Contract Law

Survey Says: The Top Five Drafting Errors in 2021 Ambiguous Contract Cases

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Contract Law

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Vol. # 22-195

6.0 CLE Credit Hours

Wednesday, October 26, 2022

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Featuring:
Lenné Eidson Espenschied, Esq.; Next Level Contracts; Saint Simons Island, Ga.
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8:30 **Introduction, Methodology of the Survey, How Courts Assess Ambiguity and Survey Results**

- Learn how the cases were selected.
- The court's five options in an ambiguous contract case.
- The five most litigated types of contracts.
- The five most litigated types of provisions.
- The five most common drafting errors that caused litigation.

9:30 **The Most Common Error: Contradictory Provisions**

- Obvious versus subtle contradictions
- Twelve examples of contradictory provisions from survey cases.

10:00 Break

10:15 **Three Practical Techniques to Prevent Contextual Ambiguity and the Second Most Common Error: Definitions**

- Three practical techniques to prevent contextual ambiguity.
- Eleven examples of ambiguous definitions in survey cases.
- Integrated versus autonomous definitions.
- Practical techniques to create clear definitions.

11:45 Lunch

12:45 **The Third Most Common Error: Questionable Associations**

Seven examples of questionable associations in survey cases.

Series-qualifier canon versus rule of the last antecedent.

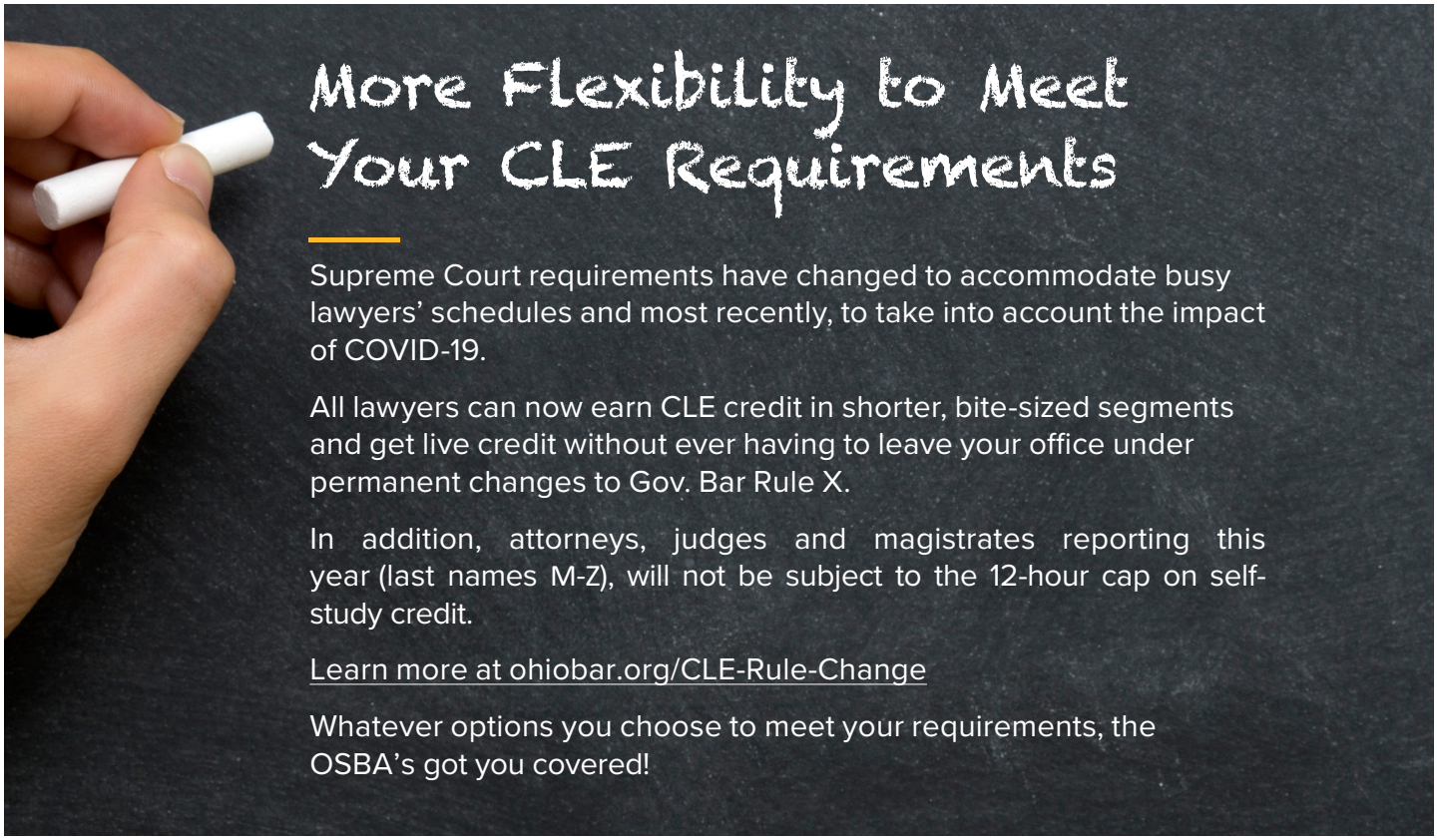
Five practical techniques for avoiding questionable associations.

2:15 Break

2:30 **The Fourth and Fifth Most Common Errors: Missing Information and Failing to Standardize Language for Specific Consequences**

- Four examples of missing information from survey cases.
- Five examples of failing to standardize language for specific consequences from survey cases.
- Practical recommendations for standardizing language.

4:00 **Program Concludes**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Survey Says…

The Top 5 Drafting Errors that Caused Contract Litigation in 2021

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Introduction

When a client hires a lawyer to draft a contract, the implicit requirement of the engagement is that the lawyer will draft an *enforceable* contract that will reliably protect the client's interests if something goes wrong. When the parties litigate to enforce contractual rights, it is rarely strictly a matter of non-performance; most contract litigation involves *interpretation* of the provisions the lawyer has drafted. **"Ambiguity"** in a contract means that two or more interpretations are equally plausible under the circumstances. The antonym of "ambiguity" is "clarity"; therefore, if a contract provision is unclear, it is ambiguous. Three types of ambiguity lurk in contracts: **semantic**, which means that two or more interpretations of a word are equally plausible; **syntactic,** which means that two or more interpretations of a sentence are equally plausible; and **contextual,** which means that either the contract is internally inconsistent or, worse, contradictory, or that something has been omitted. Ambiguous provisions threaten the viability of a contract. If a court finds, as a matter of law, that a contractual provision is ambiguous, and if unable to ascertain its meaning via extrinsic evidence, that provision and possibly the contract as a whole, are unenforceable and the lawyer has failed his or her essential mission.

The biggest problem, as I see it, is that transactional writers are largely unaware of the problems ambiguous drafting causes, or their role in causing contract litigation. For example, I recently did a program for real estate lawyers based on a "standard" commercial lease. Afterwards, I received a cordial email from an attendee who disagreed with some of the issues I had raised regarding the extraordinarily poor organization of the lease. The essence of the lawyer's position was "this isn't wrong because this is how we do it." Notice the circular logic: the premise "this is how we do it" provides no support for the conclusion "this isn't wrong." Feedback on another recent program argued that my recommendations were "academic," and "not how it's done in actual practice." I found this comment particularly amusing since I personally practiced transactional law for 25 years. Ironically, some of my colleagues at the University of Georgia School of Law considered my contract drafting course to be too practically-oriented to be "scholarly" [*specifically, they believed contract drafting is a trade skill that should be taught in practice – and told me so in no uncertain terms*.] I do not consider myself "academic," and all of my examples are authentic language used in "actual practice." Bryan Garner has noticed the same thing,[1] commenting in an article called "*Why Lawyers Can't Write*" in the ABA Journal on March 1, 2013:

> Transactional lawyers have little idea how little they know.
>
> Transactional lawyers go through their professional lives blithely unaware of the land mines they're inadvertently planting in their documents—at least until litigation over those land mines ensues.

How did you learn to draft a contract? Who taught you which words to prefer and which to avoid? Who taught you how to organize sentences, how to differentiate and create specific contractual consequences, and how to organize a contract? Who taught you the three types of ambiguity? Who taught you how to shift risk, or did you fumble along, trying to make sense of stilted language until it finally became familiar? Did you receive training that was effective and sufficient to prepare you for the

[1] By the way, if you don't know who Bryan Garner is, don't go bragging about it; if you are not acquainted with his work something fundamental is missing in your preparation for any sort of legal writing.

challenges of drafting in practice, or did you learn simply by emulating what you saw others doing? Have you questioned the way a particular provision was drafted, but ultimately wound up keeping it for fear of missing something? How many contract litigation cases have you studied to figure out what causes ambiguity? Obviously, lawyers need to be competent drafters; therefore, they must proactively take the necessary steps to hone their drafting proficiencies. By focusing on language the courts deemed ambiguous in 2021 cases, this program will help lawyers draft significantly better contracts.

1. My Methodology

Using the Google Scholar database, I selected "all courts," state and federal, and searched by "ambiguous contract," limiting the search to 2021 cases. That initial search yielded over 3,700 cases, but as I began reviewing them, I noticed that most of the cases didn't actually concern ambiguous contracts. I narrowed my search term to "the contract is ambiguous," with the quotation marks. That yielded a more manageable number, around 270 cases, but 1) many cases still were not ambiguous contract cases; and 2) in some of the ambiguous contract cases, the language was determined not to be ambiguous. After exhausting the list of 270 cases, I began using search phrases like "the language is not clear" or "it's unclear whether" until I gradually compiled a list of one hundred cases where the court determined the language was ambiguous.

Paradoxically, in many instances, the court called the language "confusing" or "unclear" but apparently did not realize that if the language is unclear, by definition it is ambiguous. Occasionally, the court claimed that obviously contradictory language within the contract was "not ambiguous" but nevertheless consulted the testimony of industry experts and other sources to determine the meaning. (For example, see *AECOM Technical Services v. Prof. Serv. Industries*, DC Florida, 2021.) Of the cases that *were* ambiguous contract cases, meaning one or both of the parties were specifically arguing the language was ambiguous, slightly over half of them were determined to be ambiguous. In order to focus in this program on what actually *does* cause ambiguity, I excluded the cases where the language was not deemed ambiguous and gathered the first one hundred cases where the language was determined to be ambiguous. Many of these cases were not finally dispositive because questions of ambiguity are often handled on motions for summary judgment, declaratory judgment, or dismissal, and ambiguous language often necessitates further litigation. Some of the opinions I reviewed are "unpublished," although available on Google Scholar.

I did not select cases based on 1) the type of contract; 2) the type of provision; or 3) the type of error; rather, the one hundred cases we've wound up with are as random as possible given the search methodology. In other words, I did not "stack the deck" by selecting the cases to make specific points regarding drafting errors; rather, they were the first one hundred ambiguous contract cases I came to using the search parameters described above.[2] The only way I influenced the cases included for discussion in this program was by adding one SCOTUS case: *lagniappe* – an extra bonus or gift! Our survey might not be considered statistically reliable for scientific research, but I allowed the content to decide itself, and the survey is as reliable as I can get it. Nevertheless, I'm quite pleased with the results and the topics we will discuss, which I believe will be very helpful to you.

[2] If you do a similar search on Google Scholar, your cases may not appear in the same order, because the list of cases Google Scholar retrieved for me was not compiled in any discernible order.

Disclaimer

In order to simplify this presentation, to avoid distractions, and to allow you to focus on the drafting errors, I have taken the liberty of editing some of the provisions slightly. Brackets, citations, internal quotations, and other punctuation marks are sometimes omitted, and the provisions are shown with the actual names of the parties rather than "plaintiff," "defendant," "appellant," "cross appellant," etc., to make the disputed language easier to follow. I have meticulously tried to avoid changing the meaning of any provision included in this program. Nevertheless, please be sure to go back to the official version of the case if you intend to quote the language.

2. How the Courts Handle Contract Litigation

First, the Litany:

In contract litigation, the proper way to construe the contract is a question of law, and the court's fundamental goal is to find and give effect to the true intent of the contracting parties. When interpreting a written contract, the court attempts to determine the intent of the parties at the time the contract was made; however, an overwhelming majority of U.S. courts and jurisdictions follow an **objective theory of contract interpretation**, so the intent is determined by how a reasonable person would read the provision, not how the actual parties did.

Because of this, virtually every breach of contract case opinion begins with a litany similar to the following that explains the process: "First, the court must determine whether the language of the contract is ambiguous. Courts do this by examining the language used in the contract, reading the contract as a whole. Courts attempt to construe the contractual language so as not to render any words, phrases, or terms ineffective or meaningless. Courts look for an interpretation of the contract that harmonizes its provisions, rather than one that places the provisions in conflict.

"A contract is not ambiguous simply because the parties argue different interpretations;[3] ambiguity only results if the parties' diverging interpretations are both reasonable. The unambiguous language of a contract is conclusive upon the parties to the contract and upon the courts. If the language is unambiguous, the parties' intent will be determined from the four corners of the contract. If, on the other hand, a contract is ambiguous, its meaning must be determined by examining extrinsic evidence. If language in a provision is ambiguous, the court first looks to see how the language is used elsewhere in the contract itself. Courts often consult dictionary definitions of any words for which the meaning is questioned – both *Black's Law Dictionary* and non-legal dictionaries, like *Merriam-Webster* – or turn to trade jargon to determine the meaning. (See *Global Reins. Corp. of Am v. Century Indem Co.*,

[3] Indeed, many appellate courts also conclude that the fact that two *judges* construe the language differently does not necessarily mean the language is ambiguous. Contrarily, in *Walworth v. Mu Sigma*, citing *Eagle Industries v. DeVilbiss Healthcare*, 702 A. 2d 1228 (Del. 1997), the court said the fact that two judges construe the language differently is *a fortiori* proof that the language is ambiguous, and I tend to agree. ***Walworth Investments L-G, LLC v. Mu Sigma*** (Illinois Court of Appeals, 2021)

(2nd Circuit, 2021.) If the court is unable to determine the meaning, its proper construction is a matter for the jury or fact finder.

"Surrounding circumstances and other extrinsic evidence are used by courts to determine the meaning of *specific words and terms used* but not to show an intention independent of the instrument or to vary, contradict or modify the written word. Extrinsic evidence is not admissible to show a party's unilateral or subjective intent as to the meaning of a contract word or term; to show an intent independent of the contract; or to vary, contradict, or modify the written word. The subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. Extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face."

This litany reveals why searching for ambiguous contract cases is difficult; *every* breach of contract case begins with an explanation of the process that mentions "ambiguous" or "ambiguity," and some even mention "the contract is ambiguous," regardless of whether the parties are actually arguing that the contract is ambiguous.

Second, the Court's Five Options in an Ambiguous Contract Case:

In ambiguous contract cases, one party's own arguments are often diametrically opposed. A party often begins by arguing that the contract unambiguously means X and unambiguously does not mean Y – what the other side says the contract means. If that argument is unavailing or unconvincing, ironically, the same party often shifts gears and argues that if the contract does not unambiguously mean X, then it is necessarily ambiguous. Thus, it is not unusual to have the same party arguing that the contract is utterly unambiguous and utterly ambiguous within the same brief or motion.

A court considering the parties' respective arguments has five options:

1. The contract is not ambiguous; it clearly means what P says it means.
2. The contract is not ambiguous; it clearly means what D says it means.
3. The contract is not ambiguous; it clearly means what I or We say it means (which is different from what P and D said it means.)
4. The contract is ambiguous, but I or We can tell what it means.
5. The contract is ambiguous, but I or We cannot tell what it means. Remand.

Notice that three of the five options conclude that the contract is not ambiguous; nevertheless, more often than not, the court concludes that the contract is ambiguous, suggesting that parties arguing for ambiguity have a distinct edge.[4]

[4]It is within the realm of possibility that this ratio could alter if all of the cases in the survey had been finally resolved. Since so many cases settle after rulings on the preliminary motions, this information is not available.

3. Survey Says

3.1 Breakdown by Court:

# of Cases	Type of Court
29	Federal Circuit Courts of Appeal
49	Federal District Courts
4	State Supreme Courts
18	State Courts of Appeal

Lagniappe: 1 SCOTUS case

3.2 Breakdown by Type of Contract:

# of Cases	Type of Contract
15	Insurance
14	Services Agreement
11	Shareholder/Asset Purchase/Stock Option
11	Settlement Agreement
9	License Agreement
9	Employment/Consulting/Sales Rep/etc.
9	Lease or Rental Agreement
5	Financing Arrangement
3	Construction
3	Collective Bargaining Agreement
2	Joint Venture Agreement
2	Residential Real Estate
2	Bank Account Agreements
1	Antenuptial
1	Franchise
1	Listing Agreement (commercial)
1	Release
1	Distribution Agreement

3.3 Breakdown by Type of Provision:

# of Cases	Type of Provision
36	Scope
21	Payment/fees
8	Termination
6	Dispute Resolution
4	Indemnification
3	Limitation of Liability
3	Forum/Choice of Law

3	Definitions Section
3	Restrictive Covenants
2	Insurance Requirements
2	Modifications
1	Representations and Warranties
1	Option
1	Personal Guaranty
1	Entire Agreement
1	Source Code Escrow
1	Assignment
1	Recitals
1	Conveyance
1	Third Party Beneficiary

Examples of Cases Involving the 5 Most Litigated Provisions in My Survey

It doesn't take a rocket scientist to predict that the most likely sources of contract disputes would entail what each party is required to do (scope section), how, when, and how much payment is required, or how they can terminate a disadvantageous agreement, and my survey bears out this hierarchy. **A good example of a scope dispute** is *ripKurrent v. Ballard* (S.D. Florida). Ballard IRA, a Georgia LLC, provides consulting services for developing business in sports, entertainment, and hospitality venues. Ballard entered into a consulting agreement with ripKurrent, a Florida LLC principally located in Boca Raton, Florida. Mr. Ballard traveled to Florida several times to meet with ripKurrent. RipKurrent paid an advance of $250,000 to engage Ballard IRA to represent and assist ripKurrent in becoming the primary contractor for products and services to be sold at "Rockdome," which is an entertainment development site in Las Vegas, Nevada. Apparently, Ballard IRA promised more than it could deliver because the relationship soured when no business actually materialized for ripKurrent. Ballard IRA repaid $15,000 of the $250,000 advance. RipKurrent filed suit in Florida courts to collect a refund of the balance but Ballard moved to dismiss for lack of jurisdiction due to the following language in the consulting agreement:

> ripKurrent hereby engages Ballard to render, as an independent contractor, consulting services on a non-exclusive basis to assist it in obtaining and presenting, solicit and obtain [sic] sports, entertainment, hospitality and retail projects and project agreements for ripKurrent in Boca Raton, Florida, as well as such additional or further scope of consulting services as may be agreed to in writing by ripKurrent and Ballard from time to time.

Although the consulting agreement contained a forum selection clause stating that Georgia courts had exclusive jurisdiction, the State of Florida's long arm statute provides that Florida courts have jurisdiction over suits that arise out of or relate to a defendant's contacts with Florida, or if the defendant engages in substantial and not isolated activity in Florida.

Ballard argued that the reference to "in Boca Raton, Florida" in the scope section merely refers to the location of ripKurrent's home offices. RipKurrent argued that Ballard actually performed consulting services in Boca Raton and the Florida long arm statute therefore provided jurisdiction in

Florida. The Florida court concluded that the language is ambiguous because it is susceptible to differing interpretations, which would require it to review extrinsic evidence; therefore, it necessarily was required to deny Ballard's motion to dismiss.

The lawyer's error in this scope section is what I call a "**questionable association**," which occurs when it is unclear what a word, phrase, or even a sentence is supposed to modify; in this case, whether "in Boca Raton" modifies ripKurrent, as Ballard argued, or whether it modifies consulting services, as ripKurrent argued. The error could have been resolved by either placing it next to consulting services: consulting services in Boca Raton; or by being more precise: ripKurrent, a Florida LLC located in Boca Raton.

A good example of a payment dispute caused by ambiguous language is *Sams v. Pinnacle Treatment Centers, Inc.* (D.C. New Jersey). Pinnacle provides substance abuse and addiction treatment services through nationwide in-patient and out-patient clinics. In February 2014, the CEO of Pinnacle sent a letter to Sams offering employment as an "OTP Developer." Sams was responsible for identifying locations within a specified territory where substance abuse treatment was unavailable, gathering data on substance abuse in those locations, and proposing sites for new Pinnacle clinics.

The parties disagree as to when Sams completed his required work for each clinic. Sams maintained that his responsibilities ended when each clinic obtained a certificate of occupancy; Pinnacle maintained that Sams was actually required to open the doors of the facilities for business. The terms of the parties' agreement were updated a couple of times but things generally proceeded according to terms of the employment letter until Sams' employment was terminated by Pinnacle in October 2017, and Pinnacle refused to pay incentives associated with seven clinics that opened and enrolled 100 clients afterwards.

The court determined that the offer letter was a "contract" under applicable state law. Two provisions of the offer letter are relevant to the dispute:

> You will be entitled to earn an incentive for opening an OTP clinic and meeting the 100 initial client enrollment. The total incentive you can earn is $75,000 per clinic you open. Fifty percent (50%) or $37,500 of the incentive will be given upon opening of the clinic and fifty percent (50%) or $37,500 will be due once the clinic reaches 100 clients. The incentive must be approved by the CEO and will be processed on the next pay period after approval is given.
>
> The compensation and benefits, including salary, commission plans, bonus plans, etc. are subject to the sole discretion of Pinnacle Treatment Centers and may be changed at any time.

The court found the first ambiguity in the offer letter regarding the meaning of the term "open" and Sams' specific duties; namely, whether Sams' contract entitled him to incentive payments when the doors of a clinic opened for business, or upon the clinic's eventual opening after Sams had identified the location, obtained premises, and gotten a certificate of occupancy. This particular ambiguity also caused the second ambiguity, regarding the 100 client enrollment incentive; namely, whether Sams must have personally opened the clinic to earn the enrollment incentive, or whether he could receive the enrollment incentive after scouting a location that eventually enrolled 100 clients.

The court also found a third ambiguity regarding the meaning of "subject to the sole discretion" in the relevant provisions; namely, whether the individual incentive payments, individual payment amounts, or the entire incentive scheme was subject to the CEO's discretion.

The court found a fourth ambiguity regarding the meaning of "approved by the CEO"; namely, it could mean that the CEO had to approve the incentive payment amount, or confirm that Sams had fulfilled his obligations before granting incentive payments, or that the CEO could unilaterally withhold incentive payments. Because it could not decipher the parties' intent regarding these four ambiguities, the case was remanded for further proceedings.

Leaseweb USA, Inc. v. Centro (Superior Court, Delaware) provides **a good example of a dispute regarding an ambiguous termination provision**. Leaseweb furnished web hosting services to Centro under a Services Agreement entered into on August 10, 2019. The parties negotiated two different terms under the agreement: a three-year rate of $73,758.97 per month and a one-year rate of $103,654.56 per month. The agreement included a one-time, opt-out provision, which states:

The following Initial Term will apply to the Order:

- Initial Term of the contract will be that of three (3) years.
- The Customer will be entitled to a one time opt-out option, provided that the Customer will give Leaseweb a thirty (30) days prior written notice. If onetime opt-out option is not exercised within the 12 months of the Initial Term, the onetime opt-out option expires.
- If the Customer chooses to invoke its right to the onetime opt-out option, the Service Charges in the one(1) year Quote will apply. This means that the difference between the three (3) year monthly recurring Service Charges and the one (1) year monthly recurring Service Charges (multiplied by 12 months) will be invoiced and due by Customer for payment within the payment term upon receipt.

Centro paid the 3-year rate from October 2019 until May 2020. On April 3, 2020, Centro sent notice to Leaseweb that it was exercising the opt-out option, effective May 3, 2020. Leaseweb advised Centro it owed $886,655.68 in service charges under the opt-out provision, calculated by multiplying the One-Year rate by 12 and subtracting the payments made by Centro. Centro claimed that the proper amount owed under the opt-out was $352,777.92, calculated by subtracting the three year rate from the one year rate, then multiplying that by 12.

The court considered both interpretations plausible, finding the opt-out unclear as to whether Centro had an obligation to pay for the remaining months of services or was free to terminate at any time and simply pay the difference between the three-year rate and the one-year rate, multiplied by 12. Hence, the court denied summary judgment.

In mathematical terms, the parties disagreed as to which of these calculations was intended:

Leaseweb's Calculation:	**Centro's Calculation:**[5]
$ 103,654.56	$103,654.56
X 12	- 73,758.97
$ 1,243,854.72	$ 29,895.59
- 357,199.08	X 12
$ 886,655.68	$358,747.08

The ambiguity here apparently involves the order of operations: whether to multiply first or subtract. I have covered this material – most common sources of ambiguity in mathematical formulas, and how to draft payment terms – in *many* of my programs!

Arbitration is a frequent topic of contract litigation, especially in the 9th Circuit, which has been embroiled in an ongoing feud with the Supreme Court over arbitration for nearly a decade. The 9th Circuit does not like to enforce arbitration and will use almost any excuse to avoid it; SCOTUS is constantly enforcing arbitration provisions and chastising the judges of the 9th Circuit but the cases keep on coming. Indeed, our survey produced a couple of arbitration cases from the 9th Circuit, but the **best illustration of a typical arbitration case** is *Soliman v. Subway Franchisee*, 999 F. 3rd 828 (2021), which is actually from the 2nd Circuit. Ms. Soliman entered a Subway franchise and an employee told her she could get a discount coupon by texting Subway. She did text Subway, and moments later, she got a free six-inch sub by purchasing a large drink. It seemed like a good deal, but the texts kept coming even though Ms. Soliman followed the steps to opt out. Ms. Soliman wound up filing a federal class action lawsuit alleging that the text messages violated the federal Telephone Consumer Protection Act, but Subway moved to compel arbitration, claiming that when Soliman signed up for discount coupons she agreed to a side order of arbitration. The 2nd Circuit concluded that Subway did not provide reasonably conspicuous notice that Ms. Soliman was agreeing to arbitration; therefore, she had not unambiguously assented to arbitration. We'll see what happens if Subway takes it up to SCOTUS. The drafting error that caused this contract litigation is failing to standardize legal consequences, which we'll address in Section 8.

Indemnification cases usually hover around whether the obligation to indemnify has been activated, whether the obligation is capped, and who is covered. For example, in *Fireman's Insurance Co. v. Story and Aerotek*, 20-2220-cv (2nd Cir. May. 27, 2021), Wegmans Food Markets entered into an agreement with Aerotek for Aerotek to provide staffing services. Aerotek assigned Mr. Story to work as foreman on a construction site where Wegmans was building a new store. Story was an employee of Aerotek; he was an independent contractor to Wegmans. Wegmans entered into a construction contract with MP Masonry, which included the following indemnification provision:

> To the fullest extent permitted by law, MP Masonry shall defend, indemnify and hold harmless Wegmans and its agents, employees, and representatives.

During the construction work, an MP Masonry employee was injured on the site and sued Wegmans and Story. Fireman's insured MP Masonry. It agreed to indemnify Wegmans, but not Story because Story

[5] The parties must have pro-rated a partial month in their calculations or added interest, because neither eight nor twelve times $73,758.97 yields $357,199 (which is closer to, but not exactly, five times $73,758.97), and Centro's calculation using its interpretation of the formula was almost $6,000 less than my calculation above.

was not an employee of Wegmans. The court concluded the indemnification agreement was "ambiguous not because it fails to list Story by name, but because it fails to include his role as foreman, construction manager, or member of the construction management team." This case has particular relevance for all lawyers who represent clients who utilize staffing services. The drafting error that caused this contract litigation is missing information, which we'll address in Section 7.

3.4 Breakdown by Type of Error:

# of Cases	Type of Error
30	Contextual Ambiguity (contradictory)
26	Definitions
15	Questionable Associations
13	Contextual Ambiguity (omission)
10	Legal Consequence (lack of standardization)
6	Say What?[6]

IN AT LEAST 94 OF THE SURVEY CASES, THE AMBIGUITIES WERE CAUSED BY ERRORS I HAVE BEEN DISCUSSING IN MY PROGRAMS FOR OVER 15 YEARS.

4. The #1 Error: Contradictory Provisions

Contextual ambiguity arises when two or more interpretations are equally plausible because: 1) provisions within the contract or within related documents are **inconsistent**, or even **contradictory**; or 2) something important has been **omitted** from the contract. (*Note: Examples of contextual ambiguity caused by omitted information are discussed in Section 7.*) Both kinds of contextual ambiguity figured prominently in my survey. Inconsistencies usually occur when language is inserted into the contract from other sources, like an insert prepared by opposing counsel or language cut and pasted from other contracts. Inconsistency can occur when one provision gets revised but another does not. When provisions overlap, contextual ambiguity can arise if the redundant language is not identical; for example, if the parties insert a provision that includes a defined term that has already been defined elsewhere in the contract, ambiguity arises as to which definition controls. Even seemingly "minor" inconsistencies can cause contextual ambiguity, as demonstrated in the cases below.

[6] This catch-all category includes provisions so plagued with drafting errors that I couldn't attribute a single cause.

In drafting a contract, no substitute exists for long periods of focused concentration. Frankly, I was surprised at the number of cases in our survey that involved contextual ambiguity caused by contradictory provisions – *30 of them!*[7] – and I suspect this has something to do with the intense demands and unreasonable turnaround times wrought on our profession by the ever increasing speed of technology. When I first began practicing law many moons ago, our deadline was set by Delta Dash: what is the last possible minute I can continue working on this draft and still drive it to Delta Airlines for delivery to opposing counsel on the West Coast tomorrow morning? (answer: 11:25 p.m. for a midnight cargo flight) That meant I had several hours of quality, quiet time to work on the document with few or no interruptions after the normal buzz and hubbub settled from the office. It also meant I could count on at least 24 hours to reflect on the transaction before it was my turn to revise or edit the document again. In this day and age, lawyers face continuous interruptions 24/7, and turnaround times are set by the speed of email and Drop Box. The pressure is intense, and it shows in the following cases. To summarize, the contradictions are:

- The title of a contract v. type of coverage provided
- Whether notice is required in 10 days, or when reasonable details become available
- "As is" with "all faults" v. in good working condition
- "Collectively" v. "each"
- When one party agrees not to seek sentencing adjustments, can it nevertheless argue against adjustments requested by the other party?
- Notice delivered to a physical address v. "in writing" [via email]
- Nothing terminates any rights, except the option v. this option can't be modified or terminated
- Longbow is responsible for taxes v. EJM is responsible for taxes
- Terms of compensation survive v. commissions end when terminated
- Southwest has sole discretion v. customer has the option to receive a refund

4.1 American Bankers Ins. Co. v. Shockley

The *American Bankers Ins. Co. v. Shockley*, 3 F.4th 322 (7th Circuit) lawsuit arose after Mr. Shockley was injured on November 11, 2016 when he was thrown form a golf cart at an equestrian event. The golf cart's operator, Ashley Ratay, used the golf cart to chase a runaway horse she was responsible for supervising in her job at St. Charles Farms. The equestrian center was 15 miles from SCF premises. SCF had an insurance policy with American Bankers Insurance, but ABIC filed this lawsuit seeking a declaratory judgment that it had no duty to defend or indemnify SFC. The policy was titled a "Farm Owner's" policy, which typically operates as a homeowner's policy by linking coverage to the premises, without coverage for commercial general liability; however, this policy listed coverage limits for commercial liability coverage on the declarations page. The relevant provisions of the policy read:

> We pay all sums which [sic] an insured becomes legally obligated to pay as damages due to bodily injury arising out of . . . a "motorized vehicle" [e.g., a golf cart] which [sic] is designed only for use off public roads and which [sic] is used to service the insured premises. (However, this

[7] Thirteen other contextual ambiguity cases described below were caused by omissions rather than contradictory language, adding to the total of 43 contextual ambiguity cases in this survey.

coverage does not apply to bodily injury arising from use of a motorized vehicle while used for recreational purposes away from the insured premises.

The issue is scope of coverage: is it limited, as the title of the policy suggests, to premises coverage or are offsite business operations included? The court noted that the policy contained an additional insured endorsement for Kane County Fairgrounds, and ultimately concluded that the parties had negotiated coverage beyond SFC's actual premises, which means that despite the title, which suggests premises coverage, the policy was for commercial coverage. The court further noted that "arising out of" is a broad phrase that is liberally construed, in insurance contracts particularly. Because the parenthetical says that coverage is excluded when a vehicle is used off premises for recreational purposes, this implies that coverage is intended when business activities occur off premises.

4.2 Sterling National Bank v. Block

In *Sterling National Bank v. Block*, 7th Cir. 2021) a dispute arose after Sterling National Bank purchased Damian Services Corporation from Block in 2015. An escrow of $2 Million was funded to resolve any disputes that arose after closing. Shortly after the purchase, a disgruntled former employee called some of Damian's clients to tell them about a billing practice pursuant to which Damian overcharged its clients by over $1 Million.

Sterling hired a law firm to investigate and ultimately refunded the overpayments to each of its current Damian clients but not to any former clients. By August 11, 2015, the law firm had prepared a preliminary memorandum on the allegedly fraudulent billing practices and discussed its findings with the U.S. Attorney's Office. The law firm presented another memorandum to the U.S. Attorney on December 2, 2015. On December 11, 2015, Sterling demanded indemnification from the escrow fund because Damian's liabilities and potential litigation had been misrepresented in the agreement. Sellers argued that Sterling had missed the deadline for claiming indemnification under Section 8.05 (c) of the agreement:

> **Direct Claims.** Any Action by an Indemnified Party on account of a Loss which does not result from a Third Party Claim (a "Direct Claim") shall be asserted by the Indemnified Party giving the Indemnifying Party reasonably prompt written notice thereof, but in any event not later than ten (10) days after the Indemnified Party becomes aware of such Direct Claim. The failure to give such prompt written notice shall not, however, relieve the Indemnifying Part of its indemnification obligations, except and only to the extent that the Indemnifying Party irrevocably forfeits rights or defenses by reason of such failure. Such notice by the Indemnified Party shall describe the Direct Claim in reasonable detail, shall include copies of all material written evidence thereof and shall indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained by the Indemnified Party.

The agreement requires notice within ten days, after a party became aware of a claim; however, the notice was required to contain "reasonable detail." The court noted this combination makes for an ambiguous mess. The parties disagreed just how much Sterling needed to know before being "aware of" its claim against the seller, and what the trigger is that starts the 10-day clock running. Sterling argued that it was not aware until the law firm completed its investigation; Block argued that Sterling was aware at least by August 2015 when it presented the basic facts to the U.S. attorney's office. The

court concluded that whether Sterling's demand came more than 10 days after it became aware of the claim could not be decided as a matter of law.

4.3 Horne v. Elec. Eel Mfg., Inc. et al.

Horne v. Elec. Eel Mfg., Inc., 987 F.3d 704 (7th Circuit) a dispute arose when Calvin Horne rented an electric drain rodder from Home Depot that was manufactured by Electric Eel. The rodder malfunctioned because the reverse switch wouldn't work, as Horne discovered when he tried to reverse the rodder because of a kink in the cable. Horne had to pull the cable out manually, but the cable snapped back, wrapped around his arm, and threw him to the ground. The applicable provisions of the rental agreement read as follows:

> The Home Depot will provide Customer the tool(s) identified on page 1 of this Agreement (the "Equipment") "as is" and in good working condition.
>
> Customer acknowledges acceptance of the Equipment "as is" and on a "where is" basis, with "all faults" and without any recourse whatsoever against the Home Depot.

Home Depot argued that Mr. Horne clearly and unambiguously released Home Depot by accepting the equipment "as is" and with "all faults." Horne argued that Home Depot was in material breach of the contract because it promised to provide the equipment "in good working condition." The court found considerable ambiguity between "as is" and "in good working condition." The court then consulted *Black's Law Dictionary* for a working definition of "all faults," since the term was not defined in the agreement. According to *Black's*, in situations that do not involve fraud by the vendor, "all faults" means "such faults and defects as are not inconsistent with the identity of the goods as the goods are described." The court found that Horne assumed the risk of operating a machine in good working order; he did not assume the risk of operating a machine with flaws in its basic function. Finally, the court concluded that the promise to provide the rodder in good working condition took precedence over the limiting terms "as is" and "all faults."

4.4 Electra et al. v. 59 Murray Enterprises, Inc.

In *Electra et al. v. 59 Murray Enterprises, Inc.*, 987 F. 3d 233 (2nd Circuit), Carmen Electra and seven other women sued 59 Murray Enterprises alleging that it used photographs of the women to advertise strip clubs. Most, if not all, of the women had signed extensive releases when their photos were taken to advertise lingerie, a dating website, costumes, and a modeling agency. The releases included **future use clauses** that authorized the photographers to use the photos for other purposes. The defendants offered to settle the lawsuit; the settlement agreement included the following language:

> Defendants hereby offer to Plaintiffs collectively to take a judgment against Defendants in the amount of $82,500.00, inclusive of interest, costs and attorneys [sic] fees, and without any admission of liability, on each of the Causes of Action contained in the Complaint.

The plaintiffs returned to defendants a document entitled "Plaintiffs' Acceptance of Defendants' Rule 68 Offer of Judgment" stating that they agreed to settle for a total of $660,000, which represented

the sum of $82,500 times "each of the Causes of Action," since eight causes of action were included in the complaint.

The court held that the sentence is ambiguous; it is reasonably susceptible to more than one interpretation because the word "collectively" contradicts the word "each." The court declined to apply *contra proferentem*, because that doctrine assumes the existence of a contract about which there is some dispute as to one or more terms. Here, there was never a "meeting of the minds" and no mutual assent; therefore, the court concluded there was no contract.

4.5 U.S. v. Moreno-Membache

In *U.S. v. Moreno-Membache*, 995 F. 3d 249, (DC Cir. 2021) Moreno pled guilty to conspiracy to knowingly and intentionally distribute cocaine. Moreno entered into a plea agreement on the understanding that the government would not argue that he was ineligible for a sentence reduction because of his alleged supervisory role in a drug-smuggling conspiracy. The government believed that it retained the ability to oppose any Safety Valve relief and characterized the relevant language in the plea agreement as "inelegant" and "unnecessary."

A separate statutory provision known as the "safety valve" allows district courts to approve sentences below a mandatory minimum in certain circumstances.

> The government *agrees not to seek any of the adjustments set out in U.S.S.G. Chapter 3, Part B*. The Defendant is permitted to request relief under Safety Valve provisions, and the Government is permitted to argue that the Safety Valve provisions do not apply to the maritime offense to which the Defendant has agreed to plead guilty and that, in any event, the Defendant does not meet the criteria to qualify for Safety Valve relief.

The question was whether the government's express agreement not to seek any adjustment under the sentencing guidelines precluded the government from arguing that Moreno was ineligible for Safety Valve relief. The court held the language is ambiguous as to the government's ability to oppose Safety Valve relief, observing that the language either meant something under Moreno's reading or it meant nothing under the government's. The court refused to believe a defendant surrendered valuable constitutional rights for a meaningless and valueless promise.

4.6 The 1228 Investment Group v. BWAY Corp., (DC E.D. PA)

BWAY provides IT support services. BWAY entered into a Master Services Agreement with IT Support Center in 2019. The Master Services Agreement contains general terms and anticipates that Statements of Work (SOWs) will be entered into from time to time. In fact, only one SOW was entered into by the parties, and it was signed simultaneously with the MSA. In June 2020, BWAY's representative emailed ITSC director Nicholas Tresp to state that BWAY intended to terminate the agreement, citing Paragraph 4 of the SOW. Tresp tried to convince BWAY to stay but ultimately accepted BWAY's termination on July 1, 2020, and the parties agreed to terminate the agreement on August 17, 2020; however, another ITSC director, Jeffrey Becker, claimed on August 19, 2020 that BWAY had breached the contract because it didn't give proper notice and it had blocked its employees from

using ITSC's services. ITSC assigned the contract to 1228, which is another entity Jeffrey Becker manages.

If we ignore, *arguendo*, that Mr. Tresp accepted BWAY's termination, as the court apparently did, there may be something probative to learn from this case. The relevant provisions of the agreement are:

> MSA: The term and termination for each Statement of Work shall be specified in the Statement of Work.
>
> Section 9.1: All notices and other communications required or permitted to be given under this Agreement will be in writing and will be delivered personally, or mailed by registered certified mail, return receipt requested or FedEx, or equivalent national delivery service, and addressed to the parties at their respective address [sic] set forth on the signature page of this Agreement.
>
> SOW, paragraph 4: This SOW will automatically renew . . . unless either party notifies the other in writing not less than 30 days prior to the expiration of the term or any Renewal Term.

BWAY argued that it was entitled to summary judgment because it properly terminated the SOW and the MSA. It argued that 1) the MSA Section 9.1 provides that the term and termination for each SOW is specified in the SOW; 2) the SOW says termination notice must be in writing; 3) BWAY emailed written notice; 4) the termination was therefore effective. 1228 argued that 1) the MSA incorporates the SOW, which is governed by its terms; 2) the MSA does not allow notice by email; 3) the SOW does not clearly provide otherwise since it merely says that notice must be in writing; and 4) BWAY's termination notice was therefore invalid.

The court held that the parties had both offered reasonable interpretations because the provisions are ambiguous. In my programs, I have repeatedly stressed, as noted in my recommendations for avoiding contextual ambiguity below, to include every provision only once in a contract and not to duplicate provisions in overlapping contracts or multiple schedules that comprise contracts. If for some rare reason the concept must be addressed twice, be sure the provisions are *completely* compatible or cancel one of them: For purposes of this SOW, Section 9.1 of the Master Agreement does not apply to notices for termination, which can be given via email.

4.7 McDonald's Corporation v. Roger C. Rosenfeld Revocable Trust, DC M.D. Georgia

McDonald's operates a store in Columbus, Georgia on land leased to it by Rosenfeld. The lease agreement includes two different options for McDonald's to purchase the leased property: 1) a straightforward option with a designated purchase price of $770,000; and 2) a right of first refusal if someone else offered to buy the property. As the parties later discovered, these options conflict when a third party offers to buy the property for $1,151,000 – more than the designated purchase price option. The relevant provisions of the lease are:

> Article 27 – Tenant shall have the first option to purchase the Premises or the beneficial interest in the Premises by giving written notice to Landlord of its intention to purchase the Premises within 30 days after it receives Landlord's notice of an offer to purchase at the same price (or, if

the Premises are part of a larger parcel, then the dollar amount allocated to the Premises) and on the same terms as the offer, except as provided below. If Tenant does not exercise the first option to purchase, this Lease shall remain in full force and effect and shall bind both Landlord and any purchaser or purchasers, and Tenant shall have, as against Landlord or any subsequent purchase, the continuing first option to purchase the Premises or the beneficial interest or any part, as described above, upon the terms of any subsequent offer or offers to purchase.

If there is any conflict between the provisions of this Article and the terms contained in the offer to purchase, then the terms of this Article shall control and supersede those contained in the offer to purchase. Neither notice to Tenant of any offers to which this Article applies nor the sale of the Premises to a third party shall terminate any other options or rights presently or subsequently held by Tenant under this Lease, except for Tenant's Option to Purchase as set forth in New Article 29, below.

Article 29 – This Option to Purchase shall continue in full force and effect for the entire term of this Lease and any extension or renewals of the term. Notwithstanding the foregoing, if the premises [sic] are purchase [sic] by a third party after Tenant fails to exercise its right of first refusal on a sale to that third party, then this Option to Purchase shall automatically become null and void. If Tenant should receive notice of any offer pursuant to any right of first refusal to purchase or to lease either presently or subsequently held by Tenant, or if the premises [sic] are sold to any third party, this Option to Purchase shall be neither modified nor terminated.

The court concluded that one reasonable interpretation of Article 27 is that the third-party offer terminated McDonald's option to purchase, but this would directly conflict with the language of Article 29, which plainly states that the option to purchase "shall be neither modified nor terminated." The court was unable to resolve the ambiguity by either giving the greatest effect possible to all provisions or by applying codified rules of construction under O.C.G.A. 13-2-2, and was unwilling to construe these provisions against McDonald's even though McDonald's counsel wrote the language in question because the entire contract was a product of negotiation between two sophisticated, represented parties.

4.8 Executive Jet Management, Inc. v. Longbow Enterprises, LLC, DC S.D. Ohio

EJM, an Ohio corporation, provides aircraft management and charter services of privately owned aircraft. In July 2011, EJM entered into an agreement with Longbow (apparently organized in either California, Arizona, or Virginia but certainly not Ohio) to lease an airplane owned by Longbow for third-party charter when the airplane was not being used by Longbow. Indeed, two things are certain: death and taxes, and right on cue in 2015, the Ohio Department of Taxation determined that the lease of the airplane was a transaction subject to sales tax under the Ohio revenue code in the amount of $158,381. EJM argued that Longbow was responsible for the taxes; Longbow argued that EJM was. The relevant sections of the lease agreement read as follows:

5.4(f) Potential Taxes on the Leasehold. Longbow shall be solely responsible for ascertaining the applicability and amount of any taxes that might apply to its lease of the Aircraft to EJM, as well as for collecting, reporting, and remitting such taxes. EJM agrees to pay Longbow such tax as Longbow represents in writing to EJM is due, provided that Longbow promptly notifies EJM of such imposition and provides reasonable documentation to EJM in support of such imposition.

9.1 Representations, Warranties, and Covenants of EJM. EJM represents, warrants, and covenants that: 1) it shall collect and remit every tax imposed by any governmental authority on EJM's sale and performance of charter operations using the aircraft.

Longbow argued it was responsible for taxes levied on the airplane itself, but EJM was responsible for taxes related to its charter operations according to section 9.1. EJM argued that section 5.4(f) makes clear that Longbow was responsible for these taxes. The court was not persuaded by either party's interpretation of the apparently conflicting provisions and denied the motions for judgment on the pleadings.

[Comment: *Consider the phraseology associated with EJM's obligation: EJM represents, warrants, and covenants that it shall. . . . This is not a representation and warranty; rather, it is a duty to perform something specific under the agreement. Representations and warranties are statements of fact as of a certain date regarding the status of some aspect of its business. Here, EJM is not stating a fact about the existing status of some aspect of its business; rather, EJM is promising to do something in the future, which should be phrased like this: EJM shall collect and remit every tax*…]

4.9 Ohio National Life Ins. Co., v. Cetera Advisor Networks, DC S.D. Ohio

Ohio National is an insurance company that sells various insurance-related products, including annuities. Ohio National sells annuities through selling agreements with broker-dealers, like Oppenheimer (whom the court refers to exclusively and doesn't reveal his connection to Cetera, the other named party in this lawsuit). The selling agreement describes the terms and conditions under which Oppenheimer received commissions for selling annuities; the selling agreement includes "trail commissions," which are paid on a periodic basis as long as the annuity remains in effect.

The selling agreement includes a Survival Provision:

The terms of compensation shall survive this Agreement unless the Agreement is terminated for cause by ONL provided that [Oppenheimer] remains a broker-dealer in good standing with the NASD and other state and federal regulatory agencies and that [Oppenheimer] remains the broker-dealer of record for the account.

[Comment: *does this proviso represent a condition, a duty, a limitation, an exception, or an additional requirement? Because provisos are interpreted so many ways, they are a prime source of ambiguity. I covered this topic in 23 Mistakes in February 2020*.]

The selling agreement also includes a provision referred to by the court as an "In Force Provision":

[Trail commissions] will continue to be paid to broker dealer of record while the Selling Agreement remains in force and will be paid on a particular contract until the contract is surrendered or annuitized.

The parties did not contest that Oppenheimer was terminated without cause. Oppenheimer argued that, because Ohio National terminated the selling agreement without cause, the selling agreement unambiguously prohibits Ohio National from withholding trail commissions; however, Ohio National argued that the selling agreement unambiguously provides that Ohio National may withhold trail commissions when the selling agreement is terminated.

The court noted that the provision Oppenheimer relied on says that the terms of compensation survive, but one of those terms of compensation says that Ohio National will continue to pay while the selling agreement remains in force. Because the commission schedule includes language that the trail commissions continue to be paid "while the agreement remains in force," this suggests that if the agreement is *not* in force then trail commissions will not continue to be paid. Even so, the court explained that to judge on the pleadings:

> The question the court must answer in connection with Ohio National's motion is not whether Ohio National's reading is plausible, but instead, whether that reading is the *only* permissible interpretation of the selling agreement.

The court declined to do so because Ohio National's argument is logically flawed – because of the fallacy called **denying the antecedent**. Because both interpretations have limitations, the court found the contract ambiguous and remanded.

4.10 Bombin and Rood v. Southwest Airlines Co., DC E.D. PA

In February 2020, Bombin purchased airline tickets from Southwest Airlines from Maryland to Cuba; Rood purchased airline tickets from California to Arizona. By the end of March, however, Covid-19 was a global pandemic and Southwest changed its flight schedules. Southwest cancelled Bombin's flight to Cuba and rescheduled Rood's flight to Arizona three times. Bombin called Southwest's customer service department to obtain more information. He requested a refund but Southwest denied and instead offered him a credit on a future flight. Rood was also offered a credit rather than a refund.

The court wryly observed that Southwest's Contract of Carriage is labyrinthine in nature and "a puzzle" to understand. One reason is that while section 4(c)(4) suggests that Southwest may determine in its sole discretion whether to offer a credit when it cancels a flight, section 10 of the Customer Service Commitment, which is incorporated by reference into the Contract of Carriage, states that "customers will have the option to receive a refund" when Southwest changes its flight schedule more than seven days before departure.

Although Southwest argued that section 4(c)(4) is more specific and should therefore control, the court found that would render the provision in section 10 of the Customer Service Commitment meaningless. It found the contract to be ambiguous because both parties presented reasonable interpretations.

[Comment: *before you incorporate content by reference, review it carefully to ensure it does not conflict in any way with the rest of the contract. If it does, draft around it, either by carving an exception: incorporated by reference except for Section 17.3; or by only incorporating a segment: Section 17.3 of the Employee Handbook is incorporated by reference*.]

Other Contextual Ambiguity Cases:

Foodbuy, LLC v. Gregory Packaging, Inc., 987 F. 3d 102 (4th Cir.): one provision indicates that pricing is for sales by GPI to Foodbuy purchasing on behalf of "Committed Customers"; another provision indicates that the discounted prices apply to *any* transaction.

Bowman v. Bowman, Mississippi Court of Appeals: property acquired in exchange for nonmarital assets is nonmarital, but property acquired during the marriage is marital property if jointly titled. What about property acquired during the marriage in exchange for nonmarital assets but is jointly titled?

Milanovich v. Quantpost, Inc., DC Montana: an option terminates three months after termination of employment unless it specifically states otherwise, but two options have stated expiration dates. Does that state otherwise?

KND Affiliates v. City of Victorville, California Court of Appeals: the interest rate is adjusted from time to time, but a specific payment amount ($88,708.35) is specified as the exact (non-adjusting) payment due in another section.

Energy Intelligence Group, Inc. v. Exelon Generation Co., DC N.D. Illinois: a corporate name appears on a subscription form, but the terms state that an authorized user can only be a living individual and never a company. Did Exelon violate Energy's copyrights?

Cabell v. CMH Homes, DC S.D. West Virginia: using a standard form sale agreement, the parties filled in the blanks on the front page to say anything having to do with construction of a modular home on the property was the owner's responsibility, but the back of the pre-printed form says the vendor is responsible for normal delivery and installation. The court held it was ambiguous.

Connect Information Technology Professionals v. MedMatica Consulting, DC E.D. Pennsylvania: The consulting agreement between Connect Info and MedMatica states that it will terminate immediately if the client terminates its agreement with MedMatica, but MedMatica behaved as though the client agreement were delayed but not terminated.

England v. Federico, Kentucky Court of Appeals: the contract clearly states "no interest," but the sum of the payments is almost $100,000 greater than the purchase price.

Preserver v. Creative Wealth Media Finance Corp, DC S.D. New York: is the relationship a "loan participation" as stated in the Financing Term Sheet, or a purchase of an undivided fractional interest in a loan as stated in the Participation Agreement; in other words, a loan or an asset?

Cryo-Tech v. JKC Bend, 495 P. 3d 699, Oregon Court of Appeals: except with respect to initial construction, which is landlord's responsibility, tenant is responsible for maintenance. Who is responsible for latent construction defects?

Grange Ins. Co., v. Capital Specialty Ins. Corp, DC E.D. Pennsylvania: a subcontractor agreement refers to "owner" as in "Agreement between the Owner and Bachmans," even though there seem to be only

two parties, Grange (subcontractor) and Bachman (contractor). Who is "owner," and is the subcontract agreement for one job or a master agreement?

Evans v. Capital Blue Cross, Pennsylvania: a disability plan states that the employer has full discretion and authority to determine eligibility and to construe and interpret all terms but also indicates that legal action can be taken against the employer, which means that employer does not actually have final say in the matter.

Patel v. Bandikatla, DC S.D. New York: the parties agree to the obligations set forth in the immigration nationality act, but the employment contract specifies a term of three years. When the attorney general determines extenuating circumstances exist and permits the employee to change employers prior to the end of the three year term, has she violated the employment agreement?

Stern v. Milestones Psychology Group, Supreme Court, NY County: an employee is required to complete 2,000 hours of supervised clinical social work to complete a Master's degree but later discovers that the supervisor assigned by her employer is not a qualified supervisor for those purposes. Is this impliedly required under the contract?

Admiral Ins. Co. v. Anderson, 529 F. Supp 3d 804: Is an insurer whose policy includes an exclusion for liabilities for hazing nevertheless required to defend members of a sorority who have been sued for failing to seek medical care or and failing to report the hazing incidents?

My Recommendations for Avoiding Contextual Ambiguity

As noted above, focused concentration is essential to avoiding contextual ambiguity, but other strategies will help, or at least enhance your ability to focus and concentrate; namely, organizing the contract properly and editing strategically.

1. Organize Contracts Properly to Prevent Contextual Ambiguity. Lawyers often fail to properly organize topics and ideas within the contract, and this problem is exacerbated as language is added from various sources during negotiations. To prevent contextual ambiguity, a lawyer must understand how to organize and group ideas within a contract.

Marie Kondo's famous method also work well in organizing contracts, with a few tweaks:[8]

- Organize by category;
- Break a category into subcategories as necessary;
- Keep only those words and sentences that contribute meaning;
- Eliminate clutter and redundant language;
- Organize your contract thoroughly and completely;
- Follow the right order; and

[8] The diminutive Ms. Kondo established an international following after the 2014 publication of her book, *The Life-Changing Magical Art of Tidying Up*. Her books on organizing have sold millions of copies around the world. Her KonMari method for eliminating clutter and organizing homes earned her recognition as one of *Time Magazine*'s 100 Most Influential People in 2015.

- Do it all in one go.

To the greatest extent possible, group all related ideas in a contract together. Organize the ideas in sections from the most important to the least. Next, organize the terms within each section in logical order from the most important to the least. Absent a compelling reason to arrange it otherwise, general information should precede specific; the "rule" should precede the exception; "what" should precede "how"; more frequently used provisions should appear before less; permanent provisions should appear before temporary, and provisions involving current operations should appear before future operations. Order events chronologically. Housekeeping items such as an arbitration clause and typical "boilerplate" provisions should appear last.

Sometimes, careful editing will reveal that an entire section is out of order. For example, a shareholders' agreement ordinarily should not begin with a section called "Removal of the CEO," and a merger agreement should not begin with a reciprocal indemnification provision. Other times, a single sentence may be out of order; for example, if a stray entire agreement provision is included in the introductory paragraph of the contract. Eventually, thinking it has been omitted, someone in the drafting chain will add another entire agreement provision in the boilerplate section, resulting in contextual ambiguity as to which should control.

Group all of the relevant information in the same section. Sometimes, a term may be applicable to more than one topic within the contract. For example, if a transaction provides for a termination fee, the lawyer could logically include this information in both the compensation and payment section and the termination section of the contract. Avoid drafting the same information into multiple sections to prevent internal inconsistency, and hence, contextual ambiguity, that can occur when one section is revised but not the other. Cross-reference sparingly to direct the reader where to find related information; having too many cross-references confuses, frustrates, and distracts readers.

2. Use a simple numbering system. After the topics have been arranged in a logical order, implement a simple numbering system that is easy to follow. Avoid confusing decimal-based numbering systems, as in "1.1.1.1.2." Use no more than one decimal; also avoid using Roman numerals, which have a varying number of characters and don't line up well. Use subparts only if there are at least two corresponding concepts. Use headings and hanging indents to reveal the structure clearly, like this.

1. Concept
    - 1.1 Section
        - (A) Paragraph
            - (1) Subparagraph
            - (2) Subparagraph
        - (B) Paragraph
    - 1.2 Section
2. Concept

3. Carefully Integrate Inserts. Lawyers often create contextual ambiguity by copying sections from one contract into another without carefully integrating the new material into the existing text. To prevent contextual ambiguity, scrutinize every insert to ensure it is consistent with the rest of the contract. Make sure the terms of the inserted language do not conflict with the terms of the contract and that the defined terms and other terminology are used consistently. Don't assume that opposing counsel has already done this with respect to any inserts he or she proposes; it's more likely that he or she *hasn't* thoroughly integrated the language. Check inserts and resolve these integration issues:

- The insert uses consistent margins and numbering formats.
- The words that are capitalized in the insert are defined in the glossary.
- No terms defined in the insert are already defined in the glossary.
- Defined terms are used consistently, like "Company" versus "UPS."
- No provisions conflict with the insert; for example, an insert that calls for summary judgment when the agreement requires arbitration.
- The provisions anticipate the same governing law; for example, an insert that refers to New York law when Delaware law controls.
- A provision is substituted or deleted in the course of negotiations, but the original provision is referenced elsewhere.

4. Eliminate Overlaps, or Use Identical Language. Sometimes, several different documents are all part of the same transaction. For example, if a client hires a new employee and grants her a stock option, the parties may enter into an employment agreement, a stock option agreement, and a shareholders' agreement. Vigorously avoid drafting the same subject matter into multiple documents. If the subject matter is addressed in more than one document, the overlapping provisions *must* match identically. If the overlapping provisions are not identical, the differences create pockets of contextual ambiguity that an adversary will be happy to exploit. For example:

> Shareholder Agreement: "Shareholder separately covenants and agrees with the Company that, for so long as he holds the Shares and **for a period of six (6) months following cessation** as a Shareholder, he will not, either directly or indirectly, on his own behalf or in the services of others in the United States, engage in the Business of the Company as an officer, director, executive, managerial employee, consultant to. . . ."
>
> Employment Agreement: "**For one (1) year following termination**, neither Employee nor any Affiliate will, without the prior written consent of Company, engage in any Competing Business…."
> [*note: These conflicting provisions activated simultaneously, because the shareholder agreement stated that upon termination of employment, the shares in question must be sold back to the Company.]*

_____

Articles of Incorporation: "Any action that may be taken at a meeting of the shareholders may be taken without a meeting if written consent setting forth the actions taken is signed by those shareholders entitled to vote with respect to the subject matter thereof having voting power to cast not less than the minimum number (or numbers, in the case of voting by classes) of votes that would be necessary to authorize or take such action at a meeting at which all shareholders entitled to vote were present and voted."

Bylaws: "Any action required or permitted to be taken at a shareholders' meeting may be taken without a meeting if all the shareholders entitled to vote on such action, or the appropriate percentage of shareholders necessary to approve the action at a meeting of the shareholders at which all shareholders entitled to vote were present and voted, sign one or more written consents."

5. Edit Strategically. The best way to edit effectively is to allow enough time in the drafting process to let the contract "sit" for at least two days after the initial draft is complete. Then, you are able to review the contract with "fresh eyes," and mistakes practically leap off the page. The second most effective way to edit is to have someone else edit the contract. Editing should involve several passes through the contract, focusing on something different with each pass. Divide editing into four levels: substantive, mechanical, semantic, and syntactic.

Substantive Edit. The primary purpose of the substantive edit is to ensure that the necessary legal provisions have been included in the contract. Consider each section separately. Take time to think through what information should be included in the section. Without looking at the contract, brainstorm and jot a rough outline of the section. Compare the terms of similar contracts to be sure you have addressed all the important issues. Search for sources of contextual ambiguity. Has any important information been omitted? Does the contract reveal the who, what, when, where, how and why of the transaction? Are the risks and liabilities properly addressed? Are the terms of the contract internally consistent? Do any provisions in the contract, related documents, or text incorporated by reference contradict each other? Are overlapping provisions in related contracts identical? The first and most important step in editing is to ensure that your contract is substantively complete.

Mechanical Edit. Experienced paralegals and newer lawyers can do the mechanical edit. The mechanical edit should include the following:

a. Eliminate archaic customs – replace useless legalese like "witnesseth" and a string of "whereas" clauses with a more modern statement of purpose. Eliminate phrases like "know all men by these presents," and "in witness whereof, Contractor has hereunto set his hand and seal." [Comment: *the concept of seal is surprisingly resilient and not archaic, but this sentence is unnecessarily stilted even if it is desirable to sign the contract under seal.*]

b. Check visual format – is the contract formatted consistently? Do the headings and paragraphs follow the same formatting conventions such as bold text, italics, underlining, font, and style? Is the text justified or not consistently throughout the

contract? Have widows/orphans been eliminated to prevent single lines of text at the top or bottom of the page?

c. Check spelling – use the Spell Check function to identify some misspelled words, but be aware that this function is not foolproof. Proofread carefully to find words that are spelled correctly but used incorrectly.

d. Check basic grammar – be sure that the contract is grammatically correct. Look for subject/verb agreement, sentence fragments, and pronouns used incorrectly.

e. Check all cross references.

f. Check the organization of the contract - are related topics grouped together? Does the order progress in a logical manner? Are related provisions ordered from the general to the specific? Is the physical layout correct as far as indented paragraphs and subparagraphs? Does the contract contain headings and subheadings to aid the reader in locating relevant provisions?

Semantic Edit. Make one pass through the contract focusing specifically on words.

a. Check recurring words and phrases to be sure you've used them consistently.

b. Eliminate variations – using different words to refer to the same concept.

c. Check Defined Terms – do a global search for each defined term to ensure that it is used, is used consistently, and is not used except as defined. Check to ensure that all defined terms appear in the glossary. Check to see if any undefined word should be defined. If industry jargon is used, make sure you understand its meaning, or if it is susceptible to alternative meanings, define it.

Syntactic Edit. Make one pass through the contract to focus specifically on sentences.

a. Target long sentences. Try to reduce them to an average of 30 words.

b. Consider each sentence separately to be sure it is organized logically to convey its point.

c. Turn passive-voice sentences into active voice in the performance provisions. [Comment: *passive voice is fine for most miscellaneous boilerplate provisions*]

d. Use parallel structure and tabulations for lists; check prefaces and tails to make clear what they modify.

e. Structure complicated provisions so the details appear after the subject and verb.

5. The #2 Error: Definitions

Defined terms are handy devices used in contracts for a couple of purposes. First, definitions serve as a shorter reference to people, entities, or ideas within a contract. For example, instead of "The Goodyear Tire and Rubber Company's Employee Stock Option Plan," we use "ESOP" and save nearly a line of text every time we reference the plan. Second, definitions can be used to expand or contract meaning, to allow us to clarify exactly what or who is included within a concept. For example, "Goodyear" means The Goodyear Tire and Rubber Holding Company and all of its subsidiaries; or "Goodyear" means the Goodyear Service Center located at 1400 Main Street. The defined term can be a shortened version of a name, or another suitable label based on the context: "Company," "Corporation," "Employer," or "Purchaser."

Who taught you how to create definitions? Did someone provide formal instruction on what to do and what not to do? Most lawyers have never had any formal instruction in using defined terms; they simply imitate what they see, which inevitably means that mistakes are perpetuated from one transaction to the next. Moreover, lawyers sometimes become so focused on complex substantive issues that they miss critical fundamentals in creating definitions, resulting in embarrassing (and easily avoidable!) errors. Unfortunately, a flawed definition is potent poison: it contaminates every provision in the contract in which the defined term appears. In this section, we'll first consider a few cases where the lawyers failed to draft a clear, logical definition that worked.

Although I expected that ambiguous definitions would factor prominently in the survey, I was surprised with the number of cases in which the court struggled with words that were not defined, so we'll also consider several of these cases. It is not necessary nor plausible, exponentially, to define every word used in a contract; we have to rely on the plain meaning of most words. When courts are unsure how to construe an undefined word in the contract, they usually turn to *Black's Law Dictionary*, if it is a legal word like "hold," or to a reference dictionary, like *Merriam-Webster* for the plain meaning. Occasionally, they turn to industry experts to define industry jargon, like "indication" in the medical realm. The examples of "ambiguous" words in the following cases may make you think you need to polish up your crystal ball, but they will give you an idea of what to look for in your own contracts. To summarize, these terms were considered ambiguous in the survey cases:

- Disputed Matter, as defined
- The Business, as defined
- The name of the correct party, as defined
- "Claims" as defined
- Prevailing Party
- Willing buyer
- Entered into
- Including; substantially similar products/technologies
- Named co-insured
- False Statement
- Prevent

5.1 DDK Hotels, LLC v. Williams-Sonoma, Inc.

In *DDK Hotels, LLC v. Williams-Sonoma, Inc.,* 6 F. 4th 308 (2nd Cir. 2021), DDK Hotels entered into a joint venture with Williams-Sonoma Stores, Inc. (West Elm) to develop a line of boutique hotels that would complement West Elm's home furnishing business. Disagreement over the direction of the project led West Elm to seek other business partners for the project, which allegedly violated the Joint Venture Agreement, so DDK Hotels sued in US District Court in the Eastern District of New York. West Elm subsequently filed suit against DDK in Delaware Chancery, seeking to dissolve the joint venture on the basis of "decisional deadlock." The Delaware court dismissed the action, so DDK demanded that West Elm reimburse the costs of litigation in Delaware. When West Elm refused, DDK amended its original filing in Federal District Court to include a claim for reimbursement. West Elm then moved to compel arbitration, arguing that the joint venture agreement delegated the question of arbitrability to the arbitrator. The relevant provision of the joint venture agreement provides:

> 16. Deadlock. (a) Mediation. If the Members (acting through the Board) are unable to agree on a matter requiring Board or Member approval (a "*Deadlock*"), except as provided in Section 16(c) [below], any Member may serve on the other Member a notice (a "*Deadlock Notice*") specifying the matter in dispute (the "*Disputed Matter*"). Promptly following the issuance of a Deadlock Notice, the Members shall set a date, being no later than 20 days after the date on which the Deadlock Notice was issued, for a meeting, at which the Disputed Matter shall be considered. If at the meeting, the Members have still not been able to pass a resolution or reach an agreement regarding the Disputed Matter, then a senior executive of West Elm and a senior executive of DDK shall promptly meet and use their good faith efforts to resolve as soon as possible the Disputed Matter. If, on the date that is 15 days after the date on which such senior executives first meet pursuant to this Section (the "*Resolution Period*"), the Disputed Matter remains unresolved, any Member may serve on the other Members a written notice (the "*Mediation Notice*") referring the parties to a non-binding mediation process under the auspices of the American Arbitration Association…
>
> (b) Arbitration. The parties unconditionally and irrevocably agree that, with the exception of injunctive relief as provided herein, and except as provided in Section 16(c), all Disputed Matters that are not resolved pursuant to the mediation process provided in Section 16(a) may be submitted by either Member to binding arbitration administered by the American Arbitration Association ("AAA") for resolution in accordance with the Commercial Arbitration Rules and Mediation Procedures of the AAA then in effect, and accordingly they hereby consent to personal jurisdiction over them and venue in New York, New York....

The court noted that while West Elm is correct that incorporating AAA rules typically evinces the intent to delegate questions of arbitrability, the provisions do not exist in a vacuum; rather, they must be read in context. In this agreement, the arbitrable issues are "Disputed Matters," defined as instances where the Members "are unable to agree on a matter requiring Board or Member approval. The provision does not submit "all" or "any" disputes related to the agreement to arbitration; the scope of arbitrable issues is explicitly limited. The court cited precedent stating: "in the absence of an arbitration agreement that clearly and unmistakably elects to have the resolution of the arbitrability of the dispute decided by the arbitrator, the question whether the particular dispute is subject to an arbitration agreement is typically an issue for judicial determination." In my opinion, the court did the drafters a

favor in picking through the language to come up with a functional definition of Disputed Matter. The definition is critically flawed because it is unclear where the definition begins and which words comprise it. That's ambiguity waiting to be noticed. Notice also that the parenthetical is separated from its definition by two other parenthetical definitions of terms. Disputed Matter should have been defined autonomously.

5.2 Lawson v. Spirit Aerosystems

Larry Lawson, the former CEO of Spirit Aerosystems, filed suit alleging Spirit breached its obligation to pay him the sums due him under the Retirement Agreement they had entered into in 2016. Spirit and Lawson had entered an Employment Agreement on March 18, 2013, and Lawson was represented by counsel. Spirit thrived under Lawson and at the end of 2015, Spirit's board indicated it wished to offer Lawson a three-year extension to his contract. Lawson told the board that he wanted to retire before the end of 2016. Board members tried to convince Lawson to stay, but ultimately brought on Tom Gentile as Chief Operating Officer, with the intention of have Gentile replace Lawson as CEO some time in 2016. Subsequently, Lawson pursued opportunities to serve on the boards of several other entities. Spirit eventually stopped paying sums due under the Retirement Agreement, alleging that Lawson had breached the restrictive covenants in his Employment Agreement. The non-compete in Paragraph 4(c) of the Employment Agreement is the crux of the present dispute:

> [N]either you nor any individual, corporation, partnership, limited liability company, trust, estate, joint venture, or other organization or association (`Person') with your assistance nor any Person in which you directly or indirectly have any interest of any kind (without limitation) will, anywhere in the world, directly or indirectly own, manage, operate, control, be employed by, serve as an officer or director of, solicit sales for, invest in, participate in, advise, consult with, or be connected with the ownership, management, operation, or control of any business that is engaged, in whole or in part, in the Business, or any business that is competitive with the Business or any portion thereof, except for our exclusive benefit.

The term "Business" was defined in Recital A of the Employment Agreement:

> We are engaged in the manufacture, fabrication, maintenance, repair, overhaul, and modification of aerostructures and aircraft components, and market and sell our products and services to customers throughout the world (together with any other businesses in which Spirit may in the future engage, by acquisition or otherwise, the "*Business*").

The Court held the plain language of the Employment Agreement must be read to mean that "the Business" refers to the *specific* products and services provided, marketed, or sold by Spirit at the time of contracting, as well as the products and services Spirit later chooses to provide, market, or sell, if and when Spirit chooses to do so. Thus, the restrictive clause targets the products actually made by Spirit, or products which Spirit makes in the future, if and when such products are actually produced. The court concluded that a contrary interpretation would both render some of the language in the definition superfluous, and would also prevent the plaintiff from being able to make an informed decision about which prospective employers to avoid. The drafter failed to consider whether the definition created in the recital (which is bad practice) worked in the non-compete, and it did not include as much protection as Spirit desired.

5.3 Yellow Pages Photos, Inc. v. YP, LLC and Print Media (11th Cir. 2021)

This case demonstrates that when you've taken the time to draft a definition, be sure to use it, consistently, to prevent ambiguity. Yellow Pages Photos owned copyrights in certain images that it licensed other companies to use. Yellow Pages Photos licensed images to L.M. Berry and AT&T Advertising, which used the photos in telephone directory advertising. Those companies have been acquired and merged with other related entities many times over the past 15 years, and the merged entities have continued to use the licensed images, so Yellow Pages Photos sued YP and Print Media for copyright infringement. The original Berry License granted Berry and "all affiliates owned or owning the same" a worldwide and perpetual license:

> …the non-exclusive right to copy, crop, manipulate, modify, alter, reproduce, create derivative works of, transmit, and display the Digital Media an unlimited number of times in any and all media for any purpose."
>
> Notwithstanding anything to the contrary in the Berry License, the rights and obligations of either party under the Agreement were permitted to be assigned, sublicensed or otherwise transferred, without written consent of the other party, to a third party that acquired substantially all of the assets or business of a party to the Agreement

First, the court noted that the phrase "owned or owning the same" is ambiguous as to whether affiliates who had common ownership with L.M. Berry were included as Licensees. Next, the Court noted numerous inconsistencies in the language of the license:

- The cover page states that the license is between Yellow Pages Photos and "AT&T Services";
- The first page of the license lists "AT&T Advertising d.b.a. AT&T Advertising and Publishing" as the entity for invoices;
- The first page also states the AT&T Affiliate Name as "ATT Services";
- Questions were to be addressed to Davis at "ATT Services";
- On the signature line appears "AT&T Affiliate Name: AT&T Services on behalf of AT&T Advertising d.b.a. AT&T Advertising and Publishing";
- The cover pages for the 1st and 2nd amendments stated the amendments are between Yellow Pages Photo and AT&T Services;
- The first page of each amendment indicates it is between Yellow Pages Photos and ATT Services
- ATT Services signed the 1st amendment and is listed as signatory for the 2nd amendment.

Based on these variations, the court concluded the license is ambiguous as to whether ATT Services or ATT Advertising was the intended party, but ultimately concluded that AT&T Advertising was.

5.4 Calderon et al. v. Sixt Rent a Car, LLC

This lawsuit was filed as a class action styled *Calderon et al. v. Sixt Rent a Car, LLC*, (11th Circuit). A customer making a reservation on Orbitz for an airline, hotel, or car-rental agrees to the terms of a contract that includes an arbitration provision requiring the customer to arbitrate disputes related to "any services or products provided." The question in this case is whether that provision applies to services provided 1) only by Orbitz; or 2) by Orbitz and any of its rental partners.

Ancizar Marin used Orbitz to reserve a rental car from Sixt. To complete the reservation, Marin clicked on a statement to acknowledge his acceptance of Orbitz's terms:

> By selecting to complete this booking I acknowledge that I have read and accept the Terms of Use.
>
> Any and all Claims will be resolved by binding arbitration, rather than in court. This includes any Claims you assert against us, our subsidiaries, travel suppliers or any companies offering products or services through us, including Suppliers, (which are the beneficiaries of this arbitration agreement.
>
> Claims – any disputes or claims relating in any way to 1) the Services; 2) any dealings with our customer service agents; 3) any services or products provided; 4) any representations made by us; or 5) our Privacy Policy.
>
> Services – the Web sites, mobile applications, call center agents, and other products and services provided by Orbitz, including any Content, and ***not* including products or services that are provided by third parties.**

Notice that "Claims," with a capital C, is a defined term; the definition includes several items that are included in "Claims," but only one is relevant to this dispute: 3) any services or products provided. The key term is Claims; if Marin's lawsuit constitutes a Claim as that term is defined in the contract, it must be arbitrated; conversely, if Marin's lawsuit does not constitute a Claim it is not required to be arbitrated. The court noted that all the other items in the definition of "Claims" involve Orbitz, not its vendors. Reading "any services or products provided" in the context of neighboring provisions and the contract as a whole, the court concluded that it refers only to services and products provided by Orbitz. Again, the drafter created a definition but failed to think through logically to be sure it worked in the arbitration provision.

5.5 Kirkland Properties v. Pillar Income Asset Management

In *Kirkland Properties v. Pillar Income Asset Management*, (DC Mississippi, 2021), the Court had entered an Order and Memorandum Opinion granting Pillar's Motion to Dismiss on the basis of a forum selection clause contained in the parties' contractual agreement. Specifically, the Court held that "[t]his litigation must occur in a court of competent jurisdiction in Madison County." Pillar then filed a Motion for Award of Attorney's Fees and Related Non-Taxable Expenses, requesting that the Court award "attorney's fees in the amount of $20,000, pursuant to the specific terms and provisions set forth in the

Purchase and Sale Agreement, given their status as prevailing parties in the instant litigation." The provision reads as follows:

> In the event of any litigation between the parties under this Agreement, the prevailing party in such litigation shall be entitled to recover (and the non-prevailing party shall pay) any and all reasonable attorneys' fees and court costs incurred at or in connection with all trial and appellate court proceedings. Unless other[wise] agreed, any litigation between the parties under this Agreement shall be conducted in a court of competent jurisdiction in Madison County, Mississippi.

Pillar asserted that it was the prevailing party and therefore entitled to attorney's fees incurred defending this action. On the other hand, Kirkland asserted that, although Pillar did prevail on the jurisdictional issue addressed in this Court's previous Order, it was not entitled to an award of attorney's fees because the Court's decision was not on the merits of the claim.

"Prevailing party" is not defined in the parties' contract. The court held that although Pillar prevailed to the extent that the case was dismissed, the dismissal was *without prejudice* so that it could be refiled in an appropriate forum. In dismissing the case *without prejudice,* the lower Court in no way addressed or even considered the merits of Kirkland's claims or the validity of any of the defenses raised by Pillar but, instead, only interpreted the forum selection clause contained in the parties' contract, which was insufficient to qualify them as "prevailing parties" entitled to attorney's fees.

5.6 Ross v. Kirkpatrick

In *Ross v. Kirkpatrick*, DC M.D. Tennessee, Ross is a business broker who arranges and assists with the sales of companies. He entered into a listing agreement with Kirkpatrick on November 10, 2019 to sell Kirkpatrick's patent drawing business called "Patent Designs." Although Kirkpatrick initially indicated he would be satisfied with a sales price over $5 million, Ross found a buyer who signed a letter of intent to purchase the business for $6.5 million. Unfortunately, Kirkpatrick's wife got cold feet and the couple backed out of selling the business, so Ross sued for commissions. Two provisions of the contract are particularly relevant:

> 2.1 Commission. Broker shall receive a commission of the amount specified in Section 2.2 below, calculated as a percentage of the selling price of substantially all of the assets or stock of the Company if: (1) Broker procures a buyer who is ready, willing, and able to purchase substantially all of the assets or stock of the Company on the terms deemed acceptable by the Company in its sole and absolute discretion; and (2) substantially all of the assets or stock of the Company are sold to a buyer procured by the Broker during the term of this listing or if, within two years after the termination of the listing, substantially all of the assets or stock of the Company are sold to a buyer who was first submitted to the Company by the Broker.
>
> 2.4 Expenses. The Company and the Broker shall each pay their own respective expenses involved in performance of their respective duties under this Agreement. In the event the Broker finds a willing buyer and the Company decides not sell [sic] the Broker will still be owed full commission described above. This is to protect all of the time and expenses the Broker is investing into this process.

The parties disputed the meaning of "willing buyer" and the court agreed that the term was ambiguous, reasoning that there is not only one way to think of whether a buyer is "willing." Ross argued that the buyer was a "willing buyer" because he/she/it was ready to proceed with the purchase for a negotiated price and had already signed a letter of intent with Kirkpatrick, stating that the buyer was ready, willing, and able to proceed with the purchase at a price of $6.5 million. Kirkpatrick argued that a willing buyer is a buyer who has made a firm offer containing all the material terms that could have been accepted by Kirkpatrick; in other words, something more binding than a letter of intent. The court held that Ross had plausibly alleged that he had found a "willing buyer" and denied Kirkpatrick's motion to dismiss.

5.7 ADVSR, LLC v. Magisto, Ltd.

In this federal case from the Northern District of California, Magisto was a software start-up company focused on video content creation. Magisto engaged ADVSR to provide consulting services for an acquisition. The contract contained a typical compensation provision:

> In the event any Covered Transaction is entered into during the term of this SOW or within the 9 month period following termination of this SOW (the "Tail Period"), Magisto shall pay to ADVSR in cash at the closing of such Transaction a transaction fee (the "Covered Transaction Fee") that is equal to 3.0% of the Transaction Value.

The parties went through several rounds of negotiations before settling on a 9-month tail period but eventually signed the contract on May 22, 2017. The record reflects that ADVSR reached out to 80 potential acquirors and advised Magisto on relevant matters, but by December, 2017, Magisto decided to terminate the contract because ADVSR had not obtained any palpable results. Then, in July 2018, one of the companies ADVSR had contacted expressed interest in Magisto and in fact, ultimately acquired the assets of Magisto; ADVSR requested its tail fee but Magisto refused to pay it.

In litigation, the parties disputed the meaning of the phrase "entered into." ADVSR argued that "entering into" a transaction encompasses serious negotiations towards completion of the transaction (which occurred within the tail period); Magisto argued that the work done by ADVSR during the tail period did not amount to "entering into" a transaction, and that the language should be construed against ADVSR as drafter. The court considered both interpretations reasonable and declined summary judgment.

5.8 Peloton Interactive, Inc. v. ICON Health & Fitness, Inc.

Peloton and ICON, *Peloton Interactive, Inc. v. ICON Health & Fitness, Inc.*, DC Delaware, are competitors in the home fitness market. They both offer products that allow consumers to attend live and on-demand fitness classes from home, and they both sell equipment. This lawsuit involves patent infringement issues. Apparently, this isn't their first squabble because this lawsuit arises out of a settlement agreement between the parties in 2017. The provision at issue reads:

> ICON grants Peloton, its parents, subsidiaries, affiliates, manufacturers, distributors and customers a non-exclusive, fully paid-up, lump sum, royalty free, worldwide license to 'iFit Functionality' including the right to import, export, make, have made, use, lease, sell, offer to

sell, or otherwise dispose of the existing Peloton Bike and substantially similar products/technologies. This license only applies to Peloton products being manufactured, distributed, and sold as Peloton products and does not include any ability to sub-license the 'iFit Functionality' to any person or entity at any time. Any such sub-license is specifically excluded from Peloton's rights. 'iFit Functionality' shall mean the functionality and features currently embodied in the Peloton Bike as of May 22, 2017, the Asserted Patents, and nothing else.

First, the parties tangled over the meaning of "**including**," namely, whether it is a term of limitation or whether it merely introduces a list of examples. Peloton argued that it introduces a list of examples, which means that the iFit license is not limited to the Peloton Bike and substantially similar products. ICON argued that Peloton's interpretation would thwart the plain, unambiguous limitation in the text.

Second, the parties tangled over the meaning of "**substantially similar products/technologies**." Peloton argued that the language is not limited to the Peloton Bike, because that would render the quoted phrase meaningless. ICON argued that if the language is not limited to the Peloton Bike, it renders "embodied in the Peloton Bike as of May 22, 2017" meaningless.

The court agreed that the phrase "substantially similar products/technologies" is ambiguous: "it is clear that the license has limits; it is something less than a license to the two patents. But is this something more than just a license for the Peloton Bike? It is not an unreasonable reading of the iFit License's 'including' clause to understand that it applies only to the Peloton Bike and substantially similar products . . . and, if so, what constitutes a substantially similar product?" Because the meaning could not be determined from the evidence available at that stage of litigation, the court denied the motion to dismiss.

Similarly, in *Freedom Mortgage Corp. v. Tschernia*, DC S.D. New York (2021), the parties disputed the meaning of the word "including," when a list seemed unusually thorough, suggesting that it may have been intended to be exhaustive. In denying a motion to dismiss, the court concluded that it was ambiguous, while nevertheless simultaneously noting that "if one said that common-law torts include conversion, unfair competition, and fraud, no one would understand the statement to mean that those are the only common-law torts. As the Supreme Court has held (and a passing familiarity with the English language confirms), 'to include' is to 'contain' or 'comprise as part of a whole.'"

5.9 Danielson v. Tourist Village Motel v. Androscoggin Valley Hospital

In *Danielson v. Tourist Village Motel v. Androscoggin Valley Hospital*, DC New Hampshire, Androscoggin Valley Hospital entered into a lease agreement with Tourist Village Motel to obtain residential housing for some of its employees. Danielson occupied an apartment leased by the hospital from Tourist Village, and he was injured when he slipped and fell on snow and ice that accumulated on the stairs outside of his apartment building.

The lease required AVH to maintain liability insurance with Tourist Village as a "named co-insured." AVH obtained a policy with a form of co-insurance that was effective at the time of the slip and fall accident. The additional insured endorsement extended coverage to Tourist Village as "a person or entity that provides equipment or premises to an Insured [AVH] pursuant to a written lease

agreement." In other words, the insurance policy extended coverage to Tourist Village, but Tourist Village was not specifically identified by name as a co-insured. The parties disputed the meaning of the phrase "named co-insured." Tourist Village insisted that a named co-insured's name must appear in the policy and the co-insured must have all the coverages under the policy. AVH argued that the endorsement in its policy satisfied the lease requirement; however, the endorsement limited insurance coverage to situations in which AVH itself was negligent so the net effect is that Tourist Village was without coverage for the accident, giving rise to this lawsuit alleging that AVH breached the contract.

The court noted that other courts differ on this issue. For example, under Florida caselaw, "named insured" cannot apply to persons not specifically named in the policy; however, under North Carolina caselaw, an insurance policy can have multiple named insureds without the policy's identifying them by name. The court also noted that *Black's Law Dictionary* defines "named insured" as "a person designated in an insurance policy as the one covered by the policy"; however, this definition doesn't specify whether the named insured must be designated by name or by description. Thus, the term "named co-insured" in the contract was ambiguous under the circumstances.

5.10 Vargas v. Safepoint Ins. Co.

In *Vargas v. Safepoint Ins. Co.*, Florida Court of Appeals, when Yolanda Vargas applied for insurance from Safepoint, she denied having made prior claims, though she actually had made a prior similar claim and had been reimbursed by another insurance company. Ms. Vargas said she did not intend to make a false statement and had simply forgotten about the prior claim. Safepoint denied coverage and Vargas filed suit. Safepoint then filed a motion for summary judgment. The question presented was whether the term "false statement" means 1) an incorrect statement; or 2) an intentionally incorrect statement.

The relevant provision states:

> With respect to all persons insured under this policy, we provide no coverage for loss if, whether before or after a loss, one or more persons insured under this policy have: a. Intentionally concealed or misrepresented any material fact or circumstance; b. engaged in fraudulent conduct; or c. made material false statements relating to this insurance.

Vargas filed a claim for water damage due to a plumbing leak. When she originally applied for insurance with Safepoint, she reported a roof claim she had made ten years prior but did not disclose any claims for water damage; however, a corporate representative of Citizens Property Insurance testified that Vargas made a claim for water damage caused by a broken pipe in 2013.

Because the policy did not define "false statement," to resolve the ambiguity the court turned to *American Heritage Dictionary* and *Merriam-Webster Dictionary* to find the given meaning of "false." Apparently, "false" has two meanings: "contrary to fact or truth" or "deliberately untrue." The court then turned to *Black's Law Dictionary*, which revealed that in the legal context, false carries the connotation of an intentionally deceptive statement: "Only when the context strongly suggests mere error is the connotation of being deceived absent . . . false has an overlay of perfidy that is absent from 'wrong': false advice is both incorrect and two-faced, while wrong advice is simply incorrect." The court noted that forfeitures of coverage are not favored, especially where forfeiture is not sought until an

event happens when the insurer is ostensibly responsible. The court denied Safepoint's motion for summary judgment.

5.11 Garber v. Nationwide Mutual Insurance Co.

In *Garber v. Nationwide Mutual Ins. Co.*, DC N.D. Alabama, Mr. Garber was looking forward to his October 9 -13, 2020 vacation in a rental house in Gulf Shores, Alabama until Hurricanes Sally and Delta arrived and Governor Kay Ivey declared a state of emergency on October 6, 2020. Fortunately, he had bought trip insurance from Nationwide; however, Nationwide denied his claim for a refund of $7,107, claiming that he was not "prevented" from renting the house because Governor Ivey lifted the state of emergency at 4:00 p.m. on October 8, 2020, the day before his vacation was supposed to begin. The relevant language in the policy read:

> The Company will reimburse you, up to the Maximum Benefit shown on the Confirmation of Coverage, if you are prevented from taking Your Trip for any of the following reasons that are Unforeseen and take place after the Effective Date: [*listed were things like natural disasters, mandatory evacuation orders, and uninhabitable premises*.]

Nationwide argued that Garber was not "prevented" from taking the vacation because the order was lifted on October 8. Garber argued that he was prevented from taking the trip because the Governor's order precluded travel shortly before the trip commenced. He also expressed serious concerns about the condition of the house he had rented.

The court reviewed the *Merriam-Webster Online Dictionary* and determined that "prevent" means: 1) to keep from happening or existing; 2) to hold or keep back, hinder, stop; and 3) to deprive of power or hope of acting or succeeding. It also noted that the policy backed up Garber's interpretation because it gives examples of other circumstances that would "prevent" a person's taking a trip: if an insured's cat or dog dies within seven days prior to a trip's departure date; if a company that employed the insured for two continuous years laid him/her off within 30 days of the trip; or if the company transferred him/her 250 miles or more from his former place of employment. None of these examples technically keep a trip from happening, but they may "hinder" the insured.

Other cases involving ambiguous words or phrases:

Sproull v. State Farm Fire and Casualty Co., Supreme Court of Illinois: whether "depreciation" should apply to materials and labor when determining the actual cash value of a replacement cost. State Farm argued that "property" is a combination of materials and labor, so it should be entitled to depreciate both. State Farm argued that Sproull was trying to read words into the policy, namely, that depreciation is applied only to materials; the court noted that State Farm was also reading words into the policy, namely, that depreciation is applied even to intangibles like depreciation that do not deteriorate. [*Touché.*]

AIC v. Deep South Roofing, DC, S.D. Mississippi: whether "roofing operations" includes soldering the flashing around dormer windows. [Comment: E*ven a cursory google search instantly reveals that the*

term "roofing operations" was defined long ago by the federal government to include flashing work, although dormer windows are not specifically mentioned:

> *Roofing operations means all work performed in connection with the installation of roofs, including related metal work such as flashing, and applying weatherproofing materials and substances (such as waterproof membranes, tar, slag or pitch, asphalt prepared paper, tile, composite roofing materials, slate, metal, translucent materials, and shingles of asbestos, asphalt, wood or other materials) to roofs of buildings or other structures. The term also includes all jobs on the ground related to roofing operations such as roofing laborer, roofing helper, materials handler and tending a tar heater.*

[27 FR 102, Jan. 5, 1962. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3450, Apr. 9, 1963. Redesignated and amended at 36 FR 25156, Dec. 29, 1971; 69 FR 57404, Dec. 16, 2004]]

Goodrich Petroleum Co. v. Columbine II, LP, Louisiana Court of Appeals: did the abbreviation "UI" in a column under the caption "Intr Type" mean only the unitized interest was conveyed and the non-unitized interest was not conveyed, or did it simply mean that the interest had been unitized but the entire interest was conveyed.

Great Lakes Ins. v. Gray Group Investments, DC E.D. Louisiana: when a potential customer is required to complete a form called "Hurricane Questionnaire/Plan" and a separate application form, is the Hurricane Questionnaire/Plan part of the application for insurance?

Garner v. Flagstar Bank (class action) DC E.D. Michigan: the language of a bank account agreement was ambiguous because it did not define at what point in time an item "is presented."

Meyer v. Delaware Valley Lift Truck, Inc., DC E.D. Pennsylvania: a shareholders' agreement was ambiguous because it did not define "major decision," "disagreement between the Shareholders that cannot be resolved," and what it means that the shareholders' father was to "resolve such disagreement."

My Recommendations for Drafting Definitions

1. Integrated or Autonomous? Defined terms can be "integrated" or "autonomous." An **integrated definition** is created within a sentence by inserting a parenthetical that includes the defined term in quotation marks. Ambiguity can result if the parenthetical is misplaced, because either too much information is included in the definition, or too little. Integrated definitions are perfectly acceptable, but **litigation occurs more often with integrated definitions**, so use extra care with them. The parenthetical should be placed immediately after the information that identifies the defined term:

> **Correct:** The Internal Revenue Code of 1986 (the "Code") is determinative.
>
> **Incorrect:** The Internal Revenue Code (the "Code") of 1986 is determinative.
>
> **Incorrect:** The Internal Revenue Code of 1986 is determinative (the "Code.")

An **autonomous definition** is set off as a separate sentence or included in a glossary, like this:
"Code" means the Internal Revenue Code of 1986.

2. Complete or Incomplete? Use "means" if the definition is intended to be complete, or "includes," if the definition is not intended to be complete. Do not use "means and includes," because that infers that the meaning is both complete and incomplete, which causes ambiguity as to which interpretation is intended. Do not clutter definitions with useless extra words, like "shall mean," "shall have the following meaning," "has the following meaning," or "shall mean and refer to." Besides contributing nothing to the definition, these errant uses of "shall" contaminate its ability to render a duty in other provisions.

> "ERISA" means the Employee Retirement Income Security Act of 1974, as amended.
>
> "Paid Holidays" include Federal Holidays designated by the U.S. Congress. [Note: *this definition would be correct if other days can also constitute Paid Holidays, like state, local, or corporate holidays; however, if no other days constitute Paid Holidays, "means" should have been used instead of "include."]*

3. Are Articles Required? The question often arises whether to use the article "the," with defined terms; for example, "the Company," or "Company"? In English, "the" is the definite article, used with common nouns, so "the Bank," in a contract means that the lawyer is referring to this particular bank, rather than any bank. When common nouns are used as defined terms to identify one of the parties, like "Company," "Corporation," "Employer," "Licensor," "Seller," or "Purchaser," either use the article "the" every time or omit it every time, but don't use "the" sometimes and omit it sometimes. The key is to use the defined term consistently throughout the contract. If you perceive "Company" as a common noun identifying this particular entity, it makes sense to use "the Company." If, however, you perceive "Company" as a substitute, temporary name, it makes sense to omit the article, because outside the legal realm, most names do not use articles. For example, we do not refer to AT&T as "the AT&T."

4. When to Use a Glossary. If the contract contains fewer than five defined terms, place each definition in the text where the term is first used. If the contract contains five or more defined terms, assemble the definitions in a glossary – *one* glossary, not multiple glossaries. Some lawyers use a separate glossary or glossaries to define terms used only in one section; however, the best practice is to use *one* glossary and define *all* the terms there. Using multiple glossaries or a combination of a glossary and integrated definitions in the text is a bad practice, very likely to cause contextual ambiguity for several reasons.

First, having a glossary that does not include all the defined terms substantially increases the likelihood that one or more terms will be defined more than once in the same contract, with different meanings that result in contextual ambiguity. Separate glossaries may work in theory, or in shorter contracts that have only a handful of defined terms, but they invite errors in long contracts with many defined terms. Because drafting is a collaborative process, contracts are often pieced together using language cut and pasted from various sources. More often than not contracts contain terms defined more than once, with different meanings, resulting in contextual ambiguity as to which definition controls. For this reason, if a contract is long enough to warrant a glossary, *all* defined terms should be defined there.

The following example demonstrates the trap of defining a word in the section in which it is used:

(c) Certain Defined Terms. As used in this **Section 4.2**, the following terms shall have the meanings indicated below:
(i) "***Transfer***" and "***Transferred***" shall mean . . . a transfer of a share of Acquiror Common Stock to a broker or other nominee (regardless of whether there in a corresponding change in beneficial ownership), or the transfer of, or entering into a binding agreement with respect to, Voting Control (as defined below).
4.3 Escrow Shares. Each Company Stockholder shall . . . . except the right of possession or Transfer thereof.

[Comment: *Notice that paragraph (c) states that the defined terms in Section 4.2 apply to Section 4.2; however, Section 4.3 uses "Transfer" as a defined term even though it is not a part of Section 4.2. If "Transfer" has not been defined in the primary glossary, what does it mean in Section 4.3? If it has been defined in the primary glossary, why define it in Section 4.2? Which definition controls after Section 4.2 if the term is defined both places? This example is sloppy drafting for many reasons, but it illustrates the confusion wrought by having terms defined in the section in which they are used, instead of the glossary. Second, what is far more annoying to any reader than having to refer to the glossary to read a definition is having to search the rest of the contract to find it—another hazard of defining terms throughout the text of a lengthy contract.]*

The glossary can be included at the end or beginning of the contract or as a schedule to the contract. The argument for putting the glossary at the end of the contract is based on organizing topics within the contract in order of importance; however, my personal preference is to put the glossary at the beginning of the contract, so the reader knows where it is and can glance at the defined terms before reading the text to which they relate. An experienced transactional lawyer knows where many hazards are lurking, either with the definitions *per se*, or within the provisions that use them, and will appreciate the opportunity to review those definitions before reading the provisions in which they are used. Even so, location of the glossary is strictly a matter of personal preference, and neither alternative is necessarily "right" or "wrong."

5. How Autonomous Definitions Can Improve the Text. One disadvantage of using integrated definitions in a complicated provision is that the words used to create definitions bog down the provision in which they appear. Paradoxically, more defined terms are usually necessary with the most complex provisions, meaning that the very places the drafting needs to be clearest are the places it is least likely to be so because of all the extra words used to create those integrated definitions. The best way to simplify a complex provision is to remove the unnecessary verbiage to distill it down to its essential concepts; one way this is accomplished is by removing the definitions and relocating them to the glossary.

6. When You "Definitely" Should Use an Autonomous Definition.[9] The most common source of litigation with integrated definitions is that the parties disagree over where the definition actually begins. Unless it is abundantly clear where the definition begins, use an autonomous definition instead. For example, what is the definition of "Delivery Point"?

[9] Do you see what I did there?

> Seller is relieved of its obligation to sell such applicable Committed Volumes to Buyer and may sell the applicable Committed Volume directly to a third party and at a mutually agreed upon alternate delivery point ("Alternate Buyer/Delivery Point")….

The parties to this contract disagreed as to whether "mutually agreed upon" was included in the definition. The seller argued that it was ridiculous to claim that the Buyer who did not want to purchase the commodity nevertheless had to agree to an alternate buyer or delivery point before the seller could sell to someone else. The court chided the drafting and determined it *could* be reasonable that the parties intended to include "mutually agreed upon" in the definition of Alternate Buyer/Delivery Point. Unfortunately, this particular language is widely used in standard energy commodity industry forms; it is unlikely the parties thought much about the definition until the dispute arose.

> Similarly, what is the definition of U.S. Benefit Plans?
>
> Except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, all Benefit Plans, other than "multiemployer plans" within the meaning of Section 3(37) of ERISA (each, a "**Multiemployer Plan**") and Non-U.S. Benefit Plans (collectively, "**U.S. Benefit Plans**"), are, and have been operated, in substantial compliance with ERISA, the Code and other applicable Laws.

It is reasonable to assume that "U.S. Benefit Plans" does not include Non-U.S. Benefit Plans, but does it include Multiemployer Plans? If it does not include "Multiemployer Plans," how is it different than "Benefit Plans"? Clearly, an autonomous definition would have been much better in this instance.

> Where does the definition of "Tenant Parties" begin in this example?
>
> Tenant shall indemnify, defend, protect, and hold harmless the Landlord Parties from any and all loss, cost, damage, expense and liability (including without limitation court costs and reasonable attorneys' fees) (collectively "**Claims'**) incurred in connection with or arising from (i) any cause in, on or about the Premises, (ii) any acts, omissions or negligence of Tenant or of any person claiming by, through or under Tenant, or of the contractors, agents, servants, employees, invitees, guests or licensees of Tenant or any such person (collectively, "**Tenant Parties**"), in, on or about the Project or (iii) any breach of the terms of this Lease by Tenant, either prior to, during, or after the expiration of the Lease Term, **provided that** the terms of the foregoing indemnity shall not apply to the negligence or willful misconduct of Landlord or any of the Landlord Parties.

Be sure it is clear which words comprise the integrated definition; the challenge of doing so provides another good reason to use a glossary of autonomous definitions instead of many integrated definitions.

6. The #3 Error: Questionable Associations

Questionable associations create syntactic ambiguity in contracts; although the words themselves are reasonably clear, what they are modifying is not. It is no surprise that questionable associations are one of the most common causes of contract litigation. The good news is that if you know what to look for, you can eliminate many common problems. To summarize, in the survey cases, these associations were deemed ambiguous:

- Does a reference to a code section mean that code section as of a specific date?
- What does "courts identified above" mean when two separate sets of courts are mentioned?
- Does a modifier at the end of a list refer to all items in the list, or only the last?
- Does "as modified" mean all the provisions are in except those provisions specifically modified, or that only the specific modified provisions are in?
- Does "at Frontier's discretion" modify the words that precede or follow?
- By locating a Change of Control provision in the midst of the termination section, is it limited to the initial term, or does the Change of Control automatically renew with the contract?
- Does "within X days of the first draw or when requested" mean no sooner than or no later than?

6.1 Contest Promotions, LLC v. City and County of San Fang-cisco[10]

This case provides additional evidence, were any necessary, that "you can't fight City Hall." After winning in Federal District Court and the Court of Appeals, Contest Promotions wound up in the California Court of Appeals, most likely as a result of a forum selection clause in its settlement agreement with the City and County of San Francisco.

Contest Promotions runs a business that helps increase foot traffic at its customers' businesses by offering promotional sweepstakes. Using small signs on the exterior of a business, Contest Promotions encourages passersby to enter the business to obtain more information about its products or services, and the prizes offered in the promotion. The City regulates the placement of business-related signage under its Planning and Building codes. Although the City initially issued permits to Contest Promotions, at some point in 2007 the City decided it didn't care for the signs and started issuing notices of violation – 80 of them – , which required Contest Promotions to remove or correct its offending signs, to re-file for permits, or to face fines of $1,000 to $2,200 per day for each sign. Contest Promotions requested reconsideration from an administrative law judge; when that administrative law judge found the signs were illegal, Contest Promotions filed suit in federal district court. In 2010, the federal district court agreed with Contest Promotions that the definition of "Business Sign" in the City ordinance was unconstitutionally vague, and the 9th Circuit later affirmed.

In 2013, Contest Promotions and the City of San Francisco negotiated a settlement agreement to resolve their signage dispute. The City agreed to recognize Contest Promotion's signs as Business Signs as long as they conformed to all requirements applicable to business signs under article 6 of its planning code. Contest Promotions agreed to submit appropriate permit applications within 270 days

[10] My spelling in the caption reflects the ire this case engendered in me.

and to pay the City a total of $375,000, including a down-payment of $150,000 within five days of the Settlement Agreement plus 24 monthly payments of $9,375. The parties also agreed to dismiss the federal lawsuit.

The relevant sections of the settlement agreement are the definition of "business sign," Paragraph 1, and Paragraph 3:

> Business Sign: A sign that meets the definition of a Business Sign as set forth in Section 602.3 of the City's Planning Code.
>
> Paragraph 1. Classification of Signs: The Parties agree and acknowledge that Signs erected by Contest Promotions within the City are and shall be deemed Business Signs for all purposes of the Planning Code, including but not limited to the filing, processing, and approval of permits by and with the Planning Department, so long as they are consistent with the dimensional, locational, and other requirements applicable to Business Signs under Article 6 of the Planning Code.
>
> Paragraph 3. Contest Promotions shall comply with all applicable provisions of the Planning Code in effect at the time the permit for the subject sign is issued.

Unbeknownst to Contest Promotions, *the very same day* the board of supervisors of the City approved the settlement agreement, they also passed a resolution to amend the definition of "business sign" in section 602.3 in a way that adversely affected Contest Promotions.

Contest Promotions argued that the reference to Section 602.3 of the city's planning code meant the version as of the date the settlement agreement was signed. The court found that although different interpretations were plausible, the definition was not tethered to Section 602.3 as of the date of the Settlement Agreement because the parties did not specifically incorporate it by reference. Although the court held otherwise regarding Contest Promotions' argument regarding bad faith, in my opinion *res ipsa loquitur.*

6.2 Synergy Hotels v. Holiday Hospitality Franchising

In this case, *Synergy Hotels v. Holiday Hospitality Franchising*, DC S.D. Ohio, the phrase "courts identified above" was held ambiguous. Synergy Hotels is a franchisee of Holiday Hospitality, owning and operating a hotel in Orbitz Ohio. Synergy filed this lawsuit contending that Holiday Hospitality created an unlawful scheme involving mandatory suppliers and vendors for goods and services that are essential to running a hotel. The parties disagree about the meaning of the forum selection clause:

> Licensee hereby expressly and irrevocably submits itself to the nonexclusive jurisdiction of the U.S. District Court for the Northern District of Georgia, Atlanta Division and the State and Superior Courts of DeKalb County, Georgia for the purpose of any and all disputes. However, Licensor remains entitled to seek injunctive relief in the federal or state courts either of Georgia or of the state of the Hotel's location or of Licensor's principal place of business. Should Licensee initiate litigation against Licensor, its parents, subsidiaries or one of its affiliated entities, Licensee must bring action in the courts identified above, provided, however, the

> foregoing will not constitute a waiver of any of Licensee's rights under any applicable franchise law of the state in which the Hotel is located.

The parties disagree as to the meaning of the phrase "courts identified above." Synergy argued that the phrase refers to the federal or state courts of Georgia OR of the state of the Hotel's location or of Licensor's principal place of business, mentioned in the second sentence. Holiday Hospitality argued that "courts identified above" means the lawsuit must be brought in the Northern District of Georgia or the courts of DeKalb County, Georgia because those are the only courts "identified" above. The court held that the word "identified" as used in this forum selection clause is ambiguous because it could mean the courts specifically named or the courts that are referenced. The court concluded that the parties intended to limit licensees to the Georgia courts specifically named, because otherwise the third sentence would be meaningless, because it is unnecessary to specify that the licensees can only sue if the scope of courts in which they can sue is coterminous with the scope of courts in which they have jurisdiction.

6.3 SBP LLLP v. Hoffman Construction

In this federal district court case, Hoffman entered into three separate construction contracts with SBP to demolish and construct improvements on real property located in Idaho. All three written contracts were based on an American Institute of Architects standard form document, A201-1997, which was incorporated by reference "as modified." When Hoffman did not receive timely payment, he filed a demand for arbitration with the American Arbitration Association, but SBP filed a complaint in court, requesting a declaratory judgment that the contracts do not include agreements to arbitrate.

The court held the "as modified" language is facially ambiguous. The parties apparently had agreed that provisions from A201-1997 could be included or excluded by reference. The parties had specifically excluded arbitration language several times during negotiations, but the contracts do not mention Section 4.6 of A201-1997, which outlines the obligation to arbitrate disputes, as being either excluded or included. Thus, the court was unable to determine, based on the record, whether the parties intended to include arbitration or omit it.

6.4 In Re Frontier

Frontier Airlines' contract of carriage provides that:

> [for schedule changes made prior to the day of travel, Frontier may transport the passenger over its own route system to the destination or,] in the event the schedule modification is significant, at Frontier's discretion, it may refund the cost of the unused portion of the ticket.

The parties in this case differed over exactly what was "at Frontier's discretion." Frontier argued that the Contract permitted it to re-book passenger Dickstein on another flight in lieu providing a refund. Dickstein argued that he was entitled to a refund because the schedule modification was "significant" because it occurred the day before his trip, he arrived to his destination 12 hours later than he intended, and he now had an overnight layover. Mr. Dickstein argued that no reasonable interpretation of the contract would "allow Frontier the discretion to regard a 12-hour delay as insignificant."

Nevertheless, the federal district court in Colorado found that Dickstein's allegations were insufficient to prove he was entitled to a refund from Frontier because the Contract provides Frontier discretion in this process. Although the contract is unclear what it leaves to Frontier's discretion — discretion to determine whether a schedule modification is "significant" or discretion whether to provide a refund — this lack of clarity had no bearing on the success of Dickstein's claim because he did not show or even allege that Frontier exercised its discretion improperly.

6.5 Waterloo, a.k.a. Facebook, Inc. v. Duguid

Facebook, Inc. v. Duguid, 141 S. Ct. 1163, is our only U.S. Supreme Court case. The Supreme Court rarely bestows its limited time on mundane commercial disputes, preferring more lofty social issues. Moreover, this is not actually a contract case but rather a statute construction case; however, the basic principles for drafting laws, which are future-oriented like contracts, are similar so this case provides useful information. Why do I call it Waterloo? Because in this case, the greatly esteemed, and deservedly so, Bryan Garner met unexpected defeat even though he had previously co-authored two books with Justice Antonin Scalia.

The case concerns the Telephone Consumer Protection Act of 1991, which established the indispensable "do not call" list, where Congress made it unlawful to make certain "robo" calls. The Act created a private cause of action for individuals to sue to enjoin unlawful calls and to recover $1,500 per violation or three times the individual's actual monetary losses. The question presented, whether Facebook had violated the Act, turned on whether the phrase "using a random or sequential number generator" in Section 227(a)(1)(A) modifies both of the two verbs that precede it ("store" and "produce"), or whether it modifies only "produce." The issue boiled down to a battle of grammatical conventions. Facebook argued that the "**series-qualifier canon**" requires that a modifier at the end of a series of nouns or verbs applies to the entire series; Duguid argued that the "**rule of the last antecedent**" applied.

Section 227(a)(1)(A) defines an "autodialer" as:

> equipment which has the capacity –
>
> (A) To store or produce telephone numbers to be called, using a random or sequential number generator; and
> (B) To dial such numbers.

In a unanimous decision, the court held that to qualify as an "automatic telephone dialing system" under the Act, a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator. The court noted that the clause "to store or produce telephone numbers to be called" "hangs together as a unified whole" and it would be odd to apply the modifier "using a random or sequential number generator" to only a portion of the cohesive preceding clause. The court also noted that the placement of the comma is evidence that the qualifying phrase is supposed to apply to all the antecedents instead of only to the immediately preceding one. Finally, the court noted that it has declined to apply the rule of the last antecedent when the modifying clause appears after an integrated list. The court concluded that there is no grammatical basis to stretch the modifier past

"telephone numbers to be called," which is actually the last antecedent, but not far enough to incorporate "to store."

Lawyers who draft contracts are presented with a dilemma: *Facebook v. Duguid* is useful as a precedent when your client winds up in litigation, but how reliable is the advice for *drafting* purposes? SCOTUS has provided a road map in broad strokes:

- Is the language before the modifier a cohesive unit?
- Are the items before the modifier separated by comma(s)?
- Is there a grammatical basis to limit the reach of the modifier?

This advice is helpful but given the frequency with which lower courts find otherwise, my advice is to avoid the issue by using tabulations, as described below. See, for example, Munden v. Stewart Title, 8 F. 4th 1040 (9th Cir. 2021), in which Judge Boggs claims that Bryan Garner is wrong on the rule of the last antecedent:

> One last wrinkle: it is perhaps not entirely clear whether the phrase "for the purpose of imparting" should modify "records established" or "statutes," although most readers would view the phrase as specifying the purpose for which the "records" were "established." We have found no authority supporting that Idaho, in interpreting contracts, follows the nearest-reasonable-referent canon (often mistakenly called the "last-antecedent canon"), as described in Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152-53 (2012) ("When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."). Nor is that canon universally accepted in the contractual or even statutory setting. *See, e.g., Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.,* 165 Ariz. 31, 796 P.2d 463, 470 (1990) (in banc) (Feldman, V.C.J., specially concurring) ("[I]t would be a fiction to pretend [the parties] drafted the language mindful that its meaning would be ascertained through use of the doctrine of the last antecedent."); *Kennett v. Bayada Home Health Care, Inc.,* 845 F. App'x 754, 768 (10th Cir. 2021) (Bacharach, J., concurring) (noting that "[t]he Colorado legislature has expressly repudiated the last-antecedent rule" in statutory interpretation and that only one Colorado court of appeals case had applied the rule in contractual interpretation).

6.6 Cocquyt v. Spartannash Company

In *Cocquyt v. Spartannash Company*, DC N.D. Indiana, John Cocquyt was painstakingly recruited to work at Martin's Super Markets from a good job at Coca Cola. Because he had a good job, Cocquyt negotiated hard over several months and multiple drafts of his employment contract for terms that were important to him; namely, a change of control provision.

The employment agreement provides for an initial term of three years, with automatic annual renewals thereafter until one of the parties decided not to renew and gave appropriate notice to the other. Cocquyt negotiated for a change of control provision that if he was terminated within twelve months of a change in control, he would receive twice his base salary:

(5)(e) Change of Control. If, and only if, the Employee is terminated within twelve (12) months after a change in control, then and in that event Employee shall receive from the Company an amount equal to two (2) times Employee's Base Salary in effect for the calendar year immediately preceding the calendar year in which his termination of employment occurs, and Section 5(d) shall be inapplicable. Such payments are to begin within thirty (30) days of the date of severance and be made over an eighteen (18) month period.

Although when read in isolation, the provision is clear, the court found that the placement of this provision in paragraph five of the agreement caused ambiguity. Under paragraph 5, Cocquyt's employment could be terminated six enumerated ways prior to the expiration of the Full-Time Term: "Termination: Rights on Termination. Employee's employment may be terminated in one of the following ways, prior to the expiration of the Full-Time Term." (These included death, disability, termination by the company for cause, termination without cause, change of control, and termination by employee.)

The question is whether the change in control provision only applies prior to the expiration of the Full-Time Term, or whether the "if, and only if" phrase meant the parties intended to treat a change in control differently. The court relied on extrinsic evidence to determine that the parties intended the change in control to be an exception and twice the base salary should be paid to Cocquyt if he was terminated within 12 months of a change in control, regardless of when this happened in relation to the initial three year term of the contract.

6.7 Quality Leasing Co., Inc., v. Atomic Dog

In February 2019, Quality Leasing and Atomic Dog, *Quality Leasing Co., Inc., v. Atomic Dog,* DC S.D. Indiana, entered into a Master Equipment Finance Agreement under which Quality agreed to provide financing for distillery equipment to be purchased by Atomic Dog from time to time under subsequent supplements to the master agreement. Supplement 30114 for a beer tank and rotary pressure canning line included a payment upon signing and a second payment according to the following language:

Second draw of $408,383.15 within thirty (90) [sic] days of the first draw or when requested by the vendor at completion & installation of the equipment.

Atomic Dog argued that although the language was obviously ambiguous regarding timing, the second payment was targeted to ensure that the payment was made after the installation of the equipment was completed. Quality disingenuously argued that the provision was unambiguous, and that it permitted Quality to make the second payment to the vendor either within 90 days of the original payment or upon the vendor's request after the delivery and installation of the equipment.

The court found that the provision was unclear: it could have meant that the second draw is to be paid "when requested by the vendor at completion and installation of the equipment," but in no event sooner than 90 (or 30?) days from the first draw, meaning Quality would not be obligated to make the payment sooner than 90 days (or 30?). It could also have meant that, regardless of when the equipment is installed, the second payment will be made no later than 90 (or 30?) days after the first draw, but sooner if the equipment is installed sooner.

The crux is whether the language meant no sooner than or no later than. Resolving the ambiguity against Quality, who wrote the language, the court held that the parties intended that the second payment would be made only once the equipment had been installed and accepted by Atomic Dog.

Other Questionable Association Cases

CAI Design v. Phoenix Federal #2 Mining, DC S.D. West Virginia: The phrase "if for any reason the fee and note are not paid" could reasonably be interpreted to mean that both the origination fee and the note would have to be unpaid for the guaranty to activate; alternatively, it could mean that unless the total amount due on both the note and the origination fee was paid, the guaranty would activate.

Nat'l American Ins. Co., v. New Dominion, LLC, Supreme Court of Oklahoma: Does an exclusion for an "irritant" or "contaminant" encompass any kind of liability caused by wastewater? NAIC argued that wastewater was an irritating or contaminating substance; the wastewater was alleged to have caused an earthquake, which gave rise to claims under the policy.

My Recommendations for Avoiding Questionable Associations

1. Avoid notwithstanding the foregoing; notwithstanding any provision to the contrary. These phrases often cause ambiguity as to what exactly constitutes "the foregoing," and which provision is supposed to be dominant or subordinate. I covered this in detail in *23 Mistakes*.

Some uses of "notwithstanding" are worse than others, but all are potentially problematic. Consider what "notwithstanding the foregoing" refers to in this example:

> 1.2.6 **Amendment to Lease**. If Tenant timely exercises Tenant's right to lease the First Offer Space as set forth herein, then Landlord and Tenant shall within thirty (30) days thereafter execute an amendment to this Lease for such First Offer Space upon the terms and conditions as set forth in the First Offer Notice and this Section 1.2. Such amendment shall include Tenant's obligation to rent additional parking passes at the ratio of one (1) unreserved parking pass for each 5,000 rentable square feet of the First Offer Space in accordance with the terms of Section 9 of the Summary and Article 28 below. **Notwithstanding the foregoing**, the failure of Landlord and Tenant to execute and deliver such First Offer Space amendment shall not affect an otherwise valid exercise of Tenant's first offer rights or the parties' rights and responsibilities in respect thereof.

The questionable association in Section 1.2.6. arises in determining exactly what is "the foregoing." Is "the foregoing" all or just a part of the sentence that precedes it within the same subsection? Does "the foregoing" extend beyond Section 1.2.6.? Does it incorporate all of Section 1.2? Does it incorporate all of Article 1?

2. Watch the tail at the end of a list. Make sure you know and apply the distinctions the court alluded to in *Facebook v. Duguid*, between integrated lists where the modifier is set off with a comma (or some other mechanism), in which the series-qualifier canon should prevail, versus non-integrated lists where the modifier is not set off, in which the rule of the last antecedent should prevail. Better still, draft the provision so the modifier is not ambiguous in the first place.

For example, in this phrase from a case involving construction of a security agreement, "all inventory, including but not limited to agricultural chemicals, fertilizers, and fertilizer materials sold to Debtor by the Creditor," "sold to Debtor by the Creditor" is a tail, not set off by a comma, that could reasonably apply to:

- fertilizer materials, the third item in the list;
- agricultural chemicals, fertilizers, and fertilizer materials, all three items in the list; or
- all inventory, which was the phrase preceding the list.

Based on the facts more so than the drafting, the court concluded that "sold to Debtor by Creditor" applied to all inventory; however, litigation might have been avoided if the drafting had been clearer.

In *U.S. Liability Insurance Co. v. Benchmark Construction Services*, (5th Cir. 2015) the court considered the following provision ambiguous, because the tail "for which any insured may become liable in any capacity" could have modified "injury" or "services":

> The coverage of this insurance policy does not apply to bodily injury to any employee of any contractor arising out of or rendering services of any kind for which any insured may become liable in any capacity.

By contrast, in *Black v. Dixie Consumer Products, LLC.* (W.D. KY 2015), the court concluded the tail "whether pursuant to this Agreement or otherwise" was not ambiguous because it was not reasonably possible of being construed as applying to anything other than the last item in the list:

> Carrier shall defend Georgia-Pacific and its subsidiaries for the injury of a person "arising out of or predicated upon 1) the operation of trucks of or by CARRIER, its agents or employees, or 2) the conduct of the business of CARRIER, or 3) the transportation and handling of goods by CARRIER, its agents or employees whether pursuant to this Agreement or otherwise.

3. When in doubt, deploy tabulations! In any list, even a short one like this example with only two Roman numerals, each component of the list should make a complete sentence when it is read together with the preface and the tail, but Roman (ii) in this example does not:

> "Security Incident" means any actual or reasonably suspected event that compromises, or could reasonably be expected to compromise (i) the privacy or security of any Personal Information, software or system accessed or used to provide the Services; or (ii) any loss, or unauthorized acquisition, access, destruction, alteration, disclosure, access, or use (in all cases whether accidental or intentional) of, or the inability to locate, Personal Information.

First, try reading the components and Roman (ii) together:

"Security Incident" means any actual or reasonably suspected event that compromises, or could reasonably be expected to compromise / (ii) any loss, or unauthorized acquisition, access, destruction, alteration, disclosure, access, or use (in all cases whether accidental or intentional) of, or the inability to locate, Personal Information.

This relatively short sentence is obviously flawed because its components cannot sensibly be read together. Further, the numbering system applied by the lawyer seems to anticipate two kinds of items but the language actually describes more, so the items have been grouped illogically. Is "Personal Information" a tail intended to modify each item in the list? Does "(in all cases whether accidental or intentional" also modify "the inability to locate" Personal Information? What did the lawyer actually intend? The question is *not* whether the lawyer understands what he or she has written, but whether the other party could *reasonably* construe it to mean something different than the lawyer intended. This provision encompasses many plausible interpretations; however, notice how using tabulations can resolve and eliminate ambiguity by strategically placing the modifiers precisely with the segment the lawyer intends them to modify:

First alternative:

"Security Incident" means any actual or reasonably suspected:

i. event that compromises, or could reasonably be expected to compromise the privacy or security of any Personal Information, software or system accessed or used to provide the Services;
ii. loss of Personal Information;
iii. unauthorized acquisition, access, destruction, alteration, disclosure, or use of Personal Information, whether accidental or intentional; or
iv. inability to locate Personal Information.

Second alternative:

"Security Incident" means:

i. any actual or reasonably suspected event that compromises, or could reasonably be expected to compromise the privacy or security of any Personal Information, software or system accessed or used to provide the Services; or
ii. any accidental or intentional:
    a. loss of;
    b. unauthorized acquisition, access, destruction, alteration, disclosure, access, or use of; or
    c. inability to locate

Personal Information.

4. Watch out for baffling tagalongs and careless references. Here is another example of a tail that does not wag: what does "other than the Confidentiality Agreement" modify?

9.7 Entire Agreement. This Agreement (including any exhibits, annexes and schedules hereto) and the documents and other agreements among the parties hereto as contemplated by

> or referred to herein, including the Company Disclosure Schedule, together with each other agreement entered into by or among any of Parent, Merger Sub and the Company as of the date of this Agreement that makes reference to this Section 9.7, constitute the entire agreement among the parties with respect to the subject matter hereof and supersede all other prior agreements, understandings, representations and warranties, both written and oral, among the parties with respect to the subject matter hereof, other than the Confidentiality Agreement.

Arguably, "other than the Confidentiality Agreement" may modify "supersede all other prior agreements," or it may modify "This Agreement … and the documents and other agreements among the parties hereto." In contract dispute cases, the order of the phrases is not always determinative; that this phrase appears at the end of the sentence does not necessarily dictate that it will be construed to modify the last phrase. The ambiguity here renders uncertain the Confidentiality Agreement's relative priority among many documents. The lawyers' intention is not clear to me but inclusion of the phrase suggests the point was significant. It should have warranted a separate, clear sentence.

Many contracts are plagued with stray references that must have been intended to clarify but wind up causing ambiguity. Consider this example:

> (b) All reasonable fees of the Shareholder Agent and all reasonable costs, attorney's fees, and expenses incurred by the Shareholder Agent in connection with the performance of its duties hereunder shall be paid out of the Representative Escrow Fund, upon presentation by the Shareholder Agent to the Escrow Agent of an accounting of such fees, costs and expenses, which accounting is subject to Parent's reasonable agreement, provided, however, that no such claim for fees, costs and expenses shall be paid until the later of the Expiration Date or the end of the last Pending Claim Extensions, if any, to terminate; and provided, further, that in the event the Escrow Agent has received Officer's Certificate(s) from Indemnified Parties with respect to Losses that exceed the Escrow Amount, the Escrow Agent shall, subject to the provisions of Section 7.3(e) hereof, deliver to Parent out of the Representative Escrow Fund, as promptly as practicable, cash held in the Representative Escrow Fund in an amount equal to such Losses (if such Losses are greater than the amount of cash in the Representative Escrow Fund then the Escrow Agent shall deliver to Parent the entire cash amount in the Representative Escrow Fund); and, provided, further, that, in the case of Pending Claim Extensions, on the Expiration Date the Escrow Agent shall distribute to the Escrow Contributors (and in the case of Vested Assumed Options, such options shall be released from the provisions of Section 7.3(c)) the portion of the Representative Escrow Fund that is not necessary **(as determined in the preceding proviso)** to satisfy such unsatisfied claims.

Which is "the preceding proviso" referred to on the last line? When does the third proviso end? Is the parenthetical part of the third proviso, in which case "the preceding proviso" would refer to the second proviso, or is the parenthetical not part of the third proviso, in which case it would refer to the third? The question is not whether you know what it means, but whether a very smart, very well-educated, very well paid, and very motivated lawyer can make a convincing argument that it means something different.

5. Watch for questionable associations caused by such, said, same. Be sure it is abundantly obvious what such, said, or same refer to. I covered this topic in detail in *23 Mistakes*. Here's an example of ambiguity caused by "the same" in a commercial lease:

> §7.1 To the extent that Landlord installs, maintains, uses, repairs or replaces pipes, cables, ductwork, conduits, utility lines, and/or wires through hung ceiling space, exterior perimeter walls and column space, adjacent to and in demising partitions and columns, in or beneath the floor slab or above, below, or through the Premises, then in the course of making any such installation or repair: (w) Landlord shall not interfere unreasonably with or interrupt the business operations of Tenant within the Premises; (x) Landlord shall not reduce Tenant's usable space, except to a *de minimus* extent, if the same are not installed behind existing walls or ceilings; (y) Landlord shall box in any of the same installed adjacent to existing walls with construction materials substantially similar to those existing in the affected area(s) of the Premises; and (z) Landlord shall repair all damage caused by the same and restore such area(s) of the Premises to the condition existing immediately prior to such work.

What does "the same" refer to?

- Pipes, cables, ductwork, conduits, utility lines, wires
- Hung ceiling space, exterior perimeter walls and column space
- Partitions and columns
- Floor slab or above
- the Premises
- installation or repair

In the following example, notice how all the "suchs" in this provision cloud its intended meaning:

> (iii) if the Borrower either fails to pay, as and when the same shall become due and payable, any principal of or interest on any other obligation for borrowed money or any obligation secured by purchase money mortgage or title retention lien beyond any period of grace provided with respect thereto, or fails to perform any other agreement, term or condition contained in an agreement under which any such obligation is created, if the effect of such failure is to cause, or to permit the holder or holders of such obligations (or a trustee on behalf of such holder or holders) to cause, such obligation to become due prior to its stated maturity;

The ambiguity in paragraph (iii) caused by the sentence length and convoluted sentence structure is resolved in the revised version below by breaking the long sentence into separate clauses and using tabulations. In the first version, it is unclear what "any principal of or interest on" refers to—does it modify "any other obligation for borrowed money" AND "any obligation secured by purchase money mortgage" AND "title retention lien?" Similarly, it is unclear whether "beyond any period of grace provided with respect thereto" modifies only "title retention liens." Another problem occurs with the words "such failure" as TWO failures have been mentioned: the failure to pay and the failure to perform. See how these ambiguities are resolved by using tabulations:

> (iii) the Borrower fails either:
> (a) to pay the principal of or interest, as and when due and payable, before any applicable grace period expires, on:

(1) any other obligation for borrowed money; or
(2) any obligation secured by purchase money mortgage or title retention lien;

and the Borrower's failure to pay causes or permits the holder or holders of the obligation (or a trustee on behalf of such holder or holders) to declare it due prior to its stated maturity; or

(b) to perform any other agreement, term or condition contained in an agreement under which any other obligation is created.

7. The #4 Error: Missing Information

Omissions usually happen when something referenced in the contract is omitted, or as a result of cutting and pasting. For example, if a provision contains a definition but the provision gets deleted in one iteration of the contract, contextual ambiguity will result from the missing definition. If a contract is missing one or more "essential terms," there is no contract and the agreement is void. The court will order remedial steps to attempt as nearly as possible to put the parties back into their original positions. See, for example, *Ward v. Cranston*, Mississippi Court of Appeals (2021) where a lease-purchase agreement was silent as to how the buyer's original payments of $20,000 were to be attributable to the purchase of a residence, which forced the court to void the transaction. The essential terms are: the parties, the subject matter, and the price or payment required.

Contracts often omit important information that, while not "essential" to the very formation of a contract, nevertheless can cause ambiguity, and my survey revealed several cases where important, but not essential information had been omitted. To summarize, in the survey cases, these kinds of information were omitted:

- Which party was supposed to provide empty railcars to load coal into
- What the revenue sharing percentage waws in a renewal term
- Whether a licensee is supposed to continue to pay license fees when the licensor is no longer providing services and licensee obtained code from a source code escrow
- Whether a licensor is supposed to refund overpayments when a provision requires the licensee to remit underpayments

7.1 XCOAL Energy & Resources v. Bluestone Energy Sales Corp.

In this federal district court case from Delaware, Bluestone agreed to supply Xcoal with a certain amount of coal, but Bluestone failed to deliver. Xcoal and Bluestone are sophisticated parties who have engaged in many business transactions and much litigation; in fact, the contract at issue in this case was entered into as a result of a settlement agreement from a prior lawsuit. According to Article 2.2 of the Agreement:

> The Coal shall be delivered, and title and risk of loss thereof shall pass from Bluestone to Xcoal, free on board (F.O.B.) after the Shipment has been properly loaded into railcars at the Bishop mine loadout.

Bluestone was responsible for loading the Coal into empty railcars at the Bishop loadout according to Article 3.5 of the Agreement:

> Bluestone shall cause Coal sold hereunder to be properly loaded into railcars for delivery to Xcoal in accordance with the Transportation Provisions of the applicable rail contract of Xcoal with Norfolk Southern.

The critical issue in the parties' dispute centered around which party was required to obtain empty railcars from Norfolk Southern. The agreement does not expressly address which party, Xcoal or Bluestone, is responsible for arranging for empty railcars to be brought to the Bishop loadout to permit Bluestone to load coal for delivery to Xcoal. Bluestone's counsel hung his hat on a single phrase and conceded that "the core issue is, who had the obligation to have the trains there? And if it was us, then I don't think we can recover on our counterclaim." The court stated that a reasonable person could interpret the provisions of the CSA as requiring Bluestone to be responsible for providing empty railcars, even though Article 3.5 also contains a reference to "Buyer's railcar." The court concluded it is reasonable and convenient to refer to the railcar destined to be loaded with coal purchased by Xcoal as "Buyer's railcar" even if Bluestone supplied the railcar.

The court concluded that the most reasonable interpretation of the provision, the course of performance, and industry practice, render Bluestone responsible for arranging the empty railcars per the Delaware version of UCC 1-303(e): The express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other." Testimony of expert witnesses established that it is custom and practice that the producer, not the buyer, must order the railcars.

7.2 Seneca Nation of Indians v. NY, 988 F. 3d 618 (3rd Cir. 2021)

The Seneca Nation entered into an agreement with the State of New York under which the Nation could open casinos for gaming. The agreement had an initial term of 14 years with graduated revenue-sharing payments for years 1-4, 5-7, and 8-14. The agreement also included a 7 year renewal term but does not specify a revenue sharing percentage for the renewal term. The agreement also included an arbitration provision, and this case resulted from the Nation's appeal of the arbitration process, due to certain complications regarding federal laws and the authority of the Secretary of the Interior.

The Nation argued that New York was fully compensated in the initial term and was not entitled to revenue-sharing in the renewal term. New York argued that it was entitled to the revenue-sharing rate in effect at the time of renewal. The arbitration panel concluded that the provision was ambiguous but "read as a whole and in light of the extrinsic evidence," the agreement should be read to require the Nation to make revenue sharing payments in the renewal. Silence on the issue in the negotiating history, and the fact that revenue-sharing was a central premise of the underlying agreement convinced the court that the parties' essential bargain involved paying to play. Ultimately, the 3rd Circuit determined that the arbitration panel performed its assigned task appropriately.

7.3 Epazz, Inc. v. National Quality Assurance (6th Cir., 2021)

NQA licensed a software program called Enterprise Quality Manager from Enterprises. The software was highly susceptible to bugs and outages, but Enterprises provided excellent technical support to keep it up and running. The parties entered into a software escrow arrangement with Iron Mountain to grant NQA access to the source code if Enterprises breached the agreement or filed bankruptcy.

Things rocked along well for many years until May 2014, when Jadian, a wholly-owned subsidiary of Epazz, bought Enterprises' assets and customer service contracts. As the district court put it, Jadian "totally fumbled the handoff." Jadian was aware that NQA was Enterprises' largest customer but never made any effort to meet the individuals involved in the relationship, and did not hire the Enterprises staff who kept the software operational. Without these staff members on board, Jadian "had no workable transition plan to shift support operations from Enterprises to Jadian," and major problems erupted only two days after the acquisition.

NQA refused to pay the subscription fee for the next quarter and sent a formal cure demand to Jadian. The letter stated that "NQA will resume normal payments for Product Support Services" when Jadian remedied its deficiencies, but that didn't happen. Eventually, NQA used the software escrow arrangement to obtain the source code from Iron Mountain and engaged another company to provide software support services. Three years later, Jadian sued NQA for using the software without paying subscription fees. The escrow agreement provided:

> Right to Use Following Release. [NQA is entitled] to use the Deposit Material for the sole purpose of continuing the benefits afforded to it by the License Agreement.

The court determined the language is ambiguous because at least two interpretations are reasonable. It could mean, as Jadian claimed, that NAQ could continue using the software only under an active licensing agreement; it could also mean, as NAQ claimed, that NAQ had the right to use the code "for the sole purpose of continuing the benefits afforded" under the license agreement without any additional payments. The court concluded that NQA's reading was more credible because it would not make sense for NQA to be required to continue to pay fees when Jadian persistently failed to fulfill its contractual support obligations.

7.4 Intermec v. Transcore, Delaware Superior Court

Intermec and Transcore entered into a cross-license agreement to use each other's RFID intellectual property to enable them to commercialize RFID for industrial usages. The licenses were very broad but not unlimited. TransCore agreed to pay Intermec royalties at percentages specified in the agreement; Intermec retained the right to audit TransCore's payments. Following an audit, Intermec learned that TransCore had underpaid, but TransCore also learned that it had been making royalty payments on non-royalty assets. TransCore also determined that Intermec had been using TransCore's technology in the transportation industry, which was strictly prohibited under the license agreement.

TransCore counterclaimed for a refund of overpayments, but Intermec claimed that it has no duty to refund overpayments under the license terms. According to the license:

> Intermec has the right. . . through an independent third party, to audit TransCore's records to verify any representations made (in quarterly reports or otherwise) by TransCore to Intermec about the matters described [in the license agreement.] Should the results of any . . . audit by [Intermec's auditor] demonstrate that any representations or payments made by TransCore resulted in an underpayment that exceeded more than one percent (1%) in any period, then TransCore will within 30 days after notice of such underpayment, pay Intermec such amount.

Notice that the audit provision doesn't say anything about Intermec's reimbursing TransCore if TransCore has overpaid. One of the issues in the case boiled down to a disagreement over whether the audit provision created a separate payment duty from the payment provision, and whether the auditor had authority to render binding judgments. TransCore has a duty to imburse Intermec for an "underpayment" that the auditor demonstrates. The court noted that the license agreement didn't define "demonstrates," but consulted a dictionary to conclude that "demonstrates" incorporates at least some aspects of proof; however, TransCore argued that the auditor did not have authority to make a final uncontestable determination that establishes a legal duty to pay what the auditor determined is an underpayment. The auditor is not an arbitrator with authority to make a final determination.

Conversely, Intermec argued that the 30-day aspect of the audit provision means that TransCore had an obligation to pay the sum the auditor computed.

The court held both interpretations were reasonable, and summarized the issue like this: Did the parties intend that (1) the audit provision could be breached independently, in which case Intermec's claims would be considered "timely"; or (2) the audit provision could not be breached independently, in which case Intermec's claims are really based on the payment provision for which the statute of limitations had run? Because it could not answer that question on the available record, the court denied summary judgment and remanded.

8. The #5 Error – Lack of Standardization for Specific Legal Consequences.

If I had a "favorite" among all the topics I teach, this would probably be it because it certainly is the only topic I discuss in nearly every one of my contract drafting programs. The reason I cover this topic so extensively is that this error – not standardizing the language used to create specific legal consequences – is so easily fixed. It is easy to avoid the errors that caused contract litigation in the following cases. To summarize:

- "Subject to" does not automatically create a condition; prefer if/then
- "fund" does not create an obligation to completely fund; use shall instead
- Use shall to require a party to deliver code
- Use "is not required to" to negate a duty
- Use "shall" to create a duty
- Be careful to distinguish "may" (privilege) from "might" (possibility)
- Use "is entitled to" to create a right

8.1 Thomas & Betts Corporation v. Trinity Meyer

The case of *Thomas & Betts Corporation v. Trinity Meyer Utility Structures, LLC* (2nd Cir, 2021) sets the stage. Thomas & Betts appealed the district court's dismissal of its claim, pitting counsel from two of the best firms in the country (King & Spalding and Gibson, Dunn & Crutcher) against each other regarding indemnification provisions in an asset purchase agreement. Trinity purchased T&B's steel structures business, and T&B sought indemnification from Trinity for a warranty claim concerning defective arm brackets used in electric transmission towers purchased from T&B in 2011. Unfortunately, the court did not record the exact language of the indemnification provision in section 6.2 or the notice provision in section 6.3; it merely described them but concluded that the district court erred in determining that the words "subject to the terms and conditions of this Article VI" in the indemnification provision (§6.2) was sufficient to create a condition precedent out of the notice provision (§6.3), particularly when T&B alleged that Trinity was aware of the claim and initially participated in negotiations to resolve it.

The court first noted that under New York law, conditions are not favored and will not be read into the agreement unless the language is unambiguous. The district court had relied on observations in *Sohm v. Scholastic, Inc.,* 959 F.3d 39, 46 (2d Cir. 2020) indicating that if, on condition that, provided that, in the event that, and subject to "can make plain a condition precedent." Even so, this court noted that mere use of the words "subject to" does not overcome the presumption against conditions precedent, especially where, as here, the language is used inconsistently. For example, in Article V, the contract specifically refers to "Conditions Precedent to Closing," proving unmistakably that the lawyers knew how to create conditions precedent. Further, a subheading in Article V is called "Conditions to Obligations of T&B and Trinity" and includes the following language: The obligation of T&B and Trinity to consummate the transactions contemplated by this Agreement to be consummated at the Closing is subject to the satisfaction of the following conditions." The court noted that the language of section 6.2 is far less explicit than the language used in Article V, which clearly listed each condition precedent and characterized the list as conditions precedent to closing.

The "subject to" language is not located in the same section that imposed the alleged condition precedent and does not specifically reference the notice procedures, and many of the other provisions of Article VI cannot reasonably be interpreted as conditions precedent.

Further, the lawyers used "subject to" frequently in the agreement in various contexts that seem to use the phrase as a cross reference, rather than to create conditions precedent. For example, "Buyer desires to assume the Assumed Liabilities upon the terms and subject to the conditions set forth herein"; "Buyer takes the Business and the Acquired Assets and Assumed Liabilities as-is and where-is, subject to the benefit of the representations and warranties set forth in Article II"; "Subject to the terms of this Agreement, each Party shall use reasonable efforts to take all actions and to do all things reasonably necessary or advisable to consummate the transactions contemplated by this Agreement."

I have discussed problems with using language inconsistently in many programs. Semantic ambiguity results when an otherwise un-ambiguous word or phrase is either misused or used inconsistently, as the words "subject to" were in this case. Although "variation," the practice of using different words to entertain the reader, has its merits in other forms of writing, lawyers should carefully avoid it in contracts. The risk in using more than one word per meaning is that different words suggest

that a difference in meaning is intended. Courts must endeavor to give each word meaning and may find distinctions between words where none were intended. Conversely, using the same word to have many different meanings will confuse as to which meaning applies to any given usage. Ambiguity that results from inconsistent usage is always avoidable.

The court warned that "Where the contracting parties are sophisticated actors represented by counsel, as they are here, we must presume that they understand how to use words and construction to establish distinctions in meaning." (citing *Int'l Fid. Ins. Co. v. Cty. Of Rockland,* 98 F. Supp. 2d 400, 412 (S.D.N.Y. 2000), and "The failure to couch the request for cure provision in the explicit language of the condition is particularly significant here because the sophisticated drafters elsewhere employed precisely such language to establish undoubted conditions precedent." (citing *Bank of N. Y. Mellon Tr. Co., v. Morgan Stanley Mortg. Cap., Inc.* 821 F.3d 297, 306 (2d Cir. 2016)

When the court states that it assumes sophisticated parties *represented by counsel* understand how to use words and construct distinct meanings, who is responsible when the contract fails to produce the intended distinct meanings? What about you? Do you know how to use words and construction to establish distinctions in meaning? Do you deliberately, mindfully, intentionally create conditions precedent using consistent words and sentence structures?

8.2 Military Order of the Purple Heart Service Foundation, Inc. v. Military Order of the Purple Heart USA (DC Cir. 2021)

[*To distinguish the parties in this intra-familial dispute, the court referred to Military Order of the Purple Heart USA as the Order; the Military Order of the Purple Heart Service Foundation as the Foundation and I will, too*.]

The Order provides services to veterans; the Foundation funds those operations. The Foundation licensed the Order to use its trademark "Purple Heart" for certain activities. The parties ran into trouble when the Foundation's funds started drying up; hence, the funds it contributed to the Order began drying up, and the Order began its own fund-raising activities using the Foundation's trademark. When the Foundation sued to prevent the Order from violating its trademarks, the Order counterclaimed that it was entitled to the assets because the Foundation had failed to fund the Order's entire budget.

> Paragraph 3 of the parties' agreement requires the Foundation to "fund the reasonable budget submitted to it by the Order."
>
> Paragraph 5.2 provides that if the Foundation "does not fund the Order, the assets or control of Holdings will be transferred to the Order."

The court noted that the ordinary meaning of "fund" does not suggest any particular amount of funding. To the extent "fund" was ambiguous with regard to whether it meant partial or full funding, the court of appeals concluded that the district court properly considered extrinsic evidence of what a reasonable person in the position of the parties would have thought the disputed language meant. Further, the negotiating history showed that the Foundation repeatedly refused to use the phrase

"properly fund" in paragraph 5.2. The court ultimately concluded that paragraph 5.2 did not require the Foundation to fully fund the Order's budget.

When I discuss drafting scope provisions in my programs, I've constantly stressed that if you want to be able to enforce an obligation, it needs to be expressed as a duty under the contract. If the parties had intended for the Foundation to fully fund the Order's budget, the best way to accomplish this would have been to establish a clear duty using standardized language: The Foundation shall completely fund the reasonable budget submitted to it by the Order.

8.3 Nuance Communications v. IBM, SDNY

In 2011, Watson, a computer system embedding IBM-designed software technology DeepQA, defeated two human former champions in a real-time competition on national television on the popular game show Jeopardy!. DeepQA accepts natural language questions and searches a body of information, generates a range of hypotheses, ranks these hypotheses, and returns the hypothesis it has the most confidence correctly answers the question, all in no more than seconds. Watson's public debut received world-wide attention; however, to fully interact with humans and be useful, Watson needed to understand and process questions beyond the Jeopardy! domain, asked through human voice. IBM's search for sophisticated partners with whom it could develop applications for DeepQA beyond winning Jeopardy! forms the backdrop of this case.

Beginning in 2010, even before DeepQA's triumphant appearance in Jeopardy!, IBM and Nuance were discussing possible partnership opportunities to build technological solutions to business problems; they entered into a Software License Agreement ("SLA") in 2010. The SLA entitled Nuance to one copy of IBM Research Group's "Automatic Open-Domain Question Answering" software system (which embedded IBM's DeepQA technology), Tools to create commercial applications based on this technology and Nuance's technology, and ten years of software "updates." In return, Nuance paid IBM $25 million.

Nuance contends that under the SLA, IBM was to supply it with updates created by all IBM groups (i.e., not just IBM Research Group, which created the technology). IBM argues to the contrary, i.e., that the delivery of updates was limited to only those developed by the Research Group. Crucial to the distinction is that under IBM's interpretation of the SLA, it was not obligated to deliver to Nuance the "blue-washed" code (created by the Software Group), a set of updates which Nuance claims made DeepQA commercially viable. The text of the provision which is the subject of the dispute is as follows:

> "Licensed IBM Background Software" means (a) all Software that exists as of the Effective Date in all available formats (Including Source Code and Object Code) that is owned by, or that has been developed or licensed by the IBM Research Group, including Tools, and that is listed on Exhibit A, including any modification, updates, upgrades, error corrections, bug fixes, diagnostic and/or testing tools, that are JDBC compliant, and other changes, if available ("Modifications"), and if such Modifications are not contractually prohibited under a Third Party agreement, and such Modifications are available, will be timely provided to Nuance; and where the Modifications continue to meet the scope contemplated in Article 2.1 regarding the licensing of Deep QA under this Agreement, as of the Effective Date and thereafter for a period of ten (10)

years, and additional Software as agreed by the parties, provided to Nuance by IBM under the Agreement (collectively "Updates"). . . .

Nuance argues that this provision is separated into two parts by the semicolon, the first part defining modifications and the second part providing that for a period of ten years, IBM will give Nuance these modifications, i.e., updates. IBM contends that the provision is separated into two parts by the second to last comma, the first part defining IBM Research modifications to which Nuance is entitled under the agreement and the second part providing that IBM will provide Nuance additional code pursuant to any separate subsequent agreements. The SLA is ambiguous on its face, and a genuine dispute of material fact exists about the parties' intent after considering the extrinsic evidence.

The Court held that this provision means Nuance is entitled to updates in the sense of code that is added to DeepQA that made DeepQA commercially usable, but not to products that are similar to or derived from DeepQA. Thus, finished products, such as Watson Core, Tone Analyzer, and Watson for Oncology were not updates under the agreement, but non-product updates, such as the blue-washed code and other similar updates could be updates under the agreement if they made DeepQA commercially usable. The Court found that Nuance was entitled to receive one set of updates that would allow DeepQA to be used in a commercial setting (i.e., the blue-washed code), and while IBM delivered some updates to Nuance, IBM breached the agreement by failing to deliver the blue-washed code.

8.4 Wnorowski v. University of New Haven

Wnorowsk v. University of New Haven (DC Connecticut) presents an interesting spin on using language deliberately and intentionally. This is a case brought about as a result of Covid. Wnorowski attended classes at the University of New Haven during the Spring 2020 semester. On March 9, 2020, six and a half weeks into the semester, UNH announced that it would be transitioning to remote instruction because of Covid; thereafter, when the State of Connecticut issued workplace restrictions for non-essential workers, UNH extended remote instruction to the end of the semester.

UNH advertises to prospective students via its website and brochures that tout the benefits of its campus and in-person facilities, such as residence halls, dining halls, library, and recreation center. Separately, the school also promotes a distinct, fully online program.

Wnorowski argued that through its website and brochures, the school expressly or impliedly promised to provide an in-person experience when he chose in-person classes and paid certain fees. Further, when he chose his classes, the registration page indicated the physical classroom location where those classes would be held. UNH argued that the contractual materials never specified that Wnorowski was entitled to an in-person education. [*Ah, but the contractual materials never specified that UNH was not required to provide in-person education, and therein lies the rub.*]

The court found that the materials comprising the contract are ambiguous, and that Wnorowski's interpretation is a reasonable reading of the contract. The court further noted that the parties' course of conduct, namely, the fact that UNH had offered in-person classes the first half of the semester and all previous semesters, also made it reasonable to construe the parties' agreement as containing an in-person component.

The mistake UNH made was failing to use explicit, deliberate language to *negate a duty*, namely, the duty to provide in-person learning: UNH is not required to provide in person instruction if doing so is inconsistent with the health and safety of its professors, students, and staff.

8.5 Metromont Corporation v. Myers, LP

Similarly, in *Metromont Corporation v. Myers, L.P.* (D.C. Maryland), the City of Baltimore entered into a contract in 2009 with Allan Myers LP to construct a building called "Montebello Plant 2 Finished Reservoir Project" for approximately $37 Million. The original design of the plant was provided by the engineering firm Whitman, Requardt & Associates. That design was incorporated into the construction contract with Myers. Myers subcontracted with Metromont Corporation to supply the component parts for the roof for approximately $4.5 Million. At some point, the City decided that a different kind of roofing joints should be used and Myers refused to pay Metromont, asserting that Metromont was responsible for the faulty initial design. The subcontract documents included the following language:

> All precast-prestressed concrete members and connections shown on the drawings are conceptual only.
>
> Contractor/precast-prestressed concrete member's manufacturer shall design the members and their connections in strict compliance with the requirements of ACI 350-06 . . . and ACI 350-3-06 for seismic design, for design loads indicated on this drawing. Submit design and shop drawings for approval of the engineer.

In a 5-day bench trial, the court turned to expert industry witnesses to determine the proper interpretation of the phrase "conceptual only," and specifically, whether in industry jargon that phrase imposed a duty on Metromont to redesign the roof system. Although the experts proffered differing opinions, the court held that neither the phrase "conceptual only" nor the ACI sections referenced in the subcontract documents imposed any duty on Metromont to review or redo the overall design of the roof system designed by WR&A.

The drafting error in this contract was a failure to establish an affirmative duty on Metromont: Metromont shall review the drawings and revise if necessary. . . .

Other Cases on Ambiguous Legal Consequences

Walworth Investments L-G, LLC v. Mu Sigma (Illinois Court of Appeals), where the language attempted to back in to antireliance language to bar Walworth Investments from asserting claims for fraud based on representations outside the agreement by stating that Mu Sigma was relying on the representations and warranties, but did not require Walworth to affirmatively state that it did not rely on statements outside the contract to decide to sign it.

Division One Foods v. Pizza Inn, (DC N.D. Texas), where Pizza Inn argued that "may" as in "may give notice" made prior notice optional, rather than an obligation.

Hash v. First Financial Bancorp (DC S.D. Indiana), where the language of a debit card agreement failed to specifically authorize FFB to charge overdraft fees upon settlement for all types of "Authorize Positive – Settle Negative" transactions.

My Recommendations for Creating Legal Consequences

Some attending this program may remember this excerpt and example from *23 Mistakes Experienced Contract Drafters Usually Make*, which is a program I did in Minnesota in 2018. The program was based entirely on a single contract, namely, the merger agreement between Amazon and Whole Foods in 2017. We used the following paragraphs of text to demonstrate that these highly qualified, experienced lawyers were not standardizing their language to establish distinctions in meaning:

Notice the various inconsistent ways the Amazon contract grapples with the concept of assigning the responsibility for these Secretary of State filings on page 2. Apparently, the lawyers do not have a clear understanding of best practices, so the drafting is inconsistent and haphazard:

1. Effective Time. As soon as practicable following, and on the date of, the Closing, the Company and Parent **will cause** the Merger to be consummated by filing all necessary documentation, including a Certificate of Merger (the "**Certificate of Merger**"), with the Secretary of State of the State of Texas as provided in the relevant provisions of the TBOC. The Merger shall become effective at the time when the Certificate of Merger has been duly filed with and accepted by the Secretary of State of the State of Texas or at such later time as may be agreed by the parties in writing and specified in the Certificate of Merger (the "**Effective Time**").

ARTICLE II

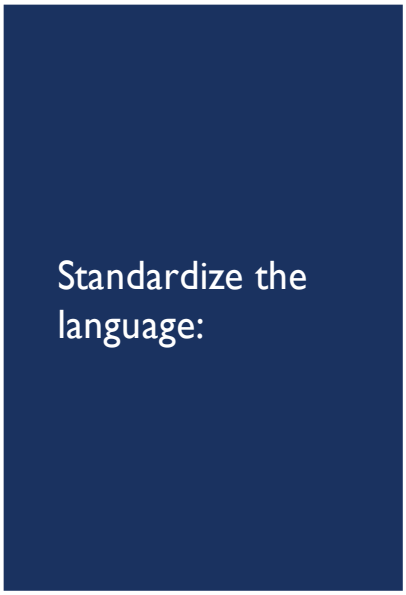
Articles of Incorporation and Bylaws
of the Surviving Corporation

1. Articles of Incorporation of the Surviving Corporation. At the Effective Time, the articles of incorporation of the Company as in effect immediately prior to the Effective Time shall be amended and restated in their entirety as of the Effective Time to be in the form set forth in Exhibit A to this Agreement, and as so amended shall be the articles of incorporation of the Surviving Corporation (the "**Charter**") until thereafter amended as provided therein or as provided by applicable Law.

2.2. Bylaws of the Surviving Corporation. The parties hereto **SHALL** take all actions necessary so that the bylaws of Merger Sub in effect immediately prior to the Effective Time shall be the bylaws of the Surviving Corporation (the "**Bylaws**") until thereafter amended as provided therein or as provided by applicable Law.

- The Company and Parent will cause
- The Merger shall become effective
- The articles shall be amended
- As so amended, the articles shall be the Articles of the Surviving Corporation
- The parties hereto **shall** take all actions necessary
- The bylaws of Merger Sub shall be the bylaws of Surviving Corporation

It seems abundantly clear to me that many of the best lawyers in the country *do not* know how to use words and sentence constructions to establish distinctions in meaning, and you can be sure I'm going to continue teaching it.



1. Different Kinds of Consequences.

The primary purpose of a contract is to create legal consequences, but there are many kinds of consequences. For example, contracts create **duties**, but they also create **rights**. Contracts create:

duties – something a party is obligated to do, or not to do, under the contract**;**
rights – something a party is entitled to receive because of the other party's duty**;**
privileges—the option to do something in the future if the party so desires;
present action – something that is accomplished simply by signing the contract;
policies—rules for how the contract will operate, such as miscellaneous provisions;
declarations—statements of facts regarding the contract itself, like defined terms and statement of purpose; and
conditions—events that must occur before a duty, right, or privilege arises.

Contracts sometimes negate duties, rights, or privileges, and create other legal consequences as well. Most contracts can be improved simply by systematically and consistently applying the correct signals to create the specific legal consequences.

2. Select the Right Consequence.

Before drafting a sentence, take time to consider what type of legal consequence you intend to create. Most contract concepts can be expressed several different ways. For example, the per share compensation to shareholders in a merger agreement *could be* expressed as a right of those shareholders, a duty on the acquiring party, a condition, or a declaration. The first step is to decide which consequence is best under the circumstances. The next step is to apply the correct language to

create that consequence. I recommend standardizing the language used for specific consequences as follows.

2.1 Duty. The correct usage of "shall" is to impose a direct duty on a party to the agreement, like this: "Tenant shall pay…." Yet, in almost any agreement, the word "shall" is also used incorrectly and inconsistently:

a. to impose an indirect duty on an unnamed party:

At the Effective Time, the articles of incorporation of the Company as in effect immediately prior to the Effective Time shall be amended and restated in their entirety as of the Effective Time to be in the form set forth in Exhibit A to this Agreement…"

b. to grant a privilege:

Each Share issued and outstanding immediately prior to the Effective Time…shall thereafter represent only the right to receive the Merger Consideration, without interest.

c. to express a condition:

The Payment Fund shall be invested by the Paying Agent, if so directed by Parent or Merger Sub.

d. to be used as a modal verb:

Each Dissenting Share shall, ~~as a result of the Merger and without any action on the part of the holder of such Dissenting Share, cease to be~~ outstanding, be cancelled without payment of any consideration therefor and **shall cease to exist**, subject to any rights the holder thereof may have pursuant to Section 4.2(g) and the TBOC.

e. to express an entitlement:

Subject to applicable Laws relating to the exchange of information, Parent shall have the right to devise and implement the strategy and timing for obtaining any clearances required under any Antitrust Law in connection with the Merger; provided, that such strategy shall be designed to obtain such clearances as promptly as reasonably practicable but in no event later than the Outside Date; provided, further, that Parent and the Company shall have the right to review in advance…

f. to clutter the writing without contributing any meaning:

No investment losses resulting from investment of the funds deposited with the Paying Agent shall diminish the rights of any holder of Shares to receive the Merger Consideration as provided herein.

Use "shall" solely to create a direct obligation on a named party to the contract, and do not use any word other than "shall" to impose a direct obligation on a party to the contract.

Manufacturer shall comply with applicable environmental laws.

Only a party to a contract can have a duty under it, so unless the word "shall" appears immediately after a named party, the usage is suspect. Even so, "shall" can appear immediately after a named party without creating a duty. Consider the following examples where "shall" is used incorrectly:

Employee shall be entitled to… [i.e., has a duty to be entitled]
Company shall have the duty to… [i.e., has a duty to have the duty]
Licensor shall have authority to… [i.e., has a duty to have authority]

To test for correct usage, substitute "has a duty to" for each "shall," and see if the sentence still makes sense. This test quickly reveals that "Base rent has a duty to be paid" and "notice has a duty to be given" are nonsensical; as a threshold issue, except in rare circumstances only a named party can have a duty under the contract, and "base rent" and "notice" are not parties to the transaction. "Company has a duty to be entitled to assign" is also nonsensical, as is "notice has a duty to have been given when," and "Lessor has a duty to be reimbursed for expenses."

Alternatives to "Shall" for Duties

Misuse of the word "shall" is so pervasive that some authorities, including Bryan Garner, advocate abandoning it and using "**must**" instead. Garner concludes that "shall" is too far gone to be rehabilitated; the Bar can no longer be trusted to use it correctly. Although Garner is the reigning authority on legal writing, generally, his recommendations with respect to "shall" and "must" in the transactional context are impractical. Anyone who has actually tried to convince obstinate opposing counsel to part with this favorite legal word realizes that lawyers are reluctant to relinquish even incorrect usages of "shall"; attempts to replace "shall" with "must" in a negotiated contract usually result in a mishmash of both terms, causing even more ambiguity as to whether clauses now using "must" have more, less, or the same force as those using "shall." Further, as Ken Adams noted, "shall" is itself the statement of the duty; "must" infers that the duty is created elsewhere. "Must" could probably be used successfully in contracts that are not negotiated, like website terms and conditions, but in those instances the lawyer is also able to apply "shall" correctly and consistently. "Shall" is still the best option except when the contract is for an unsophisticated audience that would not have "shall" in its vocabulary. Using "shall" in non-negotiated contracts makes it easier to cut and paste language between matters. "Must" should be used to create indirect duties; thus, "must" would be used in place of "shall" when neither party is directly named, like this: Notice of defects must be given within 20 days.

Other authorities have argued that the only proper use of the word "shall" is in the context of statutes; they argue that "shall" should be replaced by "**will**" in contracts. Respectfully, I disagree. As I understand it, the argument for using "will" is that because the parties enter into contract willingly, they are not *obligated* to agree as a person is obligated to comply with a statute; however, this logic is flawed because once the contract has been signed, the parties *are* obligated to comply with it. Another problem with substituting "will" for "shall" is that "will" is used to refer to future events where no promise is involved. Using "will" for a promise does not resolve the problem of inconsistent usage; it merely shifts the problem from "shall" to "will." If you use "will" to express a promise, what word do you use to refer to future events?

Although it is not used often in colloquial conversation, "shall" is certainly within the vocabulary of anyone with a high school education. Moreover, the fact that it is not used in colloquial conversation gives it added emphasis in contracts to describe promises, which after the contract is signed are obligations. The best practice is to use "shall," but to vigilantly restrict its usage to direct duties on a named party to the agreement.

2.2 Negating a duty. Use "is not required" to show that a party is not obligated to do something.

Landlord is not required to improve the premises.

2.3 A negative duty. Use "shall not" to prohibit a party from taking any action.

Company shall not assign its rights under this agreement.

2.4 Indirect duty. Use "must" to create an indirect obligation. If an obligation exists, but it is not known at the time the contract is signed which party will act, use "must."

Notice must be given within thirty days.

2.5 Right. Use "is entitled to" to create rights. Rights are the flip side of duties: A right means the other party has a duty to act. Most rights should be drafted as duties on the other party, but occasionally it is preferable to emphasize the right.

Buyer is entitled to be reimbursed for shipping costs of returned goods.

2.6 Negating a Right. Use "is not entitled to" to negate rights.

Buyer is not entitled to return defective goods to seller without advance notice.

2.7 Privilege. Use "may" to create a privilege. A privilege is discretionary, but there is no corresponding duty on the other party, except the duty to accept the choice of the party exercising the privilege.

Licensee may terminate the license upon 30 days' notice to Licensor.
The Indemnified Party may retain separate counsel at its sole expense.

Although "may" is recommended to convey privilege or discretion, "may" is also used colloquially to refer to possibility, that is, something that might happen. This distinction between privilege and possibility can cause ambiguity. For example, if a provision states that "Consultant may receive Proprietary Information regarding the Formula…," this could be interpreted to mean either that Consultant is entitled to receive the information, or that the possibility exists that Consultant might receive the information while performing its duties. To prevent ambiguity, preserve the use of "may" for privilege or discretion and convey possibility using "might," like this: "Consultant might receive Proprietary Information regarding the Formula…."

2.8 Negating a Privilege. Use "may not" to negate a privilege, but be very careful to avoid ambiguity regarding possibility versus permission discussed in the paragraph above. Sometimes, it is necessary to add clarifying words like "after October 31" in the example below to ensure that the "may not" cannot be construed as a possibility giving the party permission to make an election.

Company may not exercise the option after October 31.
Compare: Company may not exercise the option.
[*Is this a possibility or negation of a privilege?]*

Company might not exercise the option.
[*Using "might" clarifies that this is a possibility rather than a privilege.]*

2.9 Present Action. Use a present-tense verb to perform an action. If the action is actually taken within the contract, use a present-tense verb and active voice to state the action. Do not use passive voice to perform an action, as in "the license is granted to Licensee."

Licensor grants ABC a limited license to use the Software.
Investor acknowledges that it has received the disclosure statement.
Buyer assumes the liabilities secured by the assets.

2.10 Policy. Use a present-tense verb to state a policy. Policies are usually miscellaneous provisions that dictate how the contract will be implemented. Do not use "shall" in expressing policies unless you intend to impose a specific duty directly on a named party. Some authorities recommend against using passive voice in contracts but in my opinion, passive voice is the best option in boilerplate provisions where the actor is either uncertain at the time the contract is drafted, or someone who is not a party to the contract.

This agreement is governed by the laws of the State of Georgia.

2.11 Condition. Use "if" to create a condition. A condition is an event or status that must occur before a duty, right, or privilege arises. Create a condition using an if/then construction. Do not use "shall" in the "if" clause, but do use shall in the "then" clause if the condition relates to a duty. If the condition relates to a right or privilege, use "is entitled to" or "may" in the "then" clause.

If Buyer requests a sample of the Goods, Seller shall provide a sample within ten days. [*correct for conditional duty*]

If the LLC receives an opinion of counsel stating that the Transfer will not violate any laws, then Member may sell his or her Membership Interest. [*correct for conditional privilege*]

If Buyer shall request a sample of the Goods, Seller shall provide a sample within ten days. [*incorrect*]

3. Which Consequence Is Best for this Provision?

What is the best way to express the legal consequence in the following examples?

1. Neither the Surviving Corporation, Parent, the Paying Agent nor any other Person shall be liable to any former holder of Shares for any amount properly delivered to a public official pursuant to applicable abandoned property, escheat or similar Laws.

   Duty/permission/condition?

2. Buyer may place an order only by using Seller's purchase order system.

   Duty/prohibition/permission/condition?

3. Consultant agrees to assign the Works for Hire to Client.

   Duty/present action/condition/declaration?

4. A shareholder can review the corporate records by appointment.

   Right/privilege/duty/condition/policy/declaration?

Conclusion

If, by now, you're ready for dessert, consider this case, which takes the cake!

The Eclipse Law Group v. Target and Amazon (9th Cir. 2021):

Eclipse brought suit to enforce a settlement agreement to recover unpaid legal fees Target and Kmart incurred in separate cases. They were not co-defendants but the settlement agreement included both. Amazon's relationship is unclear and never mentioned in the opinion. Given Kmart's downward financial spiral, apparently, the lawyer lumped the cases together to try to get Target on the hook for the total. Is that ethical in any state?

Section 3 of the Settlement Agreement states:

> Target and Kmart agree to cause Eclipse [and an individual intervenor, presumably, the lawyer providing services] to be paid a collective sum of $425,000.00 Eclipse and Lobbin recognize that Target and Kmart will each pay a portion of the Settlement Payment and Eclipse and Lobbin may receive their payments in one or more checks/wire payments from Target and/or Kmart.

Eclipse argued the language clearly made Target and Kmart jointly liable for the collective sum. The court disagreed. The language is ambiguous because although the first sentence is susceptible to an interpretation of joint liability, the second sentence recognizes the retailers would "each pay a portion" of the settlement sum, which does not support several liability.

The court of appeals ultimately concluded that "the district court interpreted a poorly-worded contract in a reasonable way that gave effect to the parties' reasonable expectations." Even so, the dissent noted that under California law, where all the parties who unite in a promise receive some benefit from the consideration, their promise is presumed to be joint and several, so the issue was apparently closer than might appear at first blush.

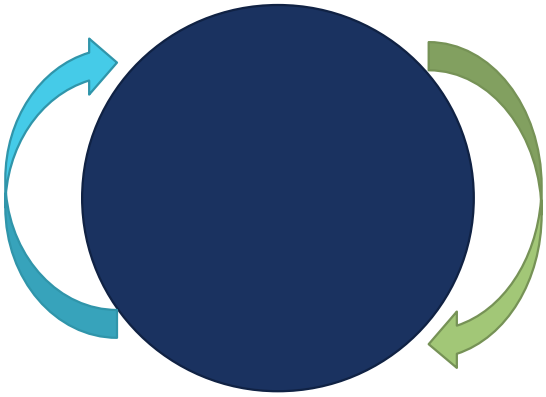
Survey Says. . .
The Top 5 Drafting Errors that Caused Contract Litigation in 2021

Ambiguity:

- Semantic
- Syntactic
- Contextual

Circular Logic:

This isn't wrong because



This is how we do it

"Academic"

"Not how it's done in actual practice"

"That's just your opinion"

"Transactional lawyers have little idea how little they know…

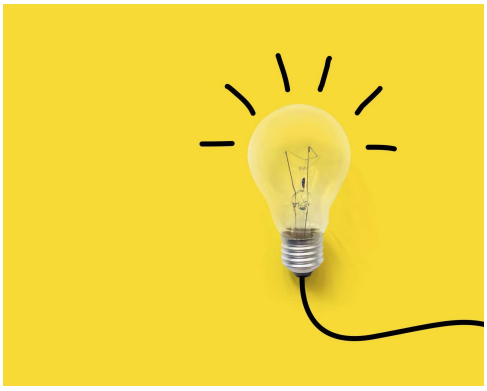
"Transactional lawyers go through their professional lives blithely unaware of the land mines they're inadvertently planting in their documents…."

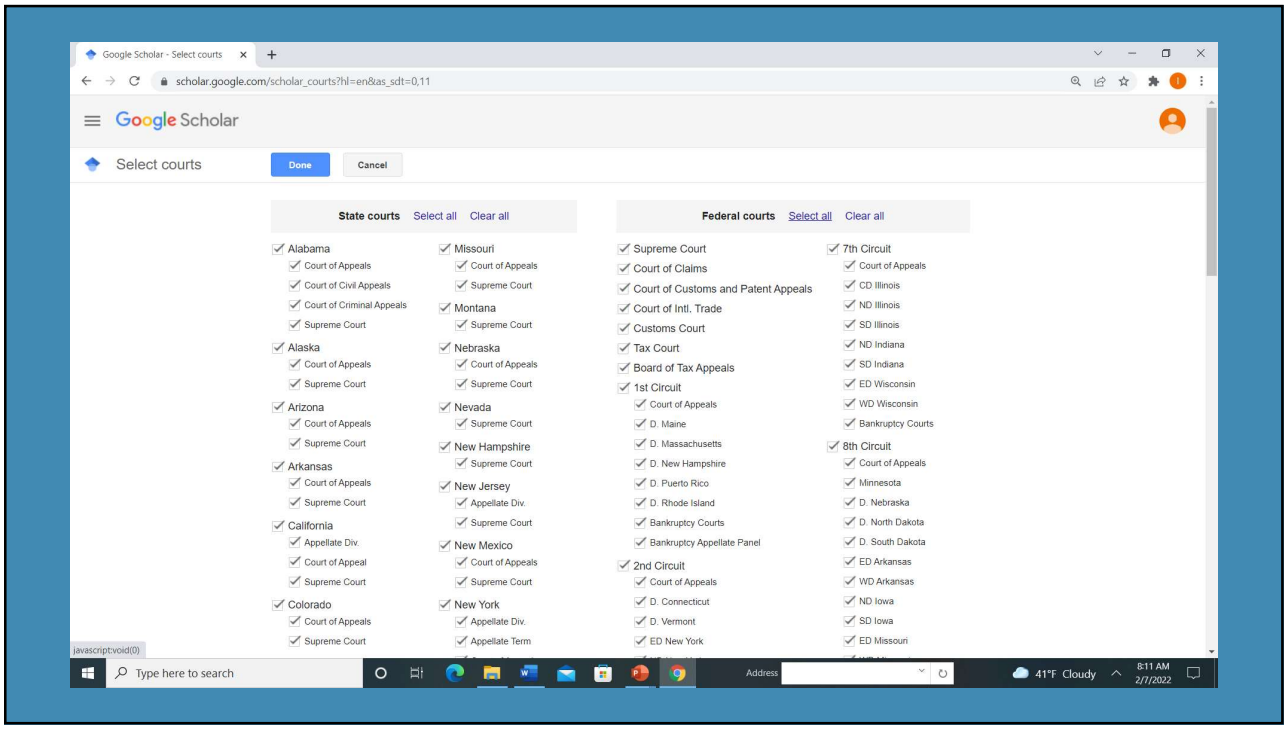
Bryan Garner, ABA Journal (2013)
http://www.abajournal.com/magazine/article/why_lawyers_can't_write.

How did you learn:

- To draft a contract
- Which words to prefer
- Which words to avoid
- How to differentiate specific legal consequences
- The three types of ambiguity in contracts
- How to shift risk

1. My Methodology for this Survey.

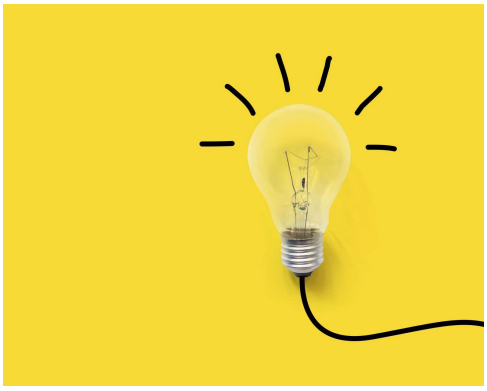


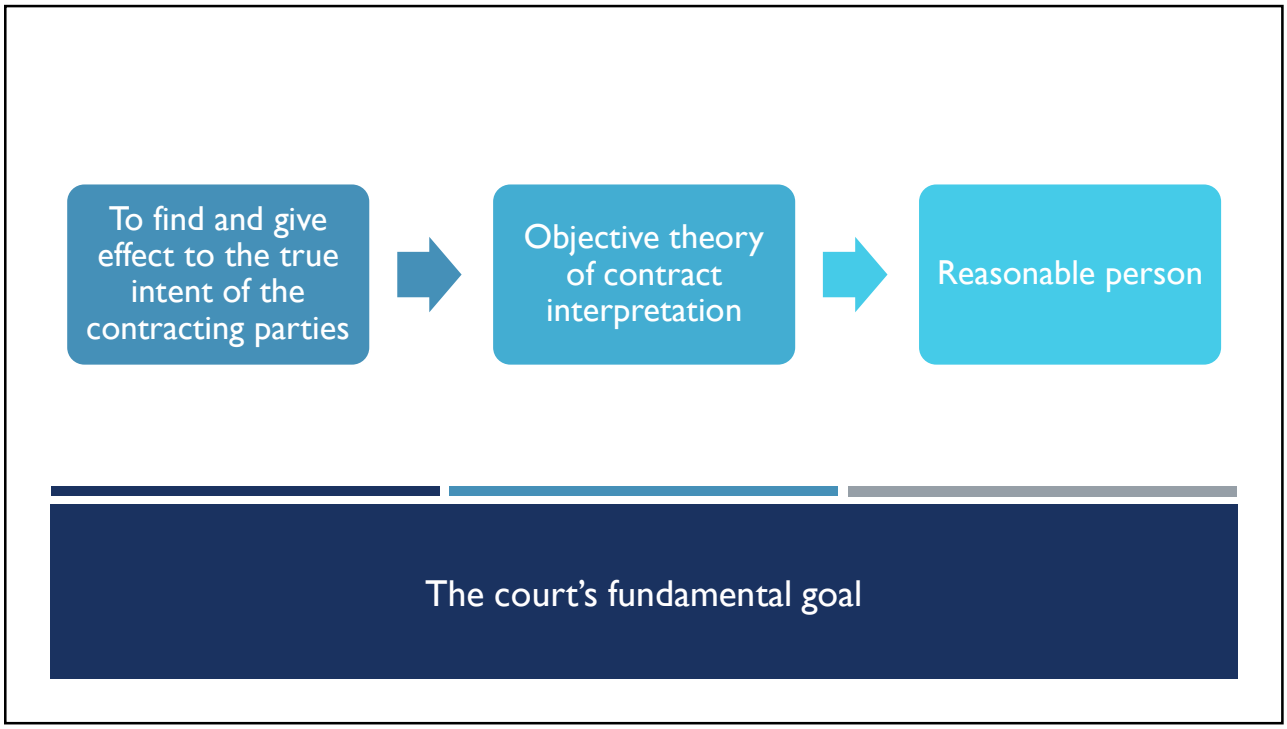


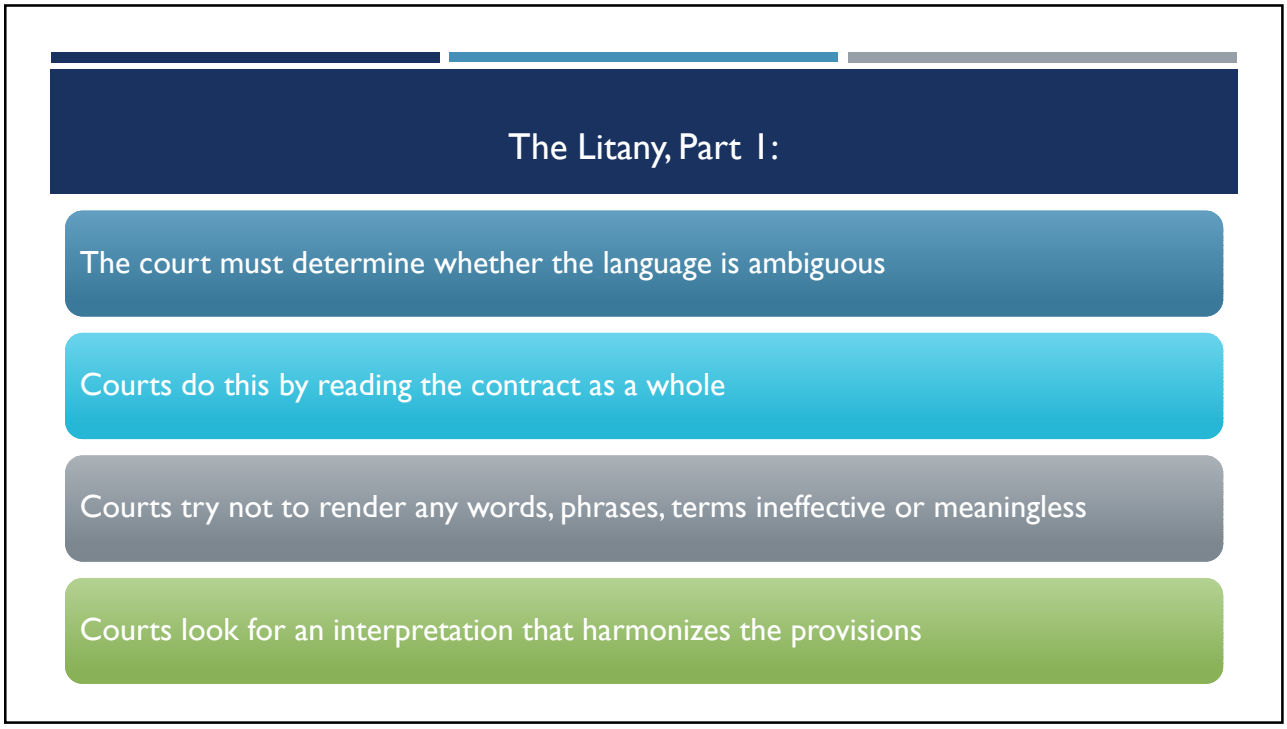
ambiguous contract

"the contract is ambiguous"

2. How the courts handle contract litigation.







The Litany, Part 2:

- A contract is not ambiguous simply because the parties construe it differently
- Ambiguity only results if the parties' interpretations are both reasonable
- The unambiguous language of a contract is conclusive
- If the language is unambiguous the parties intent is determined from the four corners of the contract

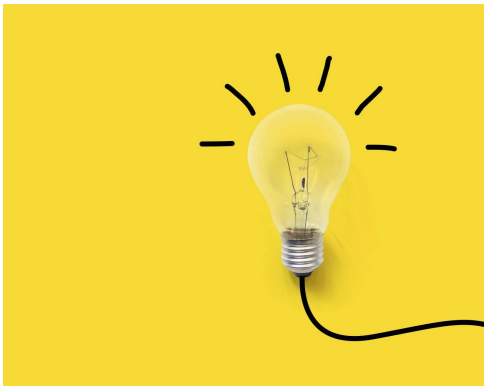
The Litany, Part 3:

- If the contract is ambiguous, the court must determine meaning by extrinsic evidence
- The courts look to see how the language is used elsewhere in the contract
- Courts often consult dictionaries to determine meaning of any unclear words
- Extrinsic evidence cannot: show a party's unilateral intent; vary, contradict, or modify the written contract; or create an ambiguity in a contract that is complete and clear

The Court's Five Options:

1. Not ambiguous; it clearly means what P says it means.
2. Not ambiguous; it clearly means what D says it means.
3. Not ambiguous; it clearly means what I/We say it means (which is different from what P and D said it means.)
4. Ambiguous, but I/We can tell what it means.
5. Ambiguous, but I/We cannot tell what it means. Remand.

3. Survey Says....



1. Breakdown by Courts:

# of Cases	Type of Court
29	Federal Circuit Courts of Appeal
49	Federal District Courts [DC]
4	State Supreme Courts
18	State Courts of Appeal

Lagniappe: 1 SCOTUS

2. Breakdown by Type of Contract:

# of Cases	Type of Contract
15	Insurance
14	Services Agreement
11	Shareholder/Asset Purchase/Stock Option
11	Settlement Agreement
9	License Agreement
9	Employment/Consulting/Sales Rep/etc.
9	Lease or Rental Agreement
5	Financing Arrangement
3	Construction
3	Collective Bargaining Agreement
2	Joint Venture Agreement
2	Residential Real Estate
2	Bank Account Agreements
1	Antenuptial
1	Franchise
1	Listing Agreement (commercial)
1	Waiver/Release
1	Distribution Agreement

3. Breakdown by Type of Provision:

# of Cases	Type of Provision
36	Scope
21	Payment/fees
8	Termination
6	Dispute Resolution
4	Indemnification
3	Limitation of Liability
3	Forum Selection/Choice of Law
3	Definitions Section
3	Restrictive Covenants
2	Insurance Requirements
2	Modifications
1	Rep & Warranties, Option, Guaranty, Entire Agreement, Assignment, Recitals, Conveyance, Third party beneficiary

Scope: ripKurrent v. Ballard

ripKurrent hereby engages Ballard to render, as an independent contractor, consulting services on a non-exclusive basis to assist it in obtaining and presenting, solicit and obtain [sic] sports, entertainment, hospitality and retail projects and project agreements for ripKurrent in Boca Raton, Florida, as well as such additional or further scope of consulting services as may be agreed to in writing by ripKurrent and Ballard from time to time.

Florida's Long Arm Statute	"in Boca Raton, Florida"	What does it modify?	Questionable association
• Defendant's contacts with Florida • substantial and not isolated activity	• The forum selection clause required Georgia Courts	• Office location • Site of services?	• The words are clear but what they are modifying is not

What does "in Boca Raton, Florida" modify?

Revise:

ripKurrent engages Ballard to render consulting services in Boca Raton, Florida

ripKurrent, a Florida LLC located in Boca Raton, Florida

Payment Term: Sams v. Pinnacle Treatment Centers

You will be entitled to earn an incentive for opening an OTP clinic and meeting the 100 initial client enrollment. The total incentive you can earn is $75,000 per clinic you open. Fifty percent (50%) or $37,500 of the incentive will be given upon opening of the clinic and fifty percent (50%) or $37,500 will be due once the clinic reaches 100 clients. The incentive must be approved by the CEO and will be processed on the next pay period after approval is given.

The compensation and benefits, including salary, commission plans, bonus plans, etc. are subject to the sole discretion of Pinnacle Treatment Centers and may be changed at any time.

Payment dispute	"open"	"subject to the sole discretion"	"approved by the CEO"
• $75,000 per clinic you "open"	• Obtaining a certificate of occupancy • Physically opening the doors for business	• The schedule of the incentive payments • Amount of incentive payments • The entire incentive arrangement	• Approve the amount • Confirm Sams' obligations were fulfilled • Withhold incentives

Term & Termination Leaseweb USA v. Centro

The following Initial Term will apply to the Order:

- Initial Term of the contract will be that of three (3) years.
- The Customer will be entitled to a one time opt-out option, provided that the Customer will give Leaseweb a thirty (30) days prior written notice. If onetime opt-out option is not exercised within the 12 months of the Initial Term, the onetime opt-out option expires.
- If the Customer chooses to invoke its right to the onetime opt-out option, the Service Charges in the one(1) year Quote will apply. This means that the difference between the three (3) year monthly recurring Service Charges and the one (1) year monthly recurring Service Charges (multiplied by 12 months) will be invoiced and due by Customer for payment within the payment term upon receipt.

One year rate: $103,653.56

01

Three year rate: $73,758.97

02

Centro paid the 3-year rate from October 2019 to May 2020

This means that the difference between the three (3) year monthly recurring Service Charges and the one (1) year monthly recurring Service Charges (multiplied by 12 months) will be invoiced and due by Customer for payment within the payment term upon receipt.

Leaseweb's Calculation:	**Centro's Calculation:**
$ 103,654.56	$103,654.56
X 12	- 73,758.97
$ 1,243,854.72	$ 29,895.59
- 357,199.08	X 12
$ 886,655.68	$358,747.08

[*The parties must have pro-rated a partial month or added interest because my calculations based on the formula don't match the amount Centro had paid.*]

How to Draft a Contract;
12 Rookie Blunders;
Webcasts

Order of Operations

Use Mathematical Terminology

Contract Drafting Essentials

Arbitration:
Soliman v.
Subway

Indemnification:
Fireman's Ins. v. Story and Aerotek

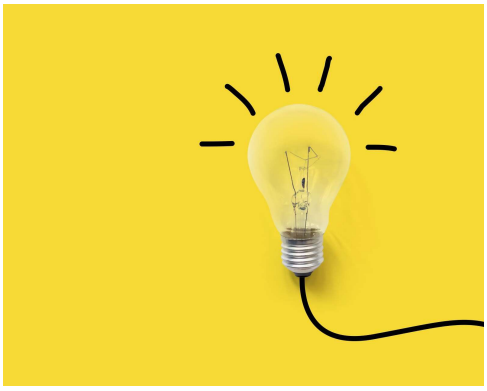
To the fullest extent permitted by law, MP Masonry shall defend, indemnify and hold harmless Wegmans and its agents, employees, and representatives.

4. Breakdown by Type of Error:

# of Cases	Type of Error
30	Contextual Ambiguity (conflict)
26	Definitions
15	Questionable Associations
13	Contextual Ambiguity (omission)
10	Legal Consequence (lack of standardization)
6	Say What???

IN AT LEAST 94 OF THE SURVEY CASES, ALL OF THE AMBIGUITIES WERE CAUSED BY ERRORS I HAVE BEEN DISCUSSING IN MY PROGRAMS FOR OVER 15 YEARS.

5. The #1 Error: Contradictory Provisions.



Contextual Ambiguity:

- Internal inconsistency
- Omission
  - Schedule or exhibit
  - Cutting and pasting
  - Edits from opposing counsel
  - Defined terms in inserts or deletes

Contradictions in the Survey Cases:

The title of a contract v. type of coverage provided	Notice is required in 10 days, or when reasonable details are available	"As is" with "all faults" v. in good working condition	"Collectively" v. "each"	I won't seek sentencing adjustments, but I'll argue against yours
Notice delivered to a physical address v. "in writing" [via email]	Nothing terminates any rights, except the option v. this option can't be modified or terminated	Longbow is responsible for taxes v. EJM is responsible for taxes	Terms of compensation survive v. commissions end when terminated	Southwest has sole discretion v. customer has the option to receive a refund

American Bankers Ins. Co. v. Shockley:

We pay all sums which [sic] an insured becomes legally obligated to pay as damages due to bodily injury arising out of . . . a "motorized vehicle" [*e.g., a golf cart*] which [sic] is designed only for use off public roads and which [sic] is used to service the insured premises. (However, this coverage does not apply to bodily injury arising from use of a motorized vehicle while used for recreational purposes away from the insured premises.

- Shockley was injured at an equestrian event, off the insured's property
- Farm Owner's policy
- Declarations page included limits for commercial liability coverage
- Is coverage limited to insured's premises?
- Is bodily injury from a motorized vehicle NOT being used for recreation, away from the insured premises covered? (*expressio unius est exclusio alterius*)
- "arising out of" and "arising from" are broad phrases that are liberally construed

Sterling National Bank v. Block

Direct Claims. Any Action by an Indemnified Party on account of a Loss which does not result from a Third Party Claim (a "Direct Claim") shall be asserted by the Indemnified Party giving the Indemnifying Party reasonably prompt written notice thereof, but in any event not later than ten (10) days after the Indemnified Party becomes aware of such Direct Claim. The failure to give such prompt written notice shall not, however, relieve the Indemnifying Part of its indemnification obligations, except and only to the extent that the Indemnifying Party irrevocably forfeits rights or defenses by reason of such failure. Such notice by the Indemnified Party shall describe the Direct Claim in reasonable detail, shall include copies of all material written evidence thereof and shall indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained by the Indemnified Party.

"An ambiguous mess"

- Sterling purchased Damian Services Corp in 2015
- Escrow of $2 Million for issues after closing
- Clients overcharged; Sterling refunded some
- Law firm hired to investigate
- Preliminary memo 8/11/15 – discussed with U.S. Attorney
- Final memo – sent to U.S. Attorney on 12/02/15
- Demand for indemnification 12/11/15
- Becomes aware vs. reasonable details = "ambiguous mess"

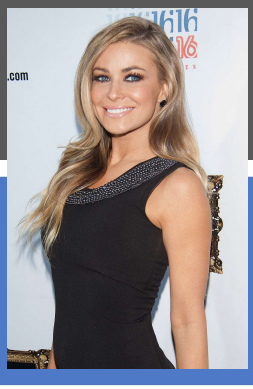
Horne v. Elec. Eel Mfg., Inc. et al.

The Home Depot will provide Customer the tool(s) identified on page 1 of this Agreement (the "Equipment") "as is" and in good working condition.

Customer acknowledges acceptance of the Equipment "as is" and on a "where is" basis, with "all faults" and without any recourse whatsoever against the Home Depot.

- Home Depot: Horne took it "as is" "with all faults"
- Horne: HD breached the contract because it wasn't "in good working condition"
- Court: "as is" but "in good working condition" is contradictory and ambiguous
- *Black's:* "all faults" – unless vendor fraud is involved, this means faults and defects that are not inconsistent with the identity of the goods, as the goods are described
- Court: Horne assumed the risk of using a machine in good working condition; in good working condition takes precedence over the limitations

Electra *et al.* v. 59 Murray Enterprises, Inc.



Defendants hereby offer to Plaintiffs collectively to take a judgment against Defendants in the amount of $82,500.00, inclusive of interest, costs and attorneys [sic] fees, and without any admission of liability, on each of the Causes of Action contained in the Complaint.

- Electra and others signed future use releases – lingerie, dating websites, costumes, modeling photos
- 59 Murray got photos from photographers and used them to advertise strip clubs
- Parties attempted a settlement
- "collectively" contradicts "each"
- *Contra proferentem* did not apply – no mutual assent; no contract

U.S. v. Moreno-Membache:

The government *agrees not to seek any of the adjustments set out in U.S.S.G. Chapter 3, Part B*. The Defendant is permitted to request relief under Safety Valve provisions, and the Government is permitted to argue that the Safety Valve provisions do not apply to the maritime offense to which the Defendant has agreed to plead guilty and that, in any event, the Defendant does not meet the criteria to qualify for Safety Valve relief.

The 1228 Investment Group v. BWAY Corp.

MSA: The term and termination for each Statement of Work shall be specified in the Statement of Work.

Section 9.1: All notices and other communications required or permitted to be given under this Agreement will be in writing and will be delivered personally, or mailed by registered certified mail, return receipt requested or FedEx, or equivalent national delivery service, and addressed to the parties at their respective address [sic] set forth on the signature page of this Agreement.

SOW, paragraph 4: This SOW will automatically renew . . . unless either party notifies the other in writing not less than 30 days prior to the expiration of the term or any Renewal Term.

BWAY:	1228:
• Per MSA, the term and termination is stated in the SOW • The SOW says notice must be in writing • BWAY emailed notice (which is "in writing") • The Termination was effective	• The MSA incorporates the SOW, which is governed by the MSA • The MSA does not allow notice by email • The SOW does not clearly provide otherwise • The Termination was invalid

McDonald's v. Rosenfeld Trust

Article 27 – Tenant shall have the first option to purchase the Premises or the beneficial interest in the Premises by giving written notice to Landlord of its intention to purchase the Premises within 30 days after it receives Landlord's notice of an offer to purchase at the same price (or, if the Premises are part of a larger parcel, then the dollar amount allocated to the Premises) and on the same terms as the offer, except as provided below. If Tenant does not exercise the first option to purchase, this Lease shall remain in full force and effect and shall bind both Landlord and any purchaser or purchasers, and Tenant shall have, as against Landlord or any subsequent purchase, the continuing first option to purchase the Premises or the beneficial interest or any part, as described above, upon the terms of any subsequent offer or offers to purchase.

McDonald's v. Rosenfeld Trust

If there is any conflict between the provisions of this Article and the terms contained in the offer to purchase, then the terms of this Article shall control and supersede those contained in the offer to purchase. Neither notice to Tenant of any offers to which this Article applies nor the sale of the Premises to a third party shall terminate any other options or rights presently or subsequently held by Tenant under this Lease, except for Tenant's Option to Purchase as set forth in New Article 29, below.

Article 29 – This Option to Purchase shall continue in full force and effect for the entire term of this Lease and any extension or renewals of the term. Notwithstanding the foregoing, if the premises [sic] are purchase [sic] by a third party after Tenant fails to exercise its right of first refusal on a sale to that third party, then this Option to Purchase shall automatically become null and void. If Tenant should receive notice of any offer pursuant to any right of first refusal to purchase or to lease either presently or subsequently held by Tenant, or if the premises [sic] are sold to any third party, this Option to Purchase shall be neither modified nor terminated.

- Option price was $770,000
- Right of first refusal kicked in when 3rd party offered $1,151,000
- Court: it's reasonable that the 3rd party offer terminated the option to purchase, but that conflicts with Article 29: the option "shall be neither modified nor terminated."
- The provisions are contradictory

Executive Jet Mgt. v. Longbow Enterprises

5.4(f) Potential Taxes on the Leasehold. Longbow shall be solely responsible for ascertaining the applicability and amount of any taxes that might apply to its lease of the Aircraft to EJM, as well as for collecting, reporting, and remitting such taxes. EJM agrees to pay Longbow such tax as Longbow represents in writing to EJM is due, provided that Longbow promptly notifies EJM of such imposition and provides reasonable documentation to EJM in support of such imposition.

9.1 Representations, Warranties, and Covenants of EJM. EJM represents, warrants, and covenants that: 1) it shall collect and remit every tax imposed by any governmental authority on EJM's sale and performance of charter operations using the aircraft.

- EJM manages charter services of privately-owned aircraft
- Ohio Dept of Taxation: $158,381 sales tax is due
- Who is responsible?

When is a rep not a rep?

9.1 Representations, Warranties, and Covenants of EJM. EJM represents, warrants, and covenants that: 1) it shall collect and remit every tax imposed by any governmental authority on EJM's sale and performance of charter operations using the aircraft.

- What is a representation? A warranty?
- What is the difference between a Rep & Warranty and an obligation under the contract?
- EJM shall collect and remit every tax…

Ohio National Life Ins. Co., v. Cetera Advisor Networks

The terms of compensation shall survive this Agreement unless the Agreement is terminated for cause by ONL provided that [Oppenheimer] remains a broker-dealer in good standing with the NASD and other state and federal regulatory agencies and that [Oppenheimer] remains the broker-dealer of record for the account.

[Trail commissions] will continue to be paid to broker dealer of record while the Selling Agreement remains in force and will be paid on a particular contract until the contract is surrendered or annuitized.

Oppenheimer was terminated without cause

Oppenheimer:

the selling agreement unambiguously requires Ohio National to pay trail commissions

Ohio National:

the selling agreement unambiguously allows it to withhold trail commissions

Court:

the terms of compensation survive; one of those terms says Ohio National will continue to pay while the agreement remains in force.

"The question the court must answer in connection with Ohio National's motion is not whether Ohio National's reading is plausible, but instead, whether that reading is the *only permissible* interpretation of the selling agreement."

Bombin and Rood v. Southwest Airlines

Section 4(c)(4) suggests that Southwest may determine in its sole discretion whether to offer a credit when it cancels a flight

Section 10 of the Customer Service Commitment, which is incorporated by reference into the Contract of Carriage, states that "customers will have the option to receive a refund" when Southwest changes its flight schedule more than seven days before departure

Southwest: 4(c)(4) is more specific and should control

Court: that would render Section 10 in the Customer Service Commitment meaningless

The contract is ambiguous

My Recommendations for Avoiding Contextual Ambiguity

Contextual ambiguity is ALWAYS avoidable.

Marie Kondo's method also works well in organizing contracts [*with a few tweaks*]!

KonMari Method:

- Organize by category;
- Break a category into subcategories as necessary;
- Keep only those [*words and sentences*] that [*contribute meaning*];
- Eliminate clutter [*and redundant language*];
- Organize your [*contract*] thoroughly and completely;
- Follow the right order; and
- Do it all in one go.

How to Organize a Contract:

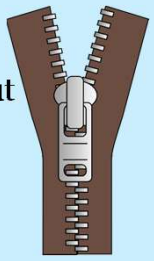
- Related concepts together
- Most important to least
- Subsections -- most important to least
- General rule before specific rules
- Exceptions after the general and specific rules
- Events chronologically
- Housekeeping items last

Simple Numbering System:

1. Concept
    1.1 Section
        (A) Paragraph
            (i) Subparagraph
            (ii) Subparagraph
        (B) Paragraph
    1.2 Section
2. Concept

Carefully Integrate Inserts:

- Substituted (or deleted), but it's referenced elsewhere.
- Defined terms used consistently: "Company" versus "UPS"
- Capitalized words in the insert are defined in the glossary
- No terms defined in both
- No conflicts: insert calls for summary judgment but agreement requires arbitration;
- Anticipates same governing law
  - an insert refers to New York law when Delaware controls
- Consistent margins and numbering formats;



Eliminate Overlaps, or Use Identical Language:

Shareholder Agreement:

"Shareholder separately covenants and agrees with the Company that, for so long as he holds the Shares and for **a period of six (6) months following cessation** as a Shareholder, he will not, either directly or indirectly, on his own behalf or in the services of others in the United States, engage in the Business of the Company as an officer, director, executive, managerial employee, consultant to...."

Employment Agreement:

"For one (1) year following termination, neither Employee nor any Affiliate will, without the prior written consent of Company, engage in any Competing Business...."

Use Identical Language:

Articles:

"Any action which *["that"]* may be taken at a meeting of the shareholders may be taken without a meeting if written consent, setting forth the actions so taken, shall be signed by those shareholders entitled to vote with respect to the subject matter thereof having voting power to cast not less than the minimum number (or numbers, in the case of voting by classes) of votes that would be necessary to authorize or take such action at a meeting at which all shareholders entitled to vote were present and voted."

Bylaws:

"Any action required or permitted to be taken at a shareholders' meeting may be taken without a meeting if all the shareholders entitled to vote on such action, or the appropriate percentage of shareholders necessary to approve the action at a meeting of the shareholders at which all shareholders entitled to vote were present and voted, sign one or more written consents."

Edit Strategically

Four Levels of Editing:

- Substantive
- Mechanical
- Semantic
- Syntactic

Substantive Edit:

Are necessary provisions included?

Are journalistic questions answered:
who
what
when
where
why
how
how much

Compare to similar contracts

Search for contradicting language

Risks and liabilities addressed?

Mechanical Edit

Eliminate	Check	Check	Check	Check	Check
Eliminate archaic customs	Check visual format	Check spelling	Check grammar	Check cross references	Check organization

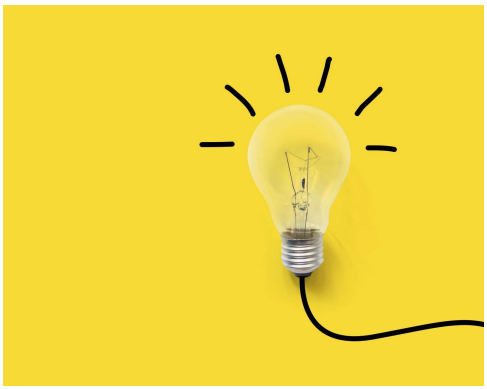
Semantic edit:

Check	Eliminate	Check	Check Defined Terms
• recurring words are used consistently	• "elegant variation"	• for patently ambiguous words	• defined - once • used • used consistently • not used except as defined

Syntactic Edit:

Target long sentences	Consider each sentence	Turn	Use Parallel Structure	Structure complicated provisions
Try to reduce them to average 30 words	Is it organized logically?	passive voice sentences into active voice	and tabulations for lists	after the verb

6. The #2 Error: Definitions.



A Shorter Reference:

The Goodyear Tire and Rubber Company's Employee Stock Option Plan

vs.

ESOP

Eliminate Ambiguity:

Holding company, subsidiaries, affiliates, officers, directors, employees

A specific store – 101 Main Street

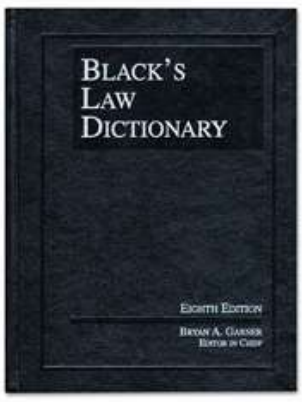
- Who taught you to create definitions?
- Did someone provide formal instruction on what to do and what not to do?

I *expected* ambiguous definitions to factor prominently in the survey.

I was surprised with the number of cases in which the court struggled with words that were not defined.

Ambiguous words in the survey cases:

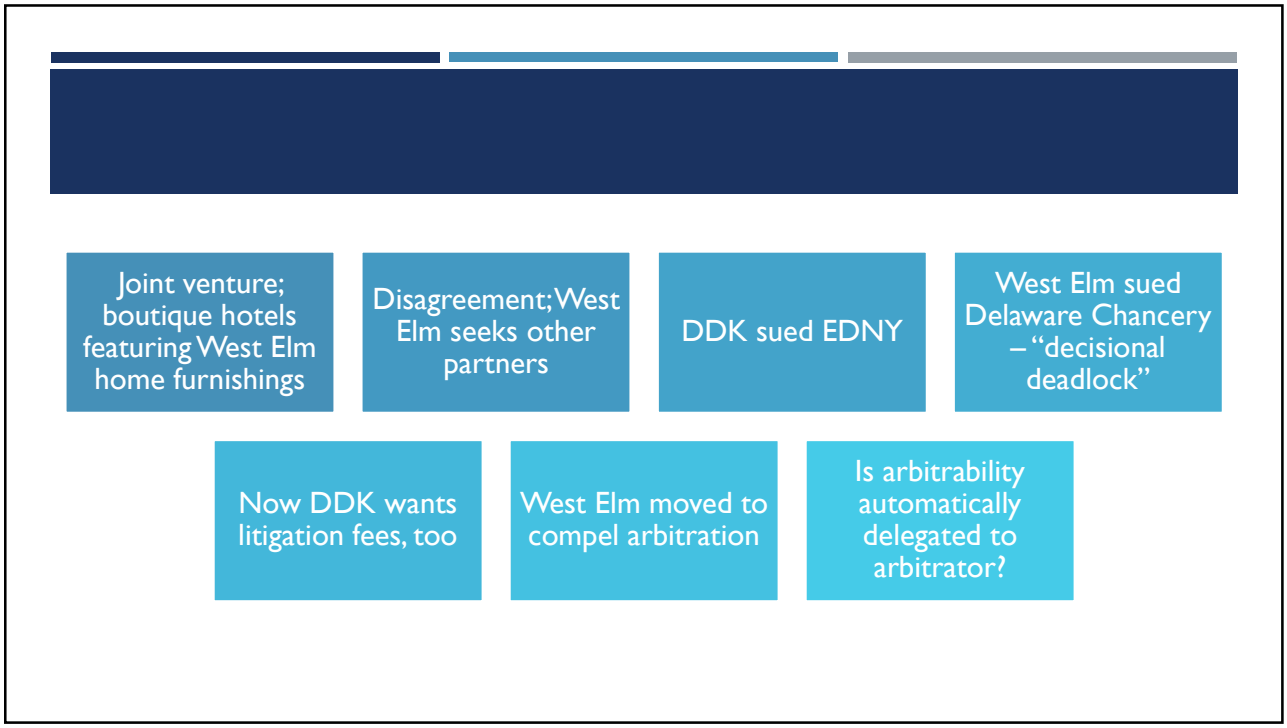
"Disputed Matter" as defined	"The Business" as defined	Name of the correct party	"Claims" as defined
Prevailing Party	Willing buyer	Entered into	Including
substantially similar products/ technologies	Named co-insured	False Statement	Prevent

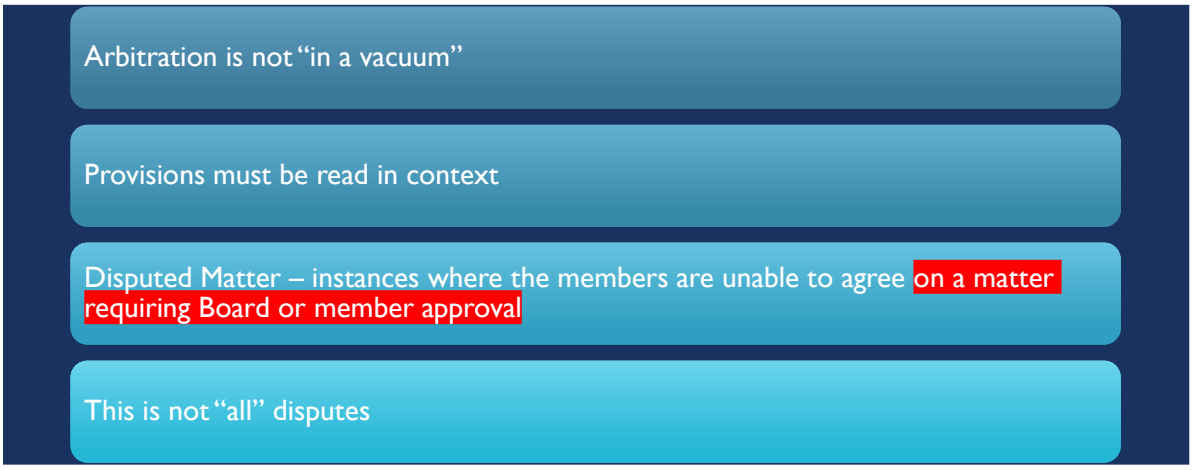


DDK Hotels v. Williams-Sonoma

16. Deadlock. (a) Mediation. If the Members (acting through the Board) are unable to agree on a matter requiring Board or Member approval (a "*Deadlock*"), except as provided in Section 16(c) [below], any Member may serve on the other Member a notice (a "*Deadlock Notice*") specifying the matter in dispute (the "*Disputed Matter*"). . . .

(b) Arbitration. The parties unconditionally and irrevocably agree that, with the exception of injunctive relief as provided herein, and except as provided in Section 16(c), all Disputed Matters that are not resolved pursuant to the mediation process provided in Section 16(a) may be submitted by either Member to binding arbitration administered by the American Arbitration Association ("AAA") for resolution in accordance with the Commercial Arbitration Rules and Mediation Procedures of the AAA then in effect, and accordingly they hereby consent to personal jurisdiction over them and venue in New York, New York....





The scope of arbitration is explicitly limited.

If the Members (acting through the Board) are unable to agree on a matter requiring Board or Member approval (a "*Deadlock*"), except as provided in Section 16(c) [below], any Member may serve on the other Member a notice (a "*Deadlock Notice*") specifying the matter in dispute (the "*Disputed Matter*"). . . .

Where does this definition begin?

If the Members (acting through the Board) are unable to agree on a matter requiring Board or Member approval (a "*Deadlock*"), except as provided in Section 16(c) [below], any Member may serve on the other Member a notice (a "*Deadlock Notice*") specifying the matter in dispute (the "*Disputed Matter*"). . . .

Where does this definition begin?

Lawson v. Spirit Aerosystems

Recital: We are engaged in the manufacture, fabrication, maintenance, repair, overhaul, and modification of aerostructures and aircraft components, and market and sell our products and services to customers throughout the world (together with any other businesses in which Spirit may in the future engage, by acquisition or otherwise, the "*Business*").

4(c): Neither you nor any individual, corporation, partnership, limited liability company, trust, estate, joint venture, or other organization or association (`Person') with your assistance nor any Person in which you directly or indirectly have any interest of any kind (without limitation) will, anywhere in the world, directly or indirectly own, manage, operate, control, be employed by, serve as an officer or director of, solicit sales for, invest in, participate in, advise, consult with, or be connected with the ownership, management, operation, or control of any business that is engaged, in whole or in part, in the Business, or any business that is competitive with the Business or any portion thereof, except for our exclusive benefit.

Larry Lawson, former CEO

Spirit didn't pay under 2016 Retirement Agreement

Spirit alleged Lawson violated the non-compete

Lawson served on boards of other companies in aviation

We are engaged in the manufacture, fabrication, maintenance, repair, overhaul, and modification of aerostructures and aircraft components, and market and sell our products and services to customers throughout the world (together with any other businesses in which Spirit may in the future engage, by acquisition or otherwise, the "*Business*").

Specific products and services provided, marketed, or sold

Definition didn't provide the protection Spirit intended

Yellow Pages Photos v. YP

To the Licensee and "all affiliates owned or owning the same"

…the non-exclusive right to copy, crop, manipulate, modify, alter, reproduce, create derivative works of, transmit, and display the Digital Media an unlimited number of times in any and all media for any purpose."

Notwithstanding anything to the contrary in the Berry License, the rights and obligations of either party under the Agreement were permitted to be assigned, sublicensed or otherwise transferred, without written consent of the other party, to a third party that acquired substantially all of the assets or business of a party to the Agreement

Does "owned or owning the same" mean affiliates who had common ownership with the original licensee?

Is ATT Services or ATT Advertising the intended party?

Ambiguous

Inconsistencies:

- The cover page states that the license is between Yellow Pages Photos and "AT&T Services";
- The first page of the license lists "AT&T Advertising d.b.a. AT&T Advertising and Publishing" as the entity for invoices;
- The first page also states the AT&T Affiliate Name as "ATT Services";
- Questions were to be addressed to Davis at "ATT Services";
- On the signature line appears "AT&T Affiliate Name: AT&T Services on behalf of AT&T Advertising d.b.a. AT&T Advertising and Publishing";
- The cover pages for the 1st and 2nd amendments stated the amendments are between Yellow Pages Photo and AT&T Services;
- The first page of each amendment indicates it is between Yellow Pages Photos and ATT Services
- ATT Services signed the 1st amendment and is listed as signatory for the 2nd amendment.

Calderon *et al.* v. Sixt Rent A Car, LLC

Any and all Claims will be resolved by binding arbitration, rather than in court. This includes any Claims you assert against us, our subsidiaries, travel suppliers or any companies offering products or services through us, including Suppliers, (which are the beneficiaries of this arbitration agreement.

Claims – any disputes or claims relating in any way to 1) the Services; 2) any dealings with our customer service agents; 3) any services or products provided; 4) any representations made by us; or 5) our Privacy Policy.

Services – the Web sites, mobile applications, call center agents, and other products and services provided by Orbitz, including any Content, and ***not* including products or services that are provided by third parties.**

P's in this class action used Orbitz to reserve a rental car from Sixt

Orbitz's contract requires arbitration for disputes related to "any services or products provided"

Does the provision apply to services provided:

Only by Orbitz

By Orbitz ***and*** any of its rental partners

Claims – any disputes or claims relating in any way to 1) the Services; 2) any dealings with our customer service agents; 3) any services or products provided; 4) any representations made by us; or 5) our Privacy Policy.

Services – the Web sites, mobile applications, call center agents, and other products and services provided by Orbitz, including any Content, and ***not*** **including products or services that are provided by third parties.**

Court: Reading "any services or products provided" in the context of neighboring provisions, it only applies to services and products provided by Orbitz.

Kirkland Properties v. Pillar Income Asset

In the event of any litigation between the parties under this Agreement, the prevailing party in such litigation shall be entitled to recover (and the non-prevailing party shall pay) any and all reasonable attorneys' fees and court costs incurred at or in connection with all trial and appellate court proceedings. Unless other[wise] agreed, any litigation between the parties under this Agreement shall be conducted in a court of competent jurisdiction in Madison County, Mississippi.

Did Pillar "prevail"?

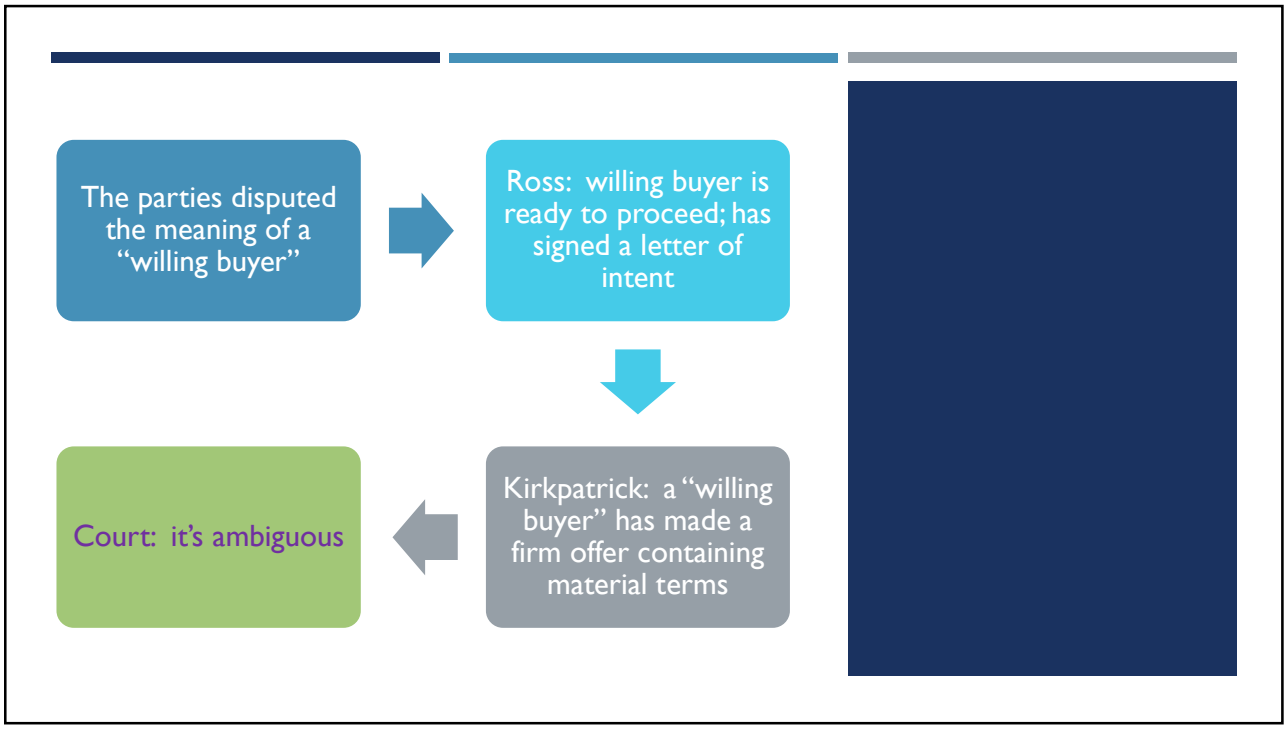
- Kirkland filed in DC Mississippi
- Court granted Pillar's motion to dismiss
- Forum Selection clause
- Pillar filed a motion for attorney's fees of $20,000, as prevailing party

- "prevailing party" is not defined
- Dismissal was without prejudice, not on the merits

Ross v. Kirkpatrick

2.1 Commission. Broker shall receive a commission of the amount specified in Section 2.2 below, calculated as a percentage of the selling price of substantially all of the assets or stock of the Company if: (1) Broker procures a buyer who is ready, willing, and able to purchase substantially all of the assets or stock of the Company on the terms deemed acceptable by the Company in its sole and absolute discretion; and (2) substantially all of the assets or stock of the Company are sold to a buyer procured by the Broker during the term of this listing or if, within two years after the termination of the listing, substantially all of the assets or stock of the Company are sold to a buyer who was first submitted to the Company by the Broker.

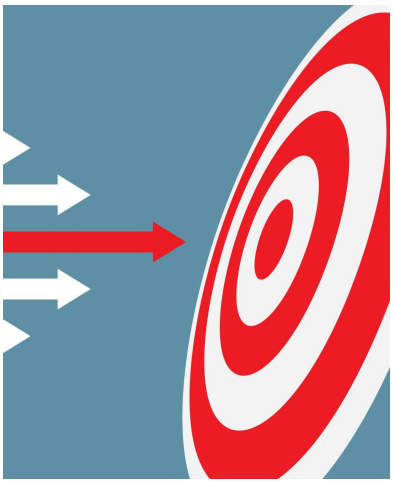
2.4 Expenses. The Company and the Broker shall each pay their own respective expenses involved in performance of their respective duties under this Agreement. In the event the Broker finds a willing buyer and the Company decides not sell [sic] the Broker will still be owed full commission described above. This is to protect all of the time and expenses the Broker is investing into this process.



ADVSR, LLC v. Magisto, Ltd.

In the event any Covered Transaction is entered into during the term of this SOW or within the 9 month period following termination of this SOW (the "Tail Period"), Magisto shall pay to ADVSR in cash at the closing of such Transaction a transaction fee (the "Covered Transaction Fee") that is equal to 3.0% of the Transaction Value.

- ADVSR hired to find an acquiror
- Contract included 9-month tail
- 80 potential acquirors
- Magisto pulled out in December 2017
- Acquiror found by ADVSR surfaced in July 2018
- Ultimately acquired, outside the tail period
- What is "entered into"?



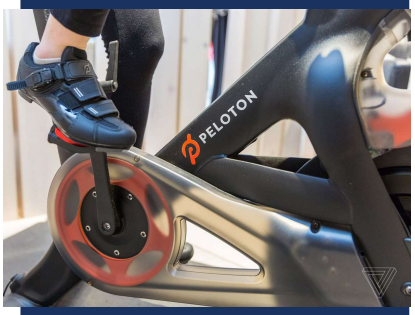
Peloton Interactive v. ICON Health

ICON grants Peloton, its parents, subsidiaries, affiliates, manufacturers, distributors and customers a non-exclusive, fully paid-up, lump sum, royalty free, worldwide license to 'iFit Functionality' including the right to import, export, make, have made, use, lease, sell, offer to sell, or otherwise dispose of the existing Peloton Bike and substantially similar products/technologies. This license only applies to Peloton products being manufactured, distributed, and sold as Peloton products and does not include any ability to sub-license the 'iFit Functionality' to any person or entity at any time. Any such sub-license is specifically excluded from Peloton's rights. 'iFit Functionality' shall mean the functionality and features currently embodied in the Peloton Bike as of May 22, 2017, the Asserted Patents, and nothing else.

"including" – term of limitation or merely introduction?

"substantially similar products/technologies" – limited to the Peloton Bike, or not?

Either "substantially similar products/technologies" is superfluous, or "embodied in the Peloton Bike" is



Also See:

Freedom Mortgage v. Tschernia (DC S.D. New York 2021): "including" was ambiguous when the list seemed unusually thorough

"As the Supreme Court has held (and a passing familiarity with the English language confirms), 'to include' is to 'contain' or 'comprise as part of a whole.'"

Danielson v. Tourist Village v. Androscoggin

The lease required AVH to maintain liability insurance with Tourist Village as a "named co-insured."

AVH obtained a policy with a form of co-insurance that was effective at the time of the slip and fall accident. The additional insured endorsement extended coverage to Tourist Village as "a person or entity that provides equipment or premises to an Insured [AVH] pursuant to a written lease agreement."

Androscoggin Hospital rented residential housing for certain employees

Danielson was injured when he slipped on ice

Danielson sued Tourist Village, who sued Androscoggin Hospital

The lease required that Tourist Village be named co-insured

Policy covered "an entity that provides premises to [AVH] pursuant to a written lease, but didn't specifically name "Tourist Village."

Net: Tourist Village did not have independent coverage under the policy

Did Androscoggin breach?

NH court considered other jurisdictions	*Black's:*	Doesn't specify whether must be:	Thus, it's ambiguous
• Florida courts: "named insured" cannot apply to persons not specifically named • North Carolina courts: do not have to be specifically named	• "named insured" is "a person designated in an insurance policy as the one covered by the policy"	• designated by name, or • by description	

Vargas v. Safepoint Ins. Co.

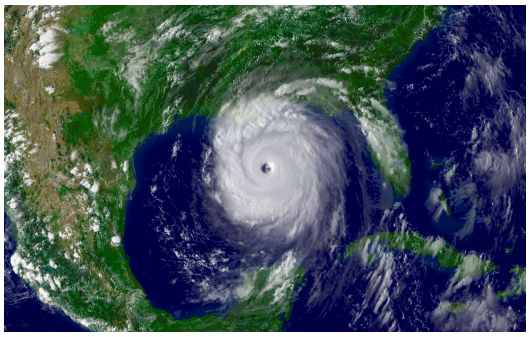
With respect to all persons insured under this policy, we provide no coverage for loss if, whether before or after a loss, one or more persons insured under this policy have: a. Intentionally concealed or misrepresented any material fact or circumstance; b. engaged in fraudulent conduct; or c. made material false statements relating to this insurance.

What is a false statement?

Vargas applied for insurance	She forgot	*Merriam-Webster* "false" can be:	*Black's* "false statement":
• Reported a roof claim 10 years earlier • Did not report a claim for water damage • She had made a claim for water damage in 2013	• If she forgot, is it a "false statement"?	• "contrary to fact or truth," or • "deliberately untrue"	• in the legal context, false carries the connotation of an intentionally deceptive statement • False has an overlay of perfidy • Incorrect and two-faced, rather than merely incorrect

Garber v. Nationwide Mutual Ins. Co.

The Company will reimburse you, up to the Maximum Benefit shown on the Confirmation of Coverage, if you are prevented from taking Your Trip for any of the following reasons that are Unforeseen and take place after the Effective Date: [*listed were things like natural disasters, mandatory evacuation orders, and uninhabitable premises*.]



- Garber's vacation: Gulf Shores, AL October 9-13, 2020
- Hurricanes Sally and Delta
- Governor declared a state of emergency on October 6
- Lifted it October 8, at 4:00 p.m.
- Was Garber "prevented" from going?

Merriam-Webster: "prevent" – 1) to keep from happening or existing; 2) to hold or keep back, hinder, stop; and 3) to deprive of power or hope of acting or succeeding

Examples of "prevent" named in the contract:

- Pet dies within 7 days prior to the trip
- Laid off within 30 days of the trip
- Transferred 250 miles from former place of employment

My Recommendations for Drafting Definitions

Integrated Definitions:

Correct:

The Internal Revenue Code of 1986 (the "Code") is determinative.

Incorrect:

The Internal Revenue Code (the "Code") of 1986 is determinative.

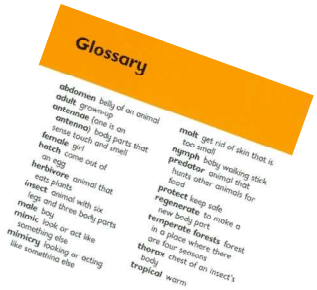
Incorrect:

The Internal Revenue Code of 1986 is determinative (the "Code.")

Autonomous Definitions:

In this Agreement, "Code" means the Internal Revenue Code of 1986.

***Glossary or separate sentence



Complete Or Incomplete?

- "ERISA" means the Employee Retirement Income Security Act of 1974, as amended.
- "Paid Holidays" include Federal Holidays designated by the U.S. Congress.

Be precise:

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

"ERISA" includes the Employee Retirement Income Security Act of 1974, as amended.

"ERISA" shall mean and refer to the Employee Retirement Income Security Act of 1974, as amended.

To article, or not to article?

- The Company vs. Company
- The Seller vs. Seller

- Grammatically, "the" means this particular one; not any similar one

- Common noun vs. substitute name

  The AT&T vs. AT&T

- Most names don't use "the" (exceptions)

- Key is consistency

Multiple Glossaries: A Trap

(c) Certain Defined Terms. As used in this **Section 4.2**, the following terms shall have the meanings indicated below:

(i) "***Transfer***" and "***Transferred***" shall mean . . . a transfer of a share of Acquiror Common Stock to a broker or other nominee (regardless of whether there in a corresponding change in beneficial ownership), or the transfer of, or entering into a binding agreement with respect to, Voting Control (as defined below).

4.3 Escrow Shares. Each Company Stockholder shall . . . . except the right of possession or Transfer thereof.

Use autonomous definitions to improve the text of the contract.

(b) From and after the Effective Time, and until the sixth (6th) anniversary of the Effective Time, Acquiror shall cause the Surviving Corporation to fulfill and honor in all respects the obligations of the Company to Persons who on or prior to the Effective Time are or were directors and/or officers of the Company or any Subsidiary (the "***Company Indemnified Parties***") pursuant to any indemnification provisions under the Company's Certificate of Incorporation or Bylaws or similar charter documents of any Subsidiary as in effect on the Agreement Date and pursuant to any indemnification agreements between the Company or any Subsidiary and such Company Indemnified Parties existing as of the Agreement Date (the "***Company Indemnification Provisions***"), with respect to claims arising out of matters occurring at or prior to the Effective Time; provided, however, that (i) during the Escrow Period, the Acquiror shall only be required to cause the Surviving Corporation to fulfill and honor the Company Indemnification Provisions if (1) Escrow Shares are available in the Escrow Fund to compensate Acquiror for any obligations, fees or expenses incurred by the Surviving Corporation as a result of fulfilling and honoring the Company Indemnification Provisions (the "***Company Indemnification Expenses***") or (2) the Company Indemnification Expenses are covered by the Company D&O Tail Policy and (ii) following the end of the Escrow Period, Acquiror shall only be required to cause the Surviving Corporation to fulfill and honor the Company Indemnification Provisions if the Company Indemnification Expenses are covered by the Company D&O Tail Policy.

From and after the Effective Time, and until the sixth (6th) anniversary of the Effective Time, Acquiror shall cause the Surviving Corporation to fulfill and honor in all respects the obligations of the Company to the Company Indemnified Parties pursuant to the Company Indemnification Provisions with respect to claims arising out of matters occurring at or prior to the Effective Time; provided, however, that (i) during the Escrow Period, the Acquiror shall only be required to cause the Surviving Corporation to fulfill and honor the Company Indemnification Provisions if (1) Escrow Shares are available in the Escrow Fund to compensate Acquiror for Company Indemnification Expenses, or (2) the Company Indemnification Expenses are covered by the Company D&O Tail Policy and (ii) following the end of the Escrow Period, Acquiror shall only be required to cause the Surviving Corporation to fulfill and honor the Company Indemnification Provisions if the Company Indemnification Expenses are covered by the Company D&O Tail Policy.

250 → *159 words; -217* → *-119.5*

What is the definition of this definition?

Seller is relieved of its obligation to sell such applicable Committed Volumes to Buyer and may sell the applicable Committed Volume directly to a third party and at a **mutually agreed upon** alternate delivery point ("Alternate Buyer/Delivery Point")….

Where does this integrated definition begin?

Except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, all Benefit Plans, other than "multiemployer plans" within the meaning of Section 3(37) of ERISA (each, a "**Multiemployer Plan**") and Non-U.S. Benefit Plans (collectively, "**U.S. Benefit Plans**"), are, and have been operated, in substantial compliance with ERISA, the Code and other applicable Laws.

*All benefit plans?

*Non-U.S. Plans?

*Benefit plans minus multiemployer but including non-U.S.?

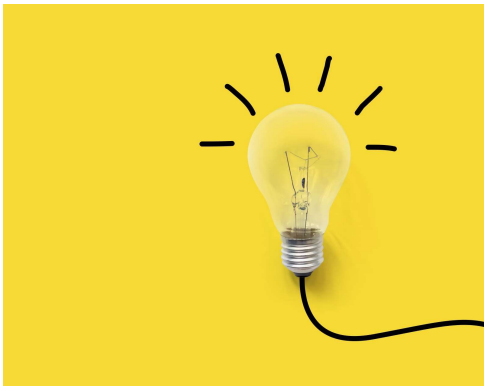
*Benefit plans minus multiemployer and non-U.S.?

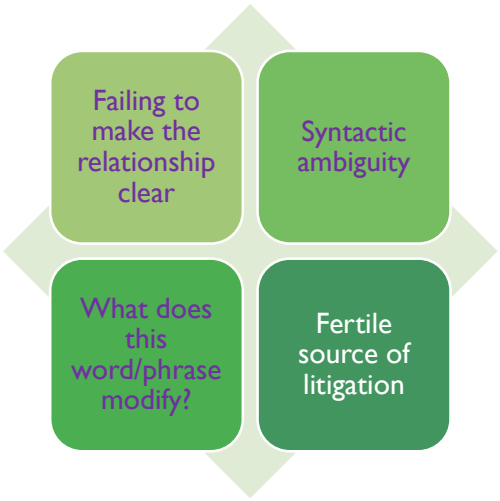
Except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, all Benefit Plans, other than "multiemployer plans" within the meaning of Section 3(37) of ERISA (each, a "**Multiemployer Plan**") and Non-U.S. Benefit Plans (collectively, "**U.S. Benefit Plans**"), are, and have been operated, in substantial compliance with ERISA, the Code and other applicable Laws.

Where does this definition begin?

Tenant shall indemnify, defend, protect, and hold harmless the Landlord Parties from any and all loss, cost, damage, expense and liability (including without limitation court costs and reasonable attorneys' fees) (collectively "**Claims'**) incurred in connection with or arising from (i) any cause in, on or about the Premises, (ii) any acts, omissions or negligence of Tenant or of any person claiming by, through or under Tenant, or of the contractors, agents, servants, employees, invitees, guests or licensees of Tenant or any such person (collectively, "**Tenant Parties**"), in, on or about the Project or (iii) any breach of the terms of this Lease by Tenant, either prior to, during, or after the expiration of the Lease Term, **provided that** the terms of the foregoing indemnity shall not apply to the negligence or willful misconduct of Landlord or any of the Landlord Parties.

7. The #3 Error: Questionable Associations.





Questionable Associations:

Questionable Associations in the Survey Cases:

- Does a reference to a code section mean that code section as of a specific date?
- What does "courts identified above" mean when two separate sets of courts are mentioned?
- Does a modifier at the end of a list refer to all items in the list, or only the last?
- Does "as modified" mean all the provisions are in except those specifically modified, or that only the specific modified provisions are in?
- Does "at Frontier's discretion" modify the words that precede or follow?
- By locating a Change of Control provision in the midst of the termination section, is it limited to the initial term, or does the Change of Control automatically renew with the contract?
- Does "within X days of the first draw or when requested" mean no sooner than or no later than?

Contest Promotions v. City of San Fang-cisco

Business Sign: A sign that meets the definition of a Business Sign as set forth in Section 602.3 of the City's Planning Code.

Paragraph 1. Classification of Signs: The Parties agree and acknowledge that Signs erected by Contest Promotions within the City are and shall be deemed Business Signs for all purposes of the Planning Code, including but not limited to the filing, processing, and approval of permits by and with the Planning Department, so long as they are consistent with the dimensional, locational, and other requirements applicable to Business Signs under Article 6 of the Planning Code.

Paragraph 3. Contest Promotions shall comply with all applicable provisions of the Planning Code in effect at the time the permit for the subject sign is issued.

San Francisco began assessing large fines on Contest Promotions' signs

Contest Promotions sued, AND WON, in Federal District Court and in the 2nd Circuit

Settlement agreement: Contest Promotions to pay $375,000 and make sure the signs comply with Section 602.3 from now on

THE DAY the settlement agreement was signed, the City Supervisors voted to amend 602.3 the definition of "business signs"

The STATE court agreed that different interpretations were plausible but found in favor of San Francisco

Bad faith? *Res Ipsa Loquitur*

Synergy Hotels v. Holiday Hospitality

Licensee hereby expressly and irrevocably submits itself to the nonexclusive jurisdiction of the U.S. District Court for the Northern District of Georgia, Atlanta Division and the State and Superior Courts of DeKalb County, Georgia for the purpose of any and all disputes. However, Licensor remains entitled to seek injunctive relief in the federal or state courts either of Georgia or of the state of the Hotel's location or of Licensor's principal place of business. Should Licensee initiate litigation against Licensor, its parents, subsidiaries or one of its affiliated entities, Licensee must bring action in the courts identified above, provided, however, the foregoing will not constitute a waiver of any of Licensee's rights under any applicable franchise law of the state in which the Hotel is located.

SBP LLLP v. Hoffman Construction:

Three written contracts were based on an American Institute of Architects standard form document, A201-1997, which was incorporated by reference "as modified."

In Re Frontier

[for schedule changes made prior to the day of travel, Frontier may transport the passenger over its own route system to the destination or,] in the event the schedule modification is significant, at Frontier's discretion, it may refund the cost of the unused portion of the ticket.

Waterloo

[a.k.a., *Facebook, Inc. v. Duguid*]

Section 227(a)(1)(A) defines an "autodialer" as:

equipment which has the capacity –

(A) To store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) To dial such numbers.

Does "using a random or sequential number generator" refer to

- "store or produce,"
- just "produce," or
- "telephone numbers to be called"

The battle of the conventions:

Series-Qualifier Canon

Rule of the Last Antecedent

SCOTUS'S Guidance:

- Is the language before the modifier a cohesive unit?
- Are the items before the modifier separated by comma(s)?
- Is there a grammatical basis to limit the reach of the modifier?

Here's a better idea:

Use Tabulations; Skip the Litigation

Cocquyt v. Spartannash Co.

(5)(e) Change of Control. If, and only if, the Employee is terminated within twelve (12) months after a change in control, then and in that event, Employee shall receive from the Company an amount equal to two (2) times Employee's Base Salary in effect for the calendar year immediately preceding the calendar year in which his termination of employment occurs, and Section 5(d) shall be inapplicable. Such payments are to begin within thirty (30) days of the date of severance and be made over an eighteen (18) month period.

- The provision seems clear in isolation
- Placement in Paragraph 5 – Term and Termination – caused ambiguity
- Cocquyt's employment could be terminated 6 ways before the expiration of the first term: (Death, disability, for cause, without cause, change of control, and termination by Cocquyt)
- Does the change in control provision apply only prior to the end of the first term, or does "if and only if" mean that a change in control is treated differently?
- Extrinsic evidence – the change in control is the exception; twice the base salary if he's terminated within 12 months of a change in control regardless of whether the 3-year term has been fulfilled

Quality Leasing Co., Inc. v. Atomic Dog

Second draw of $408,383.15 within thirty (90) [sic] days of the first draw or when requested by the vendor at completion & installation of the equipment.

Does it mean…

Quality should pay the second draw when requested by the vendor at completion and installation of the equipment, but in no event sooner than 90 (or 30?) days from the first draw

Quality is not be obligated to make the payment sooner than 90 days (or 30)?

Crux: no sooner than, or nor later than?

My Recommendations for Avoiding Questionable Associations

Squinting Modifier:

- When distributions are made frequently no compensation is paid to the partners.

Squinting Modifier:

- When distributions are made frequently no compensation is paid to the partners.
  - When distributions are made frequently?
  - Frequently no compensation is paid?

Squinting Modifiers:

The affected employee has recall rights for 12 months from the date of such layoff. The affected employee shall file in writing his or her mailing address and telephone number, if any, with the Town Manager at his/her office and shall be obligated, as a condition of his/her recall rights for said 12-month period, to continue to inform the Town Manager in writing of any change thereafter.

- the recall provision creates a condition precedent that must be met before the contract becomes effective; or
- Employee must provide the information required as a condition precedent to being eligible for recall.

1. Avoid notwithstanding the foregoing;

notwithstanding any provision to the contrary

4.2(e) **Termination of Payment Fund.** Any portion of the Payment Fund (including the proceeds of any investments of the Payment Fund) that remains unclaimed by, or otherwise undistributed to, the holders of Share Certificates and Book-Entry Shares by the one year anniversary of the Effective Time shall be delivered to the Surviving Corporation. Any holder of Shares (other than Excluded Shares) who has not theretofore complied with this Article IV shall thereafter look only to the Surviving Corporation for payment of the Merger Consideration (after giving effect to any required Tax withholdings as provided in Section 4.2(h)) upon delivery of the Share Certificates (or affidavits of loss in lieu of the Share Certificates as provided in Section 4.2(f)) or transfer of the Book-Entry Shares, without any interest thereon. **Notwithstanding the foregoing**, none of the Surviving Corporation, Parent, the Paying Agent or any other Person shall be liable to any former holder of Shares for any amount properly delivered to a public official pursuant to applicable abandoned property, escheat or similar Laws.

1: What is "the foregoing"?

1. The previous sentence?
2. The two previous sentences?
3. Beyond 4.2(e)?
4. All of 4.2?

Character flaws of notwithstanding:

- Which trumps?
- Multiple uses cancel each other out
- Dominant or subordinate?
- Alters from afar
- Inconsistency in wording; ambiguity
- Users are required to determine which provisions are affected
- NEVER in a first draft

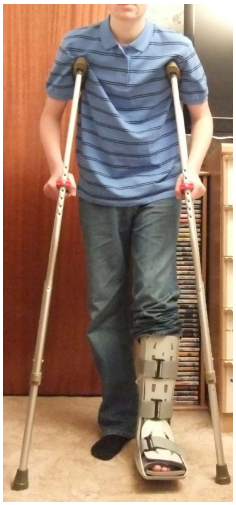
Only one can be king of the mountain…

2. Watch the tail at the end of a list

"all inventory, including but not limited to agricultural chemicals, fertilizers, and fertilizer materials sold to debtor by creditor"

- Fertilizer materials (last item in the list)
- Agricultural chemicals, fertilizers, and fertilizer materials (all 3 items in the list)
- All inventory (phrase preceding the list)

The coverage of this insurance policy does not apply to bodily injury to any employee of any contractor arising out of or rendering services of any kind for which any insured may become liable in any capacity.



3. When in doubt, deploy tabulations!

Carrier shall defend Georgia-Pacific and its subsidiaries for the injury of a person "arising out of or predicated upon 1) the operation of trucks of or by CARRIER, its agents or employees, or 2) the conduct of the business of CARRIER, or 3) the transportation and handling of goods by CARRIER, its agents or employees whether pursuant to this Agreement or otherwise.

Carrier shall defend Georgia-Pacific and its subsidiaries for the injury of a person "arising out of or predicated upon:

1) the operation of trucks of or by CARRIER, its agents or employees,

2) the conduct of the business of CARRIER, or

3) the transportation and handling of goods by CARRIER, its agents or employees whether pursuant to this Agreement or otherwise.

Carrier shall defend Georgia-Pacific and its subsidiaries for the injury of a person "arising out of or predicated upon:

1) the operation of trucks of or by CARRIER, its agents or employees,

2) the conduct of the business of CARRIER, or

3) the transportation and handling of goods by CARRIER, its agents or employees

whether pursuant to this Agreement or otherwise.

- "Security Incident" means any actual or reasonably suspected event that compromises, or could reasonably be expected to compromise, (i) the privacy or security of any Personal Information, software or system accessed or used to provide the Services; or (ii) any loss, or unauthorized acquisition, access, destruction, alteration, disclosure, access, or use (in all cases whether accidental or intentional) of, or the inability to locate, Personal Information.

- event that compromises, or could reasonably be expected to compromise … any loss, or unauthorized acquisition

"Security Incident" means any actual or reasonably suspected:

i. event that compromises, or could reasonably be expected to compromise the privacy or security of any Personal Information, software or system accessed or used to provide the Services;

ii. loss of Personal Information;

iii. unauthorized acquisition, access, destruction, alteration, disclosure, or use of Personal Information, whether accidental or intentional; or

iv. inability to locate Personal Information.

"Security Incident" means:

i. any actual or reasonably suspected event that compromises, or could reasonably be expected to compromise the privacy or security of any Personal Information, software or system accessed or used to provide the Services; or

ii. any accidental or intentional:

   a. loss of;

   b. unauthorized acquisition, access, destruction, alteration, disclosure, access, or use of; or

   c. inability to locate

   Personal Information.

4. Watch for baffling tagalongs and careless references

9.7 Entire Agreement. This Agreement (including any exhibits, annexes and schedules hereto) and the documents and other agreements among the parties hereto as contemplated by or referred to herein, including the Company Disclosure Schedule, together with each other agreement entered into by or among any of Parent, Merger Sub and the Company as of the date of this Agreement that makes reference to this Section 9.7, constitute the entire agreement among the parties with respect to the subject matter hereof and supersede all other prior agreements, understandings, representations and warranties, both written and oral, among the parties with respect to the subject matter hereof, other than the Confidentiality Agreement.

(b) All reasonable fees of the Shareholder Agent and all reasonable costs, attorney's fees, and expenses incurred by the Shareholder Agent in connection with the performance of its duties hereunder shall be paid out of the Representative Escrow Fund, upon presentation by the Shareholder Agent to the Escrow Agent of an accounting of such fees, costs and expenses, which accounting is subject to Parent's reasonable agreement, provided, however, that no such claim for fees, costs and expenses shall be paid until the later of the Expiration Date or the end of the last Pending Claim Extensions, if any, to terminate; and provided, further, that in the event the Escrow Agent has received Officer's Certificate(s) from Indemnified Parties with respect to Losses that exceed the Escrow Amount, the Escrow Agent shall, subject to the provisions of Section 7.3(e) hereof, deliver to Parent out of the Representative Escrow Fund, as promptly as practicable, cash held in the Representative Escrow Fund in an amount equal to such Losses (if such Losses are greater than the amount of cash in the Representative Escrow Fund then the Escrow Agent shall deliver to Parent the entire cash amount in the Representative Escrow Fund); and, provided, further, that, in the case of Pending Claim Extensions, on the Expiration Date the Escrow Agent shall distribute to the Escrow Contributors (and in the case of Vested Assumed Options, such options shall be released from the provisions of Section 7.[illegible] the portion of the Representative Escrow Fund that is not necessary **(as determined in the preceding proviso)** to satisfy such unsatisfied claims.

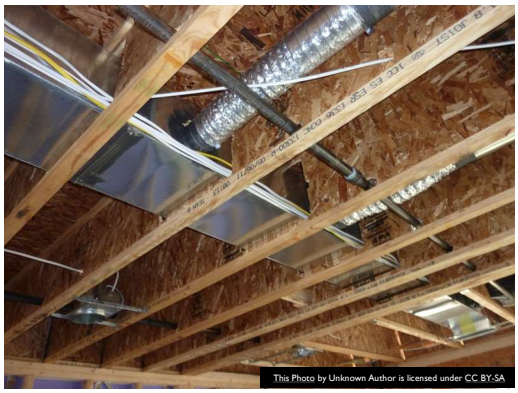
5. Watch for questionable associations caused by such, said same

Such; said; same:

- Such – similar or the very one?
- Said – "Makes you sound like a parody of law-talk."
- Same – Stilted and potentially ambiguous:
- In case of the removal of the president from office—or of his death, resignation, or inability to discharge the powers and duties of the said office—the same shall devolve on the vice president.

§7.1 To the extent that [If] Landlord installs, maintains, uses, repairs or replaces pipes, cables, ductwork, conduits, utility lines, and/or wires through hung ceiling space, exterior perimeter walls and column space, adjacent to and in demising partitions and columns, in or beneath the floor slab or above, below, or through the Premises, then in the course of making any such installation or repair: (w) Landlord shall not interfere unreasonably with or interrupt the business operations of Tenant within the Premises; (x) Landlord shall not reduce Tenant's usable space, except to a *de minimus* extent, if the same are not installed behind existing walls or ceilings; (y) Landlord shall box in any of the same installed adjacent to existing walls with construction materials substantially similar to those existing in the affected area(s) of the Premises; and (z) Landlord shall repair all damage caused by the same and restore such area(s) of the Premises to the condition existing immediately prior to such work.

What does "the same" refer to?



- Pipes, cables, ductwork, conduits, utility lines, wires
- Hung ceiling space, exterior perimeter walls and column space
- Partitions and columns
- Floor slab or above
- the Premises
- installation or repair

What do the yellow phrases modify?

(iii) if the Borrower either fails to pay, as and when the same shall become due and payable, any principal of or interest on any other obligation for borrowed money or any obligation secured by purchase money mortgage or title retention lien beyond any period of grace provided with respect thereto, or fails to perform any other agreement, term or condition contained in an agreement under which any such obligation is created, if the effect of such failure is to cause, or to permit the holder or holders of such obligations (or a trustee on behalf of such holder or holders) to cause, such obligation to become due prior to its stated maturity;

(iii) the Borrower fails either:

(a) to pay the principal of or interest, as and when due and payable, before any applicable grace period expires, on:

(1) any other obligation for borrowed money; or

(2) any obligation secured by purchase money mortgage or title retention lien;

and the Borrower's failure to pay causes or permits the holder or holders of the obligation (or a trustee on behalf of such holder or holders) to declare it due prior to its stated maturity; or

(b) to perform any other agreement, term or condition contained in an agreement under which any other obligation is created.

(iii) the Borrower fails either:

(a) to pay, as and when due and payable,

(1) the principal of or interest on any other obligation for borrowed money; or

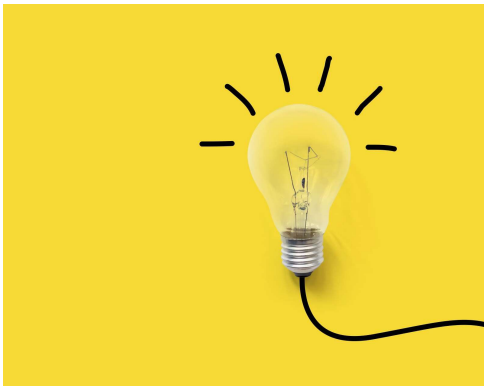
(2) any obligation secured by purchase money mortgage or title retention lien before any applicable grace period expires;

and the Borrower's failure to pay causes or permits the holder or holders of the obligation (or a trustee on behalf of such holder or holders) to declare it due prior to its stated maturity; or

(b) to perform any other agreement, term or condition contained in an agreement under which any other obligation is created.

7. Missing Information

*4th most common error



Missing Information in the Survey Cases:

- Which party was supposed to provide the empty railcars to load coal into
- What is the revenue sharing percentage in a renewal term
- Is the licensee supposed to continue to pay license fees when the licensor is no longer providing services and licensee obtained code from a source code escrow
- Is a licensor required to refund *overpayments* when a provision requires the licensee to remit underpayments

XCOAL Energy & Resources v. Bluestone

2.2 The Coal shall be delivered, and title and risk of loss thereof shall pass from Bluestone to Xcoal, free on board (F.O.B.) after the Shipment has been properly loaded into railcars at the Bishop mine loadout.

3.5 Bluestone shall cause Coal sold hereunder to be properly loaded into railcars for delivery to Xcoal in accordance with the Transportation Provisions of the applicable rail contract of Xcoal with Norfolk Southern.

"The core issue is, who had the obligation to have the trains there? And if it was us, then I don't think we can recover on our counterclaim."

Buyer's railcar?

Gap Fillers – UCC 1-303(e):

- Course of Performance
- Course of Dealing
- Trade Customs
- Industry Jargon ("Demo")
- UCC

Seneca Nation of Indians v. NY

- Contract with State of NY for Casinos
- Initial term is 14 years
- Revenue sharing:
  - Years 1-4
  - Years 5-7
  - Years 8-14
- Renewal term is 7 years

Epazz, Inc. v. National Quality Assurance

Right to Use Following Release. [NQA is entitled] to use the Deposit Material for the sole purpose of continuing the benefits afforded to it by the License Agreement.

- NQA licensed a very bug-prone software from Enterprises
- Licensor provided constant tech support
- NQA requested source code escrow, just in case…
- Licensor acquired by Epazz
- Epazz "totally fumbled the handoff"
- NQA acquired source code and hired a new tech support
- Epazz sued for license fees, despite providing no tech support

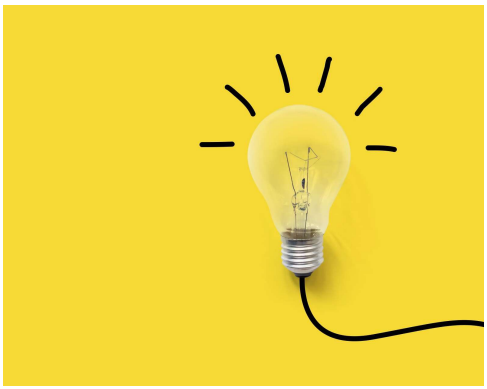
- Is NQA required to pay?
- Right to Use Following Release. [NQA is entitled] to use the Deposit Material for the sole purpose of continuing the benefits afforded to it by the License Agreement.

Intermec v. Transcore

Intermec has the right. . . through an independent third party, to audit TransCore's records to verify any representations made (in quarterly reports or otherwise) by TransCore to Intermec about the matters described [in the license agreement.] Should the results of any . . . audit by [Intermec's auditor] demonstrate that any representations or payments made by TransCore resulted in an underpayment that exceeded more than one percent (1%) in any period, then TransCore will within 30 days after notice of such underpayment, pay Intermec such amount.

8. Lack of Standardization for Specific Legal Consequences.

*5th most common error



Non-Standardized Language in the Survey Cases:

Condition	"Subject to" does not automatically create a condition; prefer if/then
Create a Duty	"Fund" does not create a duty to completely fund
Create a Duty	Use "shall" to require a party to provide all code
Negate a Duty	Use "is not required to" to negate a duty
Create a Duty	Use "shall" to create a duty
Privilege	Be careful to distinguish "may" (privilege) from "might" (possibility)
Create a Right	Use "is entitled to" to create a right

Thomas & Betts Corp. v. Trinity Meyer

"Subject to the terms and conditions of this Article VI…"

Notice the variations:

Sohm v. Scholastic (2nd Cir. 2020):	"subject to the terms and conditions of this Article VI"	This phrase is far less explicit than:	Not located in the same section as "subject to"
• if • on condition that • provided that • in the event that • subject to	• Conditions are not favored under NY law • Did this phrase unambiguously create a condition for notice?	• Article V: Conditions Precedent to Closing • Subheading: Conditions to Obligations of T&B and Trinity • The obligation…is subject to the satisfaction of the following conditions	• "Subject to" is in the indemnification provision (§6.2) • Trying to create a condition out of the notice provision (§6.3)

Notice the inconsistencies:

- "Subject to" is used frequently in the contract, basically as a cross reference:
  - Buyer desires to assume the Assumed Liabilities upon the terms and subject to the conditions
  - Buyer takes the Business and Acquired Assets. . . subject to the benefit of
  - Subject to the terms of this Agreement, each Party shall use reasonable efforts

1. Variation: same concept; different words

2. Inconsistency: same word; different concepts

Semantic ambiguity related to **usage** is **avoidable.**

Semantic ambiguity can be caused by the meaning of a word, or by the way it is used.

Avoid Semantic Ambiguity Caused By Usage:

One **word** per concept → One **concept** per word

"Where the contracting parties are sophisticated actors represented by counsel, as they are here, we must presume that they understand how to use words and construction to establish distinctions in meaning." (citing *Int'l Fid. Ins. Co. v. Cty. Of Rockland,* 98 F. Supp. 2d 400, 412 (S.D.N.Y. 2000), and "The failure to couch the request for cure provision in the explicit language of the condition is particularly significant here because the sophisticated drafters elsewhere employed precisely such language to establish undoubted conditions precedent."

Who is responsible?

When the court states that it assumes sophisticated parties *represented by counsel* understand how to use words and construct distinct meanings, who is responsible when the contract fails to produce the intended distinct meanings?

What about you?

- Do you know how to use words and construction to establish distinctions in meaning?
- Do you deliberately, mindfully, intentionally create conditions using consistent words and sentence structures?

Military Order of the Purple Heart Service Foundation v. Military Order of the Purple Heart USA

Paragraph 3 of the parties' agreement requires the Foundation to "fund the reasonable budget submitted to it by the Order."

Paragraph 5.2 provides that if the Foundation "does not fund the Order, the assets or control of Holdings will be transferred to the Order."

Nuance Communication v. IBM

"Licensed IBM Background Software" means (a) all Software that exists as of the Effective Date in all available formats (Including Source Code and Object Code) that is owned by, or that has been developed or licensed by the IBM Research Group, including Tools, and that is listed on Exhibit A, including any modification, updates, upgrades, error corrections, bug fixes, diagnostic and/or testing tools, that are JDBC compliant, and other changes, if available ("Modifications"), and if such Modifications are not contractually prohibited under a Third Party agreement, and such Modifications are available, will be timely provided to Nuance; and where the Modifications continue to meet the scope contemplated in Article 2.1 regarding the licensing of Deep QA under this Agreement, as of the Effective Date and thereafter for a period of ten (10) years, and additional Software as agreed by the parties, provided to Nuance by IBM under the Agreement (collectively "Updates"). . . .

Wnorowski v. University of New Haven

- Wnorowski: website, brochures, and registration process impliedly promised in-person
- UNH: the contractual materials never specified in-person
- [*Ahhhh, but they never specified that UNH was NOT required to provide in-person*]
- UNH failed to negate the duty

Metromont Corp. v. Myers

All precast-prestressed concrete members and connections shown on the drawings are conceptual only.

Contractor/precast-prestressed concrete member's manufacturer shall design the members and their connections in strict compliance with the requirements of ACI 350-06 . . . and ACI 350-3-06 for seismic design, for design loads indicated on this drawing. Submit design and shop drawings for approval of the engineer.

- $37 Million Reservoir plant for City of Baltimore
- Myers is contractor
- Metromont was hired to provide component parts for the roof
- Was Metromont required to redesign the roof?
- Does "conceptual only" impose an obligation?

My Recommendations for Creating Legal Consequences

From *23 Mistakes*, February 2020
Various ways of assigning responsibility:

1.3. Effective Time. As soon as practicable following, and on the date of, the Closing, the Company and Parent **will cause** the Merger to be consummated by filing all necessary documentation, including a Certificate of Merger (the "**Certificate of Merger**"), with the Secretary of State of the State of Texas as provided in the relevant provisions of the TBOC. The Merger shall become effective at the time when the Certificate of Merger has been duly filed with and accepted by the Secretary of State of the State of Texas or at such later time as may be agreed by the parties in writing and specified in the Certificate of Merger (the "**Effective Time**").

2.1. Articles of Incorporation of the Surviving Corporation. At the Effective Time, the articles of incorporation of the Company as in effect immediately prior to the Effective Time shall be amended and restated in their entirety as of the Effective Time to be in the form set forth in Exhibit A to this Agreement, and as so amended shall be the articles of incorporation of the Surviving Corporation (the "**Charter**") until thereafter amended as provided therein or as provided by applicable Law.

2.2. Bylaws of the Surviving Corporation. The parties hereto **SHALL** take all actions necessary so that the bylaws of Merger Sub in effect immediately prior to the Effective Time shall be the bylaws of the Surviving Corporation (the "**Bylaws**") until thereafter amended as provided therein or as provided by applicable Law.

- Parties will cause
- The Merger shall become
- Articles shall be amended
- As so amended, the articles shall be
- The Parties hereto shall take
- The bylaws shall be

Variation: No clear plan.

Standardize the language:

For this consequence:	Use this:
1. Duty	shall
2. Negate a duty	is not required to
3. Duty not to do something	shall not
4. Indirect duty	must
5. Right	is entitled to
6. Negate a right	is not entitled to
7. Privilege	may
8. Possibility	might
9. Negate a privilege	may not
10. Present action	present tense verb
11. Policy	present tense verb
12. Condition	if/then; subject to

Know your game!

*WILL*Y NILL*Y*

- *(informal)*
- *adjective*
- Without order or plan; haphazardly

1. Different kinds of consequences:

- Rights
- Duties
- Privileges
- Negating rights, duties, privileges
- Policies for implementing the contract
- Present action
- Conditions

2. Select the Right Consequence

Legal consequences:

- Can be expressed several different ways
- Consider what legal consequence is best
- $42/share => right to receive, or duty to pay?
- Standardize the language

To create a duty:

Use "shall"

Manufacturer shall comply with applicable environmental laws.

Not: The product shall comply

Not: Manufacturer agrees to comply

To create a duty:

"Shall" should follow a named party.

- NOT: Employee shall be entitled to…
- NOT: Company shall have the duty to…
- NOT: Licensor shall have authority to…

To Test, Substitute:

*has a duty to

*is required to

Use "shall" solely to impose a direct duty on a named party.

Not a grammatical issue

Semantic ambiguity

Possible alternatives to "shall":

Must:

Seller **must** deliver the Goods by November 30, 2021.

Favored by Garner

Hard to sell in practice

Will:

Seller **will** deliver the Goods by November 30, 2021.

The parties will not take the following into account to determine whether there has been or will be a Material Adverse Effect.

To negate a duty:

Use "is not required to"

Landlord **is not required to** provide HVAC on weekends or Federal holidays.

To create a duty not to do something:

Use "shall not"

Company **shall not** assign its rights under this Agreement.

To describe indirect duties:

Use "must"

Notice of breach **must** be given by certified mail within ten days.

To create a right:

Use "is entitled to"

Buyer **is entitled to** be reimbursed for shipping costs of returned goods.

To negate a right:

Use "is not entitled to"

Buyer **is not entitled to** return defective goods to Seller without prior notice of defect.

To create a privilege:

Use "may"

Licensee **may** terminate the license agreement at any time during the Term upon 30 days' notice to Licensor.

The Indemnified Party **may** retain separate counsel at its sole expense.

Be careful to distinguish between "may" and "might"

May = permission

Might = possibility

An actual or threatened breach of this Section might [possibility] **cause immediate irreparable harm without adequate remedy at Law. If a party breaches or threatens to breach this Section, then the other party may** [permission] **seek equitable relief to prevent the breaching party from beginning or continuing the breach.**

To negate a privilege:

Use "may not" to negate a privilege:

Company **may not** exercise the option after October 31.

[clarify if necessary – possibility vs permission]

To perform an action:

Use a present tense verb:

Licensor **grants** ABC a limited license to use the Software.

Investor **acknowledges** that it has received the disclosure statement.

Buyer **assumes** the liabilities secured by the assets.

To state a policy:

Use a present tense verb and passive voice:

This agreement is governed by the laws of the State of Colorado.

To create a condition:

Use if/then:

If Buyer requests a sample of the Goods, Seller **shall** provide a sample within ten days.
[*conditional duty; "then" is understood*]

Company **shall** pay Employee a bonus of $10,000 **if** sales exceed $1 Million for the fiscal year. [*reversed*]

If the LLC receives an opinion of counsel stating that the Transfer will not violate any laws, then Member **may** sell his or her Membership Interest.
[*conditional privilege*]

If Buyer **shall** request a sample of the Goods, Seller shall provide a sample within ten days.
[*incorrect*]

Alternative: Subject to:

Buyer's obligations are **subject to** the following….

3. Which Consequence is Best for this Provision?

Duty/permission/condition?

Notwithstanding the foregoing, none of the Surviving Corporation, Parent, the Paying Agent or any other Person shall be liable to any former holder of Shares for any amount properly delivered to a public official pursuant to applicable abandoned property, escheat or similar laws.

Duty: Surviving Corporation, Parent, or the Paying Agent shall comply with applicable abandoned property, escheat, or similar Laws, and are not liable to former holders for funds properly delivered to a public official under them.

Negating Duty: Neither Surviving Corporation, Parent, nor the Paying Agent is required to remit to any former holder of Shares any sums any one of them has properly delivered to a public official under abandoned property, escheat, or similar Laws.

Permission: Surviving Corporation, Parent, or the Paying Agent may deliver uncollected funds to a public official under, and none of them are liable to a former holder of Shares for complying with, applicable abandoned property, escheat, or similar Laws.

Condition: If funds are uncollected, then Surviving Corporation, Parent, or the Paying Agent shall/may deliver…

Duty: Surviving Corporation, Parent, or the Paying Agent shall comply with applicable abandoned property, escheat, or similar Laws, and are not liable to former holders for funds properly delivered to a public official under them.

Negating Duty: Neither Surviving Corporation, Parent, nor the Paying Agent is required to remit to any former holder of Shares any sums any one of them has properly delivered to a public official under abandoned property, escheat, or similar Laws.

Permission: Surviving Corporation, Parent, or the Paying Agent may deliver uncollected funds to a public official under, and none of them are liable to a former holder of Shares for complying with, applicable abandoned property, escheat, or similar Laws.

Condition: If funds are uncollected, then Surviving Corporation, Parent, or the Paying Agent shall/may deliver…

Duty/prohibition/permission/condition?

Buyer may place an order only by using Seller's purchase order system.

Duty: Buyer shall place orders only by using Seller's purchase order system.

Prohibition: Buyer shall not place orders except by using Seller's purchase order system.

Permission: Buyer may place orders only by using Seller's purchase order system.

Condition: If Buyer desires to place an order, it shall use Seller's purchase order system.

Duty: Buyer shall place orders only by using Seller's purchase order system.

Prohibition: Buyer shall not place orders except by using Seller's purchase order system.

Permission: Buyer may place orders only by using Seller's purchase order system.

Condition: If Buyer desires to place an order, it shall use Seller's purchase order system.

Duty/present action/condition/declaration?

Consultant agrees to assign the Works for Hire to Client.

Duty: Consultant shall assign the Works for Hire to Client.

Present Action: Consultant assigns the Works for Hire to Client.

Condition: If Works for Hire are created, Consultant shall assign them to Client.

Declaration: All Works for Hire are assigned to Client.

Duty: Consultant shall assign the Works for Hire to Client.

Present Action: Consultant assigns the Works for Hire to Client.

Condition: If Works for Hire are created, Consultant shall assign them to Client.

Declaration: All Works for Hire are assigned to Client.

Right/privilege/duty/condition/policy/declaration?

A Shareholder can review the corporate records by appointment.

Right: A Shareholder is entitled to review the corporate records by appointment.

Privilege: A Shareholder may review the corporate records by appointment.

Duty: A Shareholder shall make an appointment to review the corporate records.

Condition: If a Shareholder desires to review the corporate records, that Shareholder shall/may make an appointment.

Policy: An appointment must be scheduled to review corporate records.

Declaration: Corporate records are available for review by appointment.

Right: A Shareholder is entitled to review the corporate records by appointment.

Privilege: A Shareholder may review the corporate records by appointment.

Duty: A Shareholder shall make an appointment to review the corporate records.

Condition: If a Shareholder desires to review the corporate records, that Shareholder shall/may make an appointment.

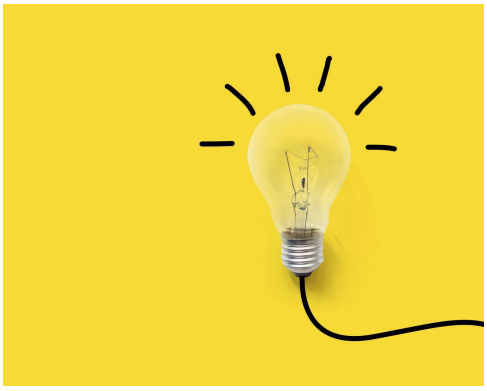
Policy: An appointment must be scheduled to review corporate records.

Declaration: Corporate records are available for review by appointment.

Errors are telling you something:

- The drafter doesn't know?
- The drafter knows but doesn't care about the risk?
- The drafter knows but can't apply?

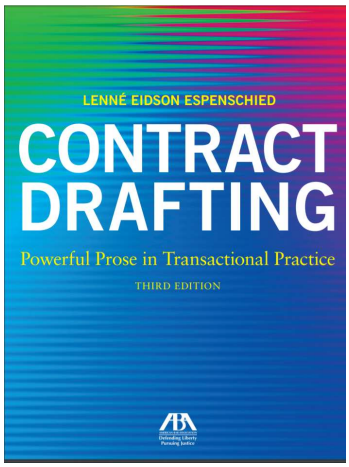
Dessert!



Eclipse Law Group v. Target and Amazon

Just another weird case from California!

Target and Kmart agree to cause Eclipse [and an individual intervenor, presumably, the lawyer providing services] to be paid a collective sum of $425,000.00. Eclipse and Lobbin recognize that Target and Kmart will each pay a portion of the Settlement Payment and Eclipse and Lobbin may receive their payments in one or more checks/wire payments from Target and/or Kmart.



Thank You!

