faced with the question of interpreting the PACC to determine whether Tenaris was a Public Acquirer, which depends on answering the question of what is common stock, particularly whether that definition includes ADSs.[199] Here, the United States Court of Appeals for the Second District reviewed *de novo* the ruling of the United States District Court for the Southern District of New York and held that because the indenture agreement was unambiguous, and the ADSs were not common stock, Tenaris was therefore not a Public Acquirer, and Maverick was not in breach of its agreement.[200]

Even though under New York law courts have allowed extrinsic evidence to be admitted to show trade usage in special circumstances even where the contract seems to have plain meaning, the court here is careful to limit the scope of such ex post facto review, particularly when the contract is integrated.[201] The court applies a test to determine whether there is ambiguity in the contract:

> An ambiguity exists where the terms of the contract "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."[202]

In other words, "[p]roof of custom and usage does not mean proof of the parties' subjective intent."[203] The personal nature of the trade usage makes no difference, instead proof of custom is determined by language that is "so far established and so far known to the parties, that it must be supposed that their contract was made in reference to it."[204] Although not admissible to change or amend the agreement, trade usage can still be considered as needed, but the

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199 *Id.*

200 *Id.* at 468.

201 *See* Gilson et al., *supra* note 117, at 90–91.

202 *Law Debenture Trust Co. of N.Y.*, 595 F.3d at 466 (quoting Int'l Multifoods Corp. v. Com. Union Ins. Co., 309 F.3d 76, 83 (2d Cir. 2002)).

203 *Id.*

204 *Id.* (quoting Belasco Theatre Corp. v. Jelin Prods., Inc., 59 N.Y.S.2d 42, 46 (App. Div. 1945)).

court must still make a determination of ambiguity based on the context of the entire integrated contract.[205]

Relying on these rules, the court found that the district court was correct, and that the language of the contract was clearly unambiguous, eschewing trade usage and relying on the meaning as derived from the four corners of the contract, despite agreeing that ordinary shares and common stock are analogous.[206] The court points out that although there is no general definition of common stock in the indenture and the definition available does not mention ADSs, another term of the contract that defines Capital Stock both includes ADSs and differentiates them from ordinary shares.[207] This shows that the drafters clearly understood the difference between the two entities, and had the parties wanted to, they would have known to include ADSs in the common stock or ordinary shares definitions.[208]

In addition, the court refutes the Trustee's position that trade usage and custom indicate that ADSs are included because they fail to show the terms are "'uniform and unvarying,' 'general and not personal.'"[209] First, the court points to the Trustee's claim that the SEC considers ADRs "'[t]he most common form in which foreign securities trade in the United States'" to show trade usage.[210] The court explains that this statement, along with others by the SEC stating ADRs are separate entities from the underlying security, are too varying to support presuming ADSs inclusion in contractual references to common stock.[211]

Next the court rebuts the Trustee's argument that SEC litigation against Tenaris, and filings to the SEC by Tenaris that refer to ADSs as common stock or ordinary shares, indicate trade usage.[212] The court first highlights that Tenaris, which only acquired Maverick in 2006, was not party to the indenture agreement in 2004, weakening the interpretive value of those filings.[213] More powerfully, the court goes forward to explain that a single party's filing to a regulatory

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205 *Id.* at 466–68.
206 *Id.* at 468–69.
207 *Id.* at 469.
208 *Id.* at 464–465.
209 *Id.* at 469–70.
210 *Id.* at 470.
211 *Id.*
212 *Id.* at 471.
213 *Id.*

agency, or even the litigation position of that regulatory agency, are personal usage and do not rise to the level of industry-wide fixed and general usage.[214]

III. TO BE(ER), OR NOT TO BE(ER)?: *CERVECERIA MODELO DE MEXICO V.CB BRAND STRATEGIES, LLC*

A. *What Is on Tap: Facts and Arguments*

To reiterate, Modelo has filed suit in the United States District Court for the Southern District of New York, claiming that Constellation has breached its contract.[215] The contract, a sublicense allowing Constellation to market and sell Modelo branded beer products, defines "Beer" as "beer, ale, porter, stout, malt beverages, and any other versions or combination of the foregoing, including non-alcoholic versions of any of the foregoing."[216]

Modelo first argues that this contract is integrated through a merger clause, and is the complete record of the agreement between themselves and Constellation—an argument that is undisputed by Constellation.[217] Next, Modelo argues that it is clear and unambiguous that the contract was not intended to include products like hard seltzer, particularly Corona Hard Seltzer, which is brewed from sugar and does not contain any malt or hops.[218] Modelo argues that this is clear from the difference between the contractual definition and other regulatory definitions of beer, like the aforementioned ATF regulation[219] and IRC statute,[220] which are much more broad.[221] Further, Modelo offers other evidence, such as marketing material, trademark applications, and statements from executives at Constellation, where Modelo argues Constellation either fails to call the product beer or clearly categorizes it as something different.[222] Although Modelo concedes that the product does have the word beer

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[214] *Id.*
[215] Second Amended Complaint, *supra* note 2, at 1.
[216] *Id.* at 10.
[217] *Id.* at 11–12.
[218] *Id.* at 3, 5, 14–15.
[219] 27 C.F.R. § 25.15 (Westlaw).
[220] I.R.C. § 5052(a) (Westlaw).
[221] Second Amended Complaint, *supra* note 2, at 10.
[222] *Id.* at 14, 16–20.

on it, they argue it is for tax purposes, only two millimeters, and outside the scope of the definition.[223] Constellation denies that it has breached the contract, claiming that the definition of beer in the agreement includes hard seltzer.[224]

B. *Integration*

Under New York law, "if a contract is 'integrated'–that is, if it expresses the full and complete agreement of the parties–then evidence from outside the four corners of the contract may not be considered."[225] If the parties adopt a merger or entire agreement clause in the contract, New York courts will give nearly conclusive deference to protection from extrinsic evidence in interpreting the contract.[226] Here, the sublicensing agreement clearly adopts such a clause in section 9.6, "Entire Agreement" when it states the agreement, "constitute[s] the entire agreement among the parties with respect to the subject matter hereof and thereof, and supersede all prior or contemporaneous agreements and understandings, whether written or oral, among the parties hereto, or any of them, with respect to the subject matter hereof and thereof."[227]

Ironically, much of the extrinsic evidence offered in the case comes from Modelo,[228] the same party arguing that the contract is protected from extrinsic evidence.[229] Although theoretically the court is making a determination within the four corners of the contract and must determine the plain meaning of the term, judicial precedent in New York still allows for specialized trade usage to be

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[223] *Id.* at 18.

[224] Answer and Defenses, *supra* note 10, at 3, 13, 32–33.

[225] Miller, *supra* note 106, at 1506.

[226] *Id.* at 1506–07.

[227] Exhibit A at 36–37, Cerveceria Modelo De Mexico v. CB Brand Strategies, LLC, No. 1:21-CV-01317-LAK (S.D.N.Y. filed Feb. 15, 2021).

[228] Second Amended Complaint, *supra* note 2, at 4 (arguing retailers view product as not beer); s*ee also id.* at 8 (arguing definitions from Final Judgment of DOJ case uses different definition from the agreement); *id.* at 10 (arguing definition in agreement shows intent through drafting to exclude products like hard seltzer); *id.* at 14 (arguing Constellation filed trademark applications for the product in a non-beer category); *id.* at 16–20 (arguing marketing and executive statements never used the term beer except to differentiate).

[229] *Id.* at 11–12.

admitted for the purpose of determining whether the terms are ambiguous.[230]

C. *Ambiguity*

Staying within the four corners of the integrated agreement, the court would first evaluate the entire agreement itself without relying on extrinsic evidence.[231] Corona Hard Seltzer does not fall into the expressly named beer styles or malt beverage categories, because it is made from fermented sugar.[232] Yet, the inclusion of the phrase "any other versions or combination of the foregoing" in the definition adds vagueness to the face of the contract itself,[233] even if the court applied the more strict interpretation of the word beer.[234] This is further amplified in that the ingredients required, other than yeast, are never specified other than that those used must meet a certain quality standard.[235] Modelo, as the plaintiff seeking a more narrow reading of the definition, has the initial burden to show that there is no ambiguity and the contract should be read in the narrower sense.[236] Here, the wording of the definition itself, along with the complete context of the entire agreement will likely lead the court to find that the term is ambiguous based on the analysis of other courts.[237]

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[230] Patterson, *supra* note 94, at 841 (citing Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 116 (S.D.N.Y. 1960)); *see also* Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 466 (2d Cir. 2010).

[231] *See Law Debenture Trust Co. of N.Y.*, 595 F.3d at 467.

[232] *See* Answer and Defenses, *supra* note 10, at 17–18.

[233] Exhibit A, *supra* note 227, at 5.

[234] *See Law Debenture Trust Co. of N.Y.*, 595 F.3d at 468 ("The court should read the integrated contract 'as a whole to ensure that undue emphasis is not placed upon particular words and phrases'" (internal citation omitted)); White City Shopping Ctr., LP v. PR Rests., LLC, No. 2006196313, 2006 WL 3292641, at *4 (Mass. Super. Ct. Oct. 31, 2006) (stating defendant was bound to the court's interpretation by failing to include more specific language or definitions).

[235] *See* Exhibit A, *supra* note 227, at 11, 15, 27.

[236] *See* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 121 (S.D.N.Y. 1960).

[237] *See Law Debenture Trust Co. of N.Y.*, 595 F.3d at 469.

1. Plain Meaning

If the court were to find the contract unambiguous on its face, it would then have to interpret the term by its plain meaning.[238] Courts generally determine plain meaning through common usage by way of dictionary definitions.[239] As we have discussed, the common usage of beer has shifted throughout historical periods and different cultures.[240] While some people consider beer to require a strict set of ingredients—water, malt, hops, and yeast,[241] and would be disappointed if they received a hard seltzer when ordering a beer,[242] others only require that some type of sugar is brewed and undergoes the fermentation process.[243] Dictionaries also offer contrary definitions, with some limiting beer to beverages fermented with malt and hops, while others allowing for substitutes.[244] Because this lack of clarity obscures a single objective meaning, the court will likely find that the plaintiff failed its burden to prove the narrower reading of beer, and will instead follow the broader one that allows for hard seltzer to be included as beer.[245]

2. Trade Usage

If the court were to determine that common sense and the plain meaning of beer does not include hard seltzer or that the contract is ambiguous, Constellation should argue that the court must consider

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[238] *See id.* at 467; *White City*, 2006 WL 3292641, at *3.

[239] *See White City*, 2006 WL 3292641, at *3; *Frigaliment*, 190 F. Supp. at 117.

[240] *See* STANDAGE, *supra* note 18, at 19; *see also* DESALLE & TATTERSALL, *supra* note 16, at 30; I.R.C. § 5052(a) (Westlaw).

[241] DESALLE & TATTERSALL, *supra* note 16, at 30.

[242] Jo Dale Carothers, *Beer: You Know It When You Taste It, Or Maybe Not*, JDSUPRA (May 28, 2021), https://www.jdsupra.com/legalnews/beer-you-know-it-when-you-taste-it-or-9352340/.

[243] *See* STANDANGE, *supra* note 18, at 19; I.R.C. § 5052(a) (Westlaw).

[244] *Compare* Beer, OXFORD LEARNER'S DICTIONARIES, https://www. oxfordlearnersdictionaries.com/us/definition/american_english/beer (last visited Jan. 2, 2022) *with* Beer, MERRIAM-WEBSTER, https://www.merriam-webster.com/ diction-ary/beer (last visited Jan. 2, 2022).

[245] *See* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 121 (S.D.N.Y. 1960).

trade usage in their interpretation.[246] Constellation would now have the burden to prove the trade usage is necessary in interpreting the contract as the party asking to admit extrinsic evidence.[247] Under New York law, an ambiguity exists where the terms of the contract "'could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'"[248] First, the court would look to the status of the parties to determine if trade usage is appropriate.[249]

Here, because the parties are two of the largest and most sophisticated actors in the alcoholic beverage industry,[250] and they would have knowledge of the statutory definitions, trade usage would be appropriate in determining an objective meaning of the terms in the contract.[251] Next, Constellation would point to the fact that federal statutes and regulations allow for the broader reading of the word beer,[252] and that these laws show a fixed and invariable general definition in the industry.[253] Further, Constellation would argue that not only would it be fair to say that Modelo should have known about these laws as a sophisticated party, but they likely did because of the use of some of the statutory language in drafting the agreement.[254]

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[246] *See id.* at 119; Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 466–67 (2d Cir. 2010) (evidence as to custom and usage is considered, as needed, to show what the parties' specialized language is "'fair[ly] presum[ed]'" to have meant (internal citations omitted)).

[247] *See Law Debenture Trust Co. of N.Y.*, 595 F.3d, at 466 (proof of custom and usage consists of proof that the language in question "is 'fixed and invariable' in the industry in question." (internal citations omitted)).

[248] *Id.* at 466.

[249] *See id.* (quoting British Int'l Ins. Co. v. Seguros La Republica, S.A., 342 F.3d 78, 84 (2d Cir. 2003) (The trade usage must be "'so well settled, so uniformly acted upon, and so long continued as to raise a fair presumption that it was known to both contracting parties and that they contracted in reference thereto.'"); *see also Frigaliment*, 190 F. Supp. at 119 (proving either that he had actual knowledge of the usage or that the usage is "'so generally known in the community that his actual individual knowledge of it may be inferred.'"(citation omitted)).

[250] Second Amended Complaint, *supra* note 2, at 5, 7–8.

[251] *See Law Debenture Trust Co. of N.Y.*, 595 F.3d at 466; *Frigaliment*, 190 F. Supp. at 119; Gilson et al., *supra* note 117, at 40–41, 90–91.

[252] I.R.C. § 5052(a) (Westlaw); 27 C.F.R. § 25.15 (Westlaw).

[253] *See Law Debenture Trust Co. of N.Y.*, 595 F.3d at 466.

[254] *See Frigaliment*, 190 F. Supp. at 120.

By using this trade usage language it would indicate to a reasonable sophisticated party that the contract was indirectly referring to those legal definitions, thus including them in the contract definition.[255]

Although Modelo would push back that by not using the legal definition as is, they were expressly rebuking it,[256] as discussed previously, the vague language of the contractual definition in the context of the entire agreement does not support that argument.[257] Furthermore, they would likely attempt to bring in the extrinsic evidence in the complaint about Constellation's marketing,[258] executive statements,[259] and trademark applications to show there was no fixed industry understanding of hard seltzer as beer, even by Constellation.[260] Even if admitted, the marketing material and executive statements ignore the issue of whether hard seltzer is beer.[261] At most the statements speak about the hard seltzer market as separate than the "core beer" market but not that the products are not both beer.[262] Therefore, the statements would be unpersuasive in showing any contradiction in Constellation's argument.[263] The patent applications would be slightly more persuasive as they do directly contradict Constellation's argument by declaring the products in a non-beer category,[264] but a court will likely find that these applications are more personal to the trademark application process than general and cannot be used to show a lack of industry custom.[265]

D. *Final Recommendation*

In summary, I believe that Modelo is likely to be unsuccessful in persuading the court that hard seltzer does not qualify as beer under the sublicensing agreement, and if necessary, Constellation

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255 *See id.* at 121.
256 Second Amended Complaint, *supra* note 2, at 10.
257 *See* Exhibit A, *supra* note 227, at 5; *see also Law Debenture Trust Co. of N.Y.*, 595 F.3d at 469.
258 Second Amended Complaint, *supra* note 2, at 18.
259 *Id.* at 18–19.
260 *Id.* at 14.
261 *See id.* at 18–19.
262 *Id.* at 18.
263 *See* Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 471 (2d Cir. 2010).
264 Second Amended Complaint, *supra* note 2, at 14.
265 *See Law Debenture Trust Co. of N.Y.*, 595 F.3d at 471.

would persuade the court that trade usage evidence be admitted, and that it supports hard seltzer's inclusion.[266] The court would likely find that the language in the contract's definition of beer is ambiguous on its face due to the express wording of the definition of beer within the context of the entire agreement.[267] Also, Constellation's contention that hard seltzer is included coincides with a dictionary definition of the term beer and historical usage, even if not all dictionaries agree.[268] In addition, the terms of the contract seem to refer to the broader statutes and regulations rather than expressly rejecting them, further supporting Constellation's argument.[269] As a part of the largest beer company in the world, Modelo should have been aware of different products, even if hard seltzer had not become a large segment of the market at the time the contract was made and been able to state its intentions explicitly.[270] And finally, even if the court were to find the contract unambiguous, or that common usage dictated hard seltzer was not included, the sophistication of the parties in the beverage industry, and the industry's fixed standard definitions, would likely support relying on trade usage to interpret beer to include hard seltzer despite the merger clause.[271]

CONCLUSION

Contracting between private parties is an essential part of our legal system, giving stability and flexibility to transactions in society.[272] Courts thus hold an invaluable position in interpreting terms

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266 *See id*. at 465–66.

267 *See id.* at 466–68.

268 *See* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 121 (S.D.N.Y. 1960).

269 *See id.*

270 *See* White City Shopping Ctr., LP v. PR Rests., LLC, No. 2006196313, 2006 WL 3292641, at *3 (Mass. Super. Ct. Oct. 31, 2006).

271 *See Law Debenture Trust Co. of N.Y.*, 595 F.3d at 472.

272 *See* Friedrich Kessler & Richard H. Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 7 (1959) ("Contract offers the parties their choice of the full range from complete commitment and no flexibility to complete flexibility and almost no commitment. Thus, contract ideally makes it possible for the parties to select whatever mixture of flexibility and stability they deem optimal.").

and determining subjective or objective intent.[273] This is even more difficult when dealing with products or terms that have a deep and historical and social relevance, as does a product like beer.[274] It is important to note that although in this case using the judicial tools of interpretation hard seltzer is beer, that conclusion could easily have come out differently if the facts were different.[275] For example, if the contractual definition excluded other variations or expressly required malted grain as an ingredient, the court likely would have found the terms unambiguous.[276] Additionally, if the parties had crafted a definition without borrowing from the IRC definition, the court may have found a lack of trade usage, and applied a more common usage.[277]

Cases in the New York courts illustrate the problem with jurisdictions that claim to adhere to a more traditional textualist approach to contractual interpretation, but in reality do rely on context.[278] Although it makes sense to focus on the text of the disputed terms and the context within the four corners of the agreement, often there is

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[273] *See* Lifshitz & Finkelstein, *supra* note 105, at 542 ("The normative content of these values is determined by the judge, according to his understanding of the values of the legal system . . . .[T]he contract serves as a mechanism for imposing on the parties the values held by the judge-interpreter or by the legal system as a whole").

[274] *See* Farnsworth, *supra* note 95, at 952–54 (discussing the issues of vagueness relating to language learned from stimuli); Florestal, *supra* note 109, at 21 (tying together the issue of contract interpretation based on common understanding in society with differences in experience due to race, class, and culture).

[275] *See* Alan Schwartz & Robert E. Scott, *Contract Theory And the Limits Of Contract Law*, 113 YALE L.J. 541, 568–69 (2003) (intention is not a static idea, but the most plausible expectation of the parties based on the facts).

[276] *See Law Debenture Trust Co. of N.Y.*, 595 F.3d at 464 (showing the ability to change otherwise clearly defined terms through express drafting of the contract).

[277] *See* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 121 (S.D.N.Y. 1960) (finding that references to trade or legal definitions within an agreement strengthen the argument to use those definitions).

[278] *E.g., id.* (court relying on dictionary definitions and witness testimony on trade usage); *Law Debenture Trust Co. of N.Y.*, 595 F.3d at 471 (weighing SEC and court filings before determining they did not show a fixed trade usage for the terms in question).

extrinsic evidence that clarifies that context.[279] Still, states like New York are right to be concerned with the lack of stability and predictability that the subjective extrinsic evidence approach creates.[280] While the contextual approach allowing for unlimited extrinsic evidence may undermine the purpose of private contracts by disregarding the agreement itself,[281] the textualist approach's rigidity often trades fair results for certainty.[282] For this reason, New York should drop the façade of pure textualism and move forward with an objective contextual approach. In many ways they already do so through exceptions and precedent,[283] but by expanding on this concept they can create a more reasonable system of interpretation based on industry standards and objectivity over a single judge's opinion.

At the end of the day, the best way to ensure that a party's contractual intent is upheld, instead of being replaced by either the objectively reasonable interpretation or the subjective interpretation of a judge, is by drafting clear and precise language. Despite the dynamic nature of language, an effective lawyer can limit the scope of interpretation by being focused and deliberate. Whether dealing with chicken, sandwiches, stocks, or beer, the lesson is to be explicit and choose your words carefully, or be prepared to face some hard truths.

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[279] *See* Goldstein, *supra* note 108, at 115–116 (explaining how trade usage establishes a range of meaning from which a judge can often easily apply to the context of an agreement).

[280] *See id.* at 116 (describing the major issue of extrinsic evidence, that even seemingly objective evidence can have subjective meaning to different groups, rendering it useless for the purpose admitted or requiring additional extrinsic evidence).

[281] *See* Miller, *supra* note 106, at 1480 (contextual jurisdictions find that "fairness, equity, or substantial justice . . . back this complex structure of agreement-trumping policies.").

[282] *See id.* at 1479 ("New York's tenderness for freedom of contract expresses itself, at times, in a seemingly atavistic pleasure in imposing the consequences of bad bargains.").

[283] *See* Patterson, *supra* note 94, at 841.