A Manual of Style for Contract Drafting

Kenneth A. Adams

Third Edition

American Bar Association
Business Law Section

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To my daughter, Sydney A. Adams

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WHAT HAS CHANGED

Welcome to the third edition of *A Manual of Style for Contract Drafting*.

The first edition appeared in 2004. I wrote it while still a practicing corporate attorney, so in my attempts to master contract language I was necessarily something of a dilettante. That changed in 2006, when I made the study of contract drafting my livelihood. That focus meant that the second edition, which came out in 2008, was a very different book—entirely redesigned, significantly expanded, extensively rewritten.

Since then I've been engaged in the same range of activities that gave rise to the second edition. I've continued to blog, originally at AdamsDrafting, then at The Koncise Drafter, now at Adams on Contract Drafting. Blogging has allowed me to air new ideas, chew over problems, hear of new developments, and engage with like-minded readers to an extent that otherwise would have been impossible. Since the second edition was published, I've posted more than 800 blog items, many of them representing my first treatment of issues addressed in this edition.

I've continued giving public seminars in the United States with West LegalEdcenter and in Canada with Osgoode Professional Development, as well as

in-house seminars at companies, law firms, and government agencies. I've also presented public seminars in Australia, Malaysia, Thailand, and Switzerland; that has given me a better sense of how drafting usages vary, or don't, from country to country. And I've continued teaching at the University of Pennsylvania Law School. I've learned a great deal from seminar participants and my students.

One new development is that I've launched Koncision Contract Automation. By 2011, document-assembly technology and my understanding of my subject had both developed enough to allow me to take a baby step toward commoditizing contract language. Koncision's proof-of-concept product is a confidentiality-agreement template, available for free. Compiling the language for that template allowed me to test some of my recommendations and explore new issues.

Thanks to the wealth of material I had to draw on, there is much that is new in this edition. I also moved some sections, and I retooled much of the prose. Here's an overview of the changes:

- *Introduction*. Extensively revised.
- *Chapter 1 (The Characteristics of Optimal Contract Language)*. New; includes some topics previously addressed in the introduction, in what is now chapter 7, and in what is now chapter 17.
- *Chapter 2 (The Front of the Contract)*. Significantly expanded by integrating new material throughout.

- *Chapter 3 (Categories of Contract Language)*. Greatly expanded by integrating new material throughout; by adding new sections on language of belief, language of intention, and language of recommendation; and by adding, from what is now chapter 13, an expanded discussion of *represents and warrants*.
- *Chapter 4 (Layout)*. Significantly expanded by integrating new material throughout.
- *Chapter 5 (The Back of the Contract)*. Slightly expanded.
- *Chapter 6 (Defined Terms)*. Slightly expanded.
- *Chapter 7 (Sources of Uncertainty in Contract Language)*. Significantly expanded by integrating new material throughout and by adding sections on antecedent ambiguity and failure to address an issue.
- *Chapter 8 ("Reasonable Efforts" and Its Variants)*. Slightly expanded.
- *Chapter 9 ("Material" and "Material Adverse Change")*. Slightly expanded.
- *Chapter 10 (References to Time)*. Significantly expanded by integrating new material throughout.
- *Chapter 11 (Ambiguity of the Part Versus the Whole)*. Significantly expanded by adding a section on the ambiguity that arises when one of a series linked by *or* is modified by a conditional clause, and by adding a case study. Revised the sections on the effect of adjectives and cumulation of attributes.
- *Chapter 12 (Syntactic Ambiguity)*. Significantly expanded by adding a section on closing modifiers with offsetting commas and a section on the serial comma.
- *Chapter 13 (Selected Usages)*. Expanded by more than two-thirds (in terms of the number of paragraphs).
- *Chapter 14 (Numbers and Formulas)*. Slightly expanded.

- *Chapter 15 (Provisions Specifying Drafting Conventions)*. Largely unchanged.
- *Chapter 16 (Typography)*. The section on fonts rewritten; otherwise largely unchanged.
- *Chapter 17 (Drafting as Writing)*. Shorter, because some sections were moved to chapter 1.
- *Chapter 18 (Amendments)*. Largely unchanged.
- *Chapter 19 (Letter Agreements)*. Largely unchanged.
- *Chapter 20 (Corporate Resolutions)*. Largely unchanged.

ACKNOWLEDGMENTS

I owe a great debt to the readers of my blog, at its different addresses, who have offered me comments and suggestions. My commenter hall of fame includes Michael Fleming, Eric Goldman, and Chris Lemens. Steven H. Sholk has been a prolific source of leads. Mark Anderson has provided a valuable English-law perspective. Brian D. Rogers and Bradley B. Clark have provided welcome encouragement. And Glenn D. West has been gracious enough to chime in when I've asked for the benefit of his unmatched expertise in some key areas.

I owe particular thanks to Gregory M. Harris. He gave a substantial portion of the manuscript of this edition a thoroughgoing review of the sort that an author can only dream of. He corrected me on some important points, persuaded me to refine how I present analyses and make recommendations, and pointed out some annoying tics in my prose. Meade

Ali, Ajay Krishnan, Chris Lemens, Vance R. Koven, Brian D. Rogers, and Steven H. Sholk also provided many valuable comments on the manuscript. And a squad of volunteers too numerous for me to name here read extracts of the manuscript and flagged an array of issues needing my attention. Thank you, all.

I was very fortunate that Rodney Huddleston, coauthor of *The Cambridge Grammar of the English Language*, was kind enough to read a version of chapter 11 (Ambiguity of the Part Versus the Whole) and offer detailed comments. The assistance that Professor Jeffrey P. Kaplan of San Diego State University and Dr. Colin Sparrow of the Mathematics Institute of the University of Warwick, England, rendered in connection with the previous editions carries over into this one, and so do my thanks to them.

Thanks to encouragement and support from Stephen W. Seemer, West LegalEdcenter now offers my U.S. live seminars, various webcasts, and my book *The Structure of M&A Contracts*. And I continue to benefit from the enthusiasm and determination of Heather J. Gore of Osgoode Professional Development.

I've benefitted greatly from my relationship with Tim Allen and his colleagues at Business Integrity, developer of ContractExpress, the leading document-assembly software. Their support allowed me to launch Koncision Contract Automation, and I've had a blast getting to grips with their amazing product. Tim and I see eye to eye on the current

state of contract drafting and prospects for the future, and I greatly enjoy our occasional dinners together in cities around the United States.

I continue to rely on Bruce T. Wilson for good-humored counsel and friendship. And I remain indebted to Steven Pappas for helping to smooth my transition from law-firm associate to freewheeling contract-drafting guy.

My wife, Joanne, continues to be an indefatigable source of love, tolerance, good humor, and old-fashioned hard work. My daughter, Sydney, stands to be far more accomplished and engaged than her father. The support of Joanne's parents, Steve and Toni Kourepinos, continues to be invaluable. But Max the Pekingese, my industrious assistant while I wrote the second and third editions, is no longer with us.

Although my mother has since passed away, I'll repeat the paragraph that rounded out the acknowledgments in the second edition:

One agreeable aspect of what I now do is that I'm unexpectedly revisiting, in an altogether more concerted way, the affinity for English usage that was routinely on display around the Adams family dinner table. My mother Florence, my late father Charles, and my siblings living (Charles, Jr. and Christine) and departed (Adrian, Louise, and Andrew) created a fertile mix of intellect and idiosyncrasy. I thank them for it.

THE SCOPE AND ORGANIZATION OF THIS MANUAL

This manual offers guidelines for clear and concise contract language. If you draft contracts, this manual will help you ensure that they're clearer and shorter and that they express the transaction more accurately, allowing you and your organization to save time and money, reduce risk, and compete more effectively. If you review or negotiate contracts, this manual will help you determine whether deal points are articulated in a way that makes sense and will help you spot and address potential sources of uncertainty. If you interpret contracts—for example, if you're involved in dispute resolution—this manual will help you assess meaning and determine what is causing any confusion.

This manual should be of use to readers in every contract ecosystem—a solo or small-firm general practitioner handling a broad range of contracts, from leases to separation agreements; a contract-management professional responsible for negotiating contracts with customers; a big-law associate drafting mergers-and-acquisitions contracts; an in-house lawyer overhauling the company's template sales contracts; a paralegal reviewing confidentiality agreements a company is

asked to sign; a judge trying to make sense of a confusing contract provision.

There are some things this manual doesn't do. It doesn't address what you should say in a contract. Instead, it addresses how to say clearly and effectively whatever you want to say.

It doesn't address contracts between businesses and individual consumers. Instead, it's intended for those who draft, review, negotiate, or interpret contracts between parties who are sophisticated or are represented by legal counsel. For simplicity, this manual refers to such contracts as "business contracts."

It doesn't attempt a synthesis of current contract usages. Instead, it recommends the clearest and most concise usages over those that have nothing but tradition going for them. If a recommendation departs markedly from what is traditional, that fact is noted.

To keep this manual concise, it doesn't contain footnotes, it cites authorities sparingly, and it cuts short some explication. It doesn't offer a bibliography, because it attempts to address, in sufficient detail for those seeking practical guidance, the full range of issues relating to the language and layout of contracts.

The final chapter deals with corporate resolutions. They aren't contracts, but lawyers who draft contracts are often called on to draft corporate

resolutions, which present issues analogous to those that arise in drafting contracts.

Appendix 1 contains three versions of a contract: the "Before" version; the "Before" version, annotated with footnotes to show its drafting shortcomings; and the "After" version, redrafted consistent with the recommendations contained in this manual. The difference between the "Before" version and the "After" version shows the cumulative effect of a rigorous approach to drafting usages, big and small. Readers might find that the footnotes in the annotated "Before" version provide a quick way to find those parts of this manual that discuss issues of particular interest to them. And the "After" version shows what a contract would look like if the drafter were to follow the recommendations in this manual.

To illustrate the analyis, this manual contains many examples of contract language. Except as indicated, they're not offered as models.

WHY A MANUAL OF STYLE?

A manual of style serves as a resource for any person or organization seeking greater clarity and consistency in written usages. That's the case for any kind of writing, but for the following three reasons a manual of style should prove especially useful to those who draft, review, negotiate, or interpret contracts.

First, compared to other kinds of writing (expository, narrative, and persuasive), contract

prose is limited and stylized—except for recitals (see 2.127), it serves only to regulate conduct and state facts. This limited scope makes it feasible for a manual of style to be comprehensive.

Second, contracts benefit from precise use of language—the stakes are often high enough to justify disputes over nuances (see 1.37). Using a manual of style is the best way to promote precision.

And third, contracts benefit from consistency of usages, because differences in wording can result in unintended differences in meaning (see 1.63). Using a manual of style is the best way to promote consistency.

But a manual of style is more than useful—it's necessary. That's because traditional contract language needs a thorough overhaul. In the eight years since the first edition of this manual, we've certainly seen progress—for one thing, interest in clear drafting has been sufficient to warrant a second edition and this third edition. Nevertheless, what the second edition had to say about the state of contract drafting remains true:

All might seem well—the wheels of industry keep turning, and deals keep getting done. But take a closer look and you'll find dysfunction. Any given business contract may appear to address the deal points adequately, and perhaps it does. But it will almost certainly be cluttered with deficient usages that, collectively, turn prose into "legalese"—flagrant archaisms, meaningless

boilerplate, redundant synonyms, use of *shall* to mean anything other than "has a duty to," inefficient layout, and so forth. That's the case no matter how exalted the law firm, or how substantial the company, that was responsible for drafting the contract.

Legalese renders a contract a chore to read, negotiate, interpret, and use as a model. As a result, companies waste vast amounts of money and time that, increasingly, they can ill afford, and lawyers are coming to be seen as impediments to business rather than facilitators.

And the fog of legalese makes it more likely that a contract will contain a flaw that leads to a dispute or deprives a client of an anticipated benefit. Much litigation has its roots in mishandled contract language, even when the lawyers had every incentive to draft carefully. . . .

So given the very nature of contract drafting and the dysfunctional language of mainstream contract drafting, it's doubly clear that a rigorous and comprehensive manual of style would be invaluable to those who would like to put their contract drafting on a more rational footing. This manual aspires to serve that function.

In the topics it addresses, and in the detail in which it addresses them, this manual goes beyond simply tackling legalese. But a starting point to clear drafting has to be a willingness to rid contracts of

that which is unclear, archaic, redundant, or otherwise inefficient.

Advocates of clearer contract language should remain undaunted. In a field as conservative as contract drafting, progress was always bound to be slow and hard to gauge.

USE OF A STYLE GUIDE

It's unlikely that the drafters in an organization would each opt for the same usages, so the only way to achieve consistency would be to impose a style guide.

For an organization to prepare a comprehensive style guide from scratch would be challenging, considering the expertise and time required. It could instead compile a short style guide of a dozen or more pages, but that wouldn't come close to covering the territory adequately. This manual is as long as it is for a reason.

An alternative would be for an organization to customize and adopt as its own the model "statement of style for contract drafting" included as appendix 2. Such a statement of style would allow an organization to say that it's accepting this manual's recommendations regarding contract language and layout, explain why it's doing so, and highlight some key points. It's called a statement of style rather than a style guide because it doesn't go into any detail. The model statement of style is worded as if it were adopted by a company, but it

would be a simple matter to revise it for a law firm. An organization could elect to supplement its statement of style by adding simplified versions of guidelines from this manual.

SURRENDERING AUTONOMY

Perhaps the greatest obstacle to acceptance of this manual or use of a style guide within an organization is that lawyers generally resist efforts to standardize their work. Individual autonomy has long been an integral part of being a lawyer.

In particular, it's commonplace to hear lawyers refer to their own or someone else's drafting "style." The implication is that contract drafting is a craft, with each drafter drawing on a palette of alternative yet equally valid usages.

But that notion is inconsistent with what's required for optimal contract language. (The word "style" in the title of this manual conveys a different meaning and isn't an endorsement of the notion of drafting styles.) The only criterion for judging contract prose is how clear it is. When a drafter has several alternative usages available to accomplish a drafting goal, one will generally be clearer than the others. It would make sense for all drafters to employ only the clearest usages.

Even if those alternative usages are equally clear, having all the members of an organization employ the same usage would eliminate confusion and make

it easier to move blocks of text from one contract to another.

Resistance to standardized contract usages also comes from the difficulty of objectively assessing drafting skills. The delusion that one drafts well is easy to catch and hard to shake, particularly in the absence of proper training, rigorous guidelines, and a critical readership. If more attention has been paid to litigation writing than to the language of contracts, it's likely because litigators write for an outside audience—judges. Unless a problem arises, a contract's only readers might well be the lawyers who drafted and negotiated it and, to a greater or lesser extent, their clients. That's not a critical readership.

Lawyers should consider surrendering autonomy over the building blocks of contract language. The freedom to recycle a grab-bag of usages based on some combination of limited research, uncertain conventional wisdom, and expediency isn't freedom worth preserving. Just as use of standardized, high-quality brick, stone, and steel doesn't prevent architects and builders from being creative, use of standardized contract usages doesn't stifle creativity in articulating the terms of a transaction. In fact, it enhances creativity, because it leaves you more time to focus on substance and makes you more confident that you're being clear and concise.

SPECIALIZATION

As the heft of this manual suggests, acquiring a command of the full range of issues lurking in contract language takes time. That investment certainly pays off, but perhaps not for everyone. Generally, in larger organizations, greater complexity leads to greater specialization—it doesn't make economic sense for everyone in the organization to be a specialist, and not everyone will have the necessary aptitude.

So the realities of the contract-drafting process suggest that for a substantial organization to achieve high quality and maximum efficiency, what's required is not only standardization but also specialization. For an organization with a sufficient volume of contracts requiring some measure of customization, specialization can readily be achieved through document-assembly software. With document assembly, you create contracts not by copying-and-pasting from precedent contracts but by completing an annotated online questionnaire and selecting from among the options offered. The task of drafting the contract language used in a document-assembly system necessarily falls to a limited number of specialists.

Aside from the question of whether an organization is able to achieve the necessary economies of scale to warrant implementing a bespoke document-assembly system, the obstacles to specialization are cultural. They're the same as those that impede standardization, except that specialization involves not just surrendering

autonomy but also, for some, relinquishing any role in contract drafting. For those organizations that are able to shake off the shackles of inertia, the potential rewards are clear.

THE MARKETPLACE OF IDEAS

Much of what is new and improved about this edition is due to reader comments, so I welcome your input. Some of those who've expressed to me how useful they've found previous editions of this manual have prefaced their remarks with, "Although I don't always agree with you . . . ," but they don't go on to explain what they disagree with, and why. If you think I'm mistaken, please let me know, explaining why I'm mistaken. Let's have it out in the marketplace of ideas. May the best ideas win!

COUNTERING PUSHBACK

Anyone contemplating switching from traditional contract language to the approaches recommended in this manual might worry about encountering resistance from senior colleagues, from clients, or from those on the other side of a deal.

That concern is largely unwarranted. If the recommendations in this manual were unduly challenging, it wouldn't be as widely used as it is. (Those recommendations markedly at odds with convention are noted as such.)

Nevertheless, you can expect occasional resistance. Because resistance can lead to fruitless discussion of pointless changes requested by a traditionalist, it makes sense to preempt resistance by alerting those to whom you send a draft contract that it complies with the guidelines in this manual. To do so, you could use the proposed text for an e-mail cover note included in the model statement of style in appendix 2. If your organization has adopted a style guide, adjust the cover note to refer to it.

A NECESSARY INGREDIENT FOR CHANGE

The world of contract drafting has experienced some of the turbulence that has visited the legal profession in recent years. More specifically, information technology now offers alternative ways to compile contract language.

Utopians see potential in crowdsourcing, with individuals collaborating to create contracts that reflect collective wisdom. That notion has died aborning, as contract drafting is different from Wikipedia—it involves greater complexity, and more is at stake.

Others maintain free online repositories of a motley range of contracts, offering enthusiasm but next to nothing in the way of quality control, consistency, customization, or guidance.

Others hawk the snake oil of artificial intelligence with little or no editorial control—let the machines figure out what contract language works best!

Still others offer the mass market, for a fee, business contracts of embarrassingly poor quality. The best that can be said for these products is that they're no worse than much of what one can find for free online.

One feature common to each of these dead-end approaches is a disregard for the consistency and rigor in contract language that comes only with using a manual of style. To be plausible, any venture seeking to replace the traditional copy-and-paste process of contract drafting will have to offer contract language that complies with a manual of style. (In full disclosure, the author of this manual has dipped his toe in these waters with his venture Koncision Contract Automation.)

USE OF THIS MANUAL INTERNATIONALLY

English is used in contracts around the world, and not only in contracts between companies from English-speaking countries. English has become the lingua franca of international business. A Swedish company and a Brazilian company might elect to have any contracts between them be in English, rather than Swedish or Portuguese. And a German company that's part of an international group might prefer that its contracts with other German companies be in English.

Anyone drafting contracts in English can safely use this manual. Contracts drafted in English by lawyers from the United States, the United Kingdom,

Australia, Canada, and elsewhere share the same basic contract concepts and use essentially the same language, although this manual notes some minor differences.

This manual cites caselaw as part of its discussion of some usages. Most of the cited opinions are by federal or state courts in the United States, but some are by English, Canadian, and Australian courts. Because court opinions reveal usages that cause disputes and the ways in which judges can misinterpret contract language, they provide clues as to how drafters can avoid creating confusion. Because the language of contracts in English is so similar the world over, the lessons derived from caselaw are universal—what an Illinois case has to say about, for example, the potential for syntactic ambiguity to give rise to a dispute is as relevant to Australian drafters as it is to drafters in the United States.

This manual doesn't cite court opinions as support for attributing a specific meaning to a particular usage. A principle underlying the recommendations in this manual is that a contract should speak directly to the reader without any need for caselaw to breathe meaning into it (see 1.30).

CULTURAL DIFFERENCES

To generalize broadly, drafters in different parts of the world seem to bring different approaches to bear. Those in the United States are particularly willing to

recycle dense verbiage (for example, see 4.57). English lawyers and judges seem particularly susceptible to improvised and misapplied terms of art (for example, see 3.286 and 8.32–33). Australia has made great progress in weeding out ludicrous usages, but there's room for improvement (for example, see 3.74 and 5.48). And based on the experience of the author of this manual, Canadians are particularly willing to consider what's required to make contracts clearer.

It's reasonable to expect that with continued cross-border transactions, the prose of English-language contracts will become even more consistent the world over, but you can assume that cultural differences will remain.

CHAPTER 1

THE CHARACTERISTICS OF OPTIMAL CONTRACT LANGUAGE

1.1 Form follows function. The limited function of contracts—regulating conduct and stating facts—has implications for the nature of contact language. Treating it as just another form of legal writing can result in serious misconceptions.

1.2 This chapter considers the general characteristics of clear and concise contract language. It identifies principles invoked throughout this manual in analyzing individual usages. Once you start consulting those analyses, you might find it worthwhile to revisit this chapter occasionally, just to remind yourself of the underlying principles. You can apply these principles when considering usages not examined in this manual.

CONTRACT LANGUAGE SHOULD BE CLEAR

1.3 It might seem blindingly obvious that contracts should be clear. But traditional contract language strays from clarity in many different ways that fall into the categories discussed in this section.

Omit Archaisms

1.4 Traditional contract drafting is full of archaic usages. This manual considers many of them—for example, use of *whereas* in recitals (see 2.128).

1.5 Inertia might explain how archaisms survive, but it's also likely that many drafters think, at least subconsciously, that archaisms add gravitas, thereby making it more likely that clients and others will take contracts seriously. But archaisms create distance between the text and the reader—they tell the reader that they're entering into an occult, counterintuitive world. Readers who expect archaisms do so only because they're unaware that there's an alternative. It's hard to imagine that once presented with a contract purged of archaisms, any rational reader would miss them.

1.6 The business world aims to ruthlessly purge whatever is inefficient. The legal profession has been stumbling in that direction too. In that environment, it's quaint that anyone would want to perpetuate archaisms. This manual recommends that you eliminate obvious ones and think hard about borderline cases.

Omit Problematic Terms of Art

1.7 Contract language includes legal terms of art—words and phrases that have a specialized doctrinal meaning. They serve as shorthand for legal concepts, allowing those concepts to be articulated with a minimum of fuss.

1.8 Legal terms of art add complexity, but that can be difficult to avoid. Contracts are as complex as the transactions they embody, and many transactions are highly technical. Expressing that complexity usually requires specialized terminology. Attempting to purge contracts of that terminology can result in contracts that fail to articulate the intended meaning clearly and efficiently.

1.9 For example, it would be awkward to have to do without the term of art *security interest* for purposes of drafting a contract in which a party grants a security interest. Similarly, it likely would be awkward to draft a security agreement without using the noun *perfection* or the verb *perfect*, terms of art relating to security interests.

1.10 But a feature of traditional contract drafting is reliance on three kinds of flawed legal terms of art, namely those that are "misapplied," those that are "improvised," and those that are "top-heavy."

MISAPPLIED TERMS OF ART

1.11 A particularly blinkered form of literal-mindedness has it that a concept doesn't apply to a contract provision if that provision doesn't use terminology explicitly associated with that concept, with the associated terms being co-opted as terms of art.

1.12 For example, traditionalists would have it that a statement of fact can't support an action for misrepresentation unless that statement constitutes a representation, and that it can't constitute a

representation unless it's introduced by the word *represents*. And that a statement of fact that uses the word *represents* can't constitute a warranty and so can't support an action for breach of warranty. (See 3.273–304.)

1.13 But that's not how language works. Instead, whether it would be appropriate to use a particular term of art to describe a provision depends on the meaning conveyed by the provision.

1.14 For example, in a security agreement, why have a party "hypothecate" a security interest? Why not have it simply "grant" the security interest? *Hypothecate* means, in a nutshell, "to pledge without delivery of title and possession." That meaning goes beyond the function required of the verb in language granting a security interest, so it adds useless complexity. And that meaning isn't otherwise necessary, as the security agreement itself will specify what the terms of the security interest are. *Hypothecate* might have value as shorthand for purposes of court opinions or scholarly texts, but that's very different from what's required for purposes of a contract. Using *grant* for purposes of granting language in a security agreement wouldn't prevent that grant from being a hypothecation, assuming that the remainder of the granting language is consistent with that meaning. If it isn't, using *hypothecate* instead wouldn't fix that.

1.15 What characterizes a misapplied term of art is a discrepancy between the meaning conveyed by the term of art and the semantic function required of

it in a contract—a misapplied term of art is a dollar word or phrase doing a nickel's worth of work. That discrepancy creates three problems. First, using the misapplied term of art can create confusion over the semantic function it serves. Second, using the misapplied term can suggest that no other terminology could convey the same meaning. And third, using the misapplied term can suggest that use of the term is by itself sufficient to ensure that the underlying concept applies to the provision in question, regardless of what the provision otherwise says.

1.16 Confusion regarding the verb *indemnify* illustrates the problem with using misapplied terms of art. The verb *indemnify* conveys a meaning beyond the semantic function it serves in a contract: *shall indemnify X* simply means *will be liable to X for*. That discrepancy has resulted in widespread confusion regarding what is required of an indemnifying party (see 13.335).

1.17 Relatively few terms of art are misapplied in this manner. Other examples of misapplied terms of art are *allonge* (see 13.7), *attorn* (see 13.56), and *novation* (see 13.478). But terminology associated with misapplied terms of art—particularly the verbs *represent*, *warrant*, and *indemnify*—is pervasive. And so is the confusion it causes.

IMPROVISED TERMS OF ART

1.18 Misapplied terms of art are what result when doctrinal terminology is shoehorned into

contracts. By contrast, improvised terms of art are what result when lawyers and judges seek to graft doctrinal implications onto terminology that would otherwise be free of them.

1.19 Drafters have long added the phrase *hold harmless* after *indemnify*, presumably for the rhetorical flourish it offers. But many lawyers and some judges haven't been able to resist the urge to claim that *hold harmless* conveys a distinct meaning (see 13.323). Similarly, *best efforts* is a creature of idiom and rhetoric, but many lawyers and some judges ignore that and instead invent unwarranted distinctions in the various flavors of *efforts* provisions (see chapter 8).

1.20 The urge to improvise terms of art arises from the rule of construction that every word in a provision is to be given effect. Applied zealously, that rule requires attributing significance to every stray word or phrase and to every variation in terminology, even if you have to disregard the rhetorical urges that gave rise to them.

TOP-HEAVY TERMS OF ART

1.21 A third category of problematic terms of art consists of those with a meaning that's fairly well established but that's also sufficiently broad, or sufficiently complex, that drafters are quick to use them without fully appreciating the implications. Three examples are *consequential damages* (see 13.105), *coupled with an interest* (see 13.131), and *time is of the essence* (see 13.687). Depending on

the term of art, the result of using a top-heavy term of art might be that the provision in question is held unenforceable, or that it has unanticipated consequences.

REPLACING TERMS OF ART

1.22 Contracts would be clearer if instead of terms of art, real or imagined, falling into the three categories described above, drafters were to use straightforward alternatives.

1.23 Replacing a particular term of art might not be feasible—doing so might prompt too much fruitless debate. The notion of replacing a term of art can seem shockingly novel—for example, using *states* instead of *represents* (see 3.299). You have to weigh the risks of confusion against the transaction costs of change.

1.24 One way of facilitating change would be to use the term of art but also explain what it means. For an example of that, see 13.139–40 regarding the phrase *coupled with an interest*. For another example, see 13.480 regarding the term *novation*.

1.25 Replacing some terms of art would likely pass unnoticed. See, for example, 13.740–41 regarding an alternative to using the verb *warrant*.

1.26 Replacing terms of art not only makes life easier for the reader, it can also help the drafter realize that although terms of art might suggest professionalism, problematic terms of art distract the drafter from articulating the deal effectively.

1.27 If you're contemplating replacing a term of art, first determine whether there's any indication that courts accord significance to use of that term of art, and then factor that into your analysis. This manual discusses some relevant caselaw. In general, U.S. courts don't have a literal-minded approach to terms of art.

Use Standard English

1.28 Eliminating archaisms, magic words, and terms of art goes a long way toward turning traditional contract prose into a specialized version of standard English—the English used by educated native English speakers. That's what you should aim for.

1.29 Standard English has nothing to do with dumbing down contract prose to make it as accessible as documents intended to be read by consumers—a misconceived notion, given that a contract is necessarily as complex as the transaction it embodies. Instead, by using standard English a drafter can articulate a transaction without recourse to usages that interfere gratuitously with the ability of any reader—lawyer or nonlawyer—to understand the contract. To avoid suggesting otherwise, this manual doesn't use the term "plain English," which can be understood, or misunderstood, as applying only to the simplified language required of consumer contracts.

The Myth of "Tested" Contract Language

1.30 Traditionalists resist using standard English in contracts on the grounds that although contract prose could certainly be improved, change would be risky—traditional contract language has been litigated, or "tested," so it has a clearly established, or "settled," meaning, and replacing it with standard English would be rash.

1.31 Here's how one commentator expressed this concept: "[C]areful writing can even be counterproductive if the result is to re-draft language that has been previously interpreted by a court as having a particular meaning. Ironically, in such a case, changing the words—even for the better—can only increase uncertainty." Robert C. Illig, *A Business Lawyer's Bibliography: Books Every Dealmaker Should Read*, J. Legal Educ., 585, 625 (May 2012).

1.32 This excuse for not using standard English in contracts suffers from three fatal weaknesses:

1.33 First, because courts have scrutinized some traditional contract terminology but not the full range of contract usages, the notion of "tested" contract language applies only narrowly.

1.34 Second, the notion of "tested" contract language suggests that all courts ascribe the same set meaning to individual usages. That's not so. How courts interpret usages depends on the circumstances of each case, not to mention the semantic acuity of the judge, and can vary over time and among jurisdictions.

1.35 And third, if parties to a contract had to ask a court to determine the meaning of a particular provision, that's because the contract failed to state clearly the intent of the parties. Why rely on language that created confusion? Instead, express meaning clearly, so you needn't gamble on a court's breathing the desired meaning into the contract.

1.36 Although some lawyers will continue to claim that "tested" contract language is safer than expressing meaning clearly using standard English, it's a lazy platitude that doesn't survive scrutiny. That's why those who invoke "tested" contract language rarely get around to offering arguments to support it.

CONTRACT LANGUAGE SHOULD BE PRECISE

1.37 Traditionalists maintain that traditional contract legalese is precise. It isn't, as the analyses in this manual demonstrate.

1.38 Real precision makes it harder for a disgruntled contract party to claim, or for a judge to find, a meaning that the drafter hadn't intended. Among other things, real precision allows drafters to distinguish between conditions and obligations (see 3.263–68) and to eliminate potentially mischievous alternative meanings associated with and and or (see 11.9–72). The enemy of precision is uncertainty. Chapter 7 discusses the sources of uncertainty.

1.39 It's easy to denigrate precision. "Wordsmithing" is a term that's popular among red-meat-eating deal makers. It refers to minions figuring out, away from negotiations, the language needed to express a deal point. It's also used dismissively of someone whose supposed pedanticism is getting in the way of the deal. Either way, the term "wordsmithing" suggests that once you reach agreement on a deal point, coming up with the wording to express it is a formality.

1.40 Instead, it's routine for nuances in wording to give rise to disputes. That's because the deal is what the contract says it is, not some abstraction—how the drafter articulates a deal provision determines its meaning. Precise contract language should be a priority, not an afterthought.

CONTRACT LANGUAGE SHOULD OMIT REDUNDANCY

1.41 Redundancy is a hallmark of traditional contract legalese, but it's pernicious—it adds unnecessary words and can create confusion. It comes in different forms.

Limit the Use of Strings

1.42 Lawyers have long strung together words, and rare is the contract that doesn't include strings of two, three, or more synonyms or near-synonyms. (Pairs of words are referred to as "couplets" and groups of three are "triplets.")

Some strings, for example *goods and chattels*, presumably reflect that in medieval England the primary language of legal expression gradually shifted from Latin to French to English. Rather than rely on just one language to express a concept, scribes were in the habit of using words from two languages, and sometimes all three.

But because of its rhythmical appeal, lexical doubling has been with us since the dawn of English. And it has been too long entrenched in legal language to be explained by a narrow historical circumstance. Contract drafters continually improvise new strings, such as the requirement, in a share purchase agreement, that Smith *sell, convey, assign, transfer, and deliver* the shares to Jones.

Presumably one attraction of strings is that they add pomp to contract prose. Strings also appeal to the risk-averse in lawyers, allowing them to finesse the often-tricky task of selecting the best word.

But strings are problematic in three respects. First, if one of the words used suffices to express the intended meaning, the others are extraneous—at best, they're simply clogging up the works.

Second, courts routinely invoke the principle that in interpreting legal documents, every word is to be given meaning and nothing is to be treated as superfluous. Consequently, you shouldn't be surprised if a court attributes unanticipated

meaning to an element in a string. This phenomenon is behind litigation over the meaning of the phrase *indemnify and hold harmless* (see 13.325–28).

1.48 third, a drafter might use a string more than once in a contract, with minor but potentially mischievous variations. For example, if one provision refers to *losses, liabilities, damages, and claims* and another to *losses, liabilities, and damages*, a party to a dispute might try to convince a court that omission of *claims* from the second string is significant.

1.49 can safely prune many traditional synonym strings, as the extra words are surplusage. This manual considers a number of such strings, including *books and records* (see 13.76) and *costs and expenses* (see 13.127).

1.50 ’t rely on strings incorporating overly subtle distinctions if you can express the intended meaning more clearly using a different approach. For example, see 13.18 regarding devising clearer alternatives to *arising out of or relating to*.

1.51 for improvised strings, consider the example mentioned in 1.44—a requirement in a share purchase agreement that Smith *sell, convey, assign, transfer, and deliver* the shares to Jones. Just as *purchase* would be adequate to reflect the transaction from the perspective of Jones, Smith can simply sell the shares. *Convey*, *assign*, and *transfer* reflect concepts that are implicit in a sale. Address

in a section on closing procedures whatever *deliver* covers.

1.52 Similarly, instead of saying that Acme *grants, assigns, conveys, mortgages, pledges, hypothecates, and transfers* a security interest, saying just *grants* should be sufficient. But instead of picking one of the words in a string, consider whether an alternative approach would allow you to convey the intended meaning more clearly. Compare the string in italics in the first example below with the language in italics in the second example:

. . . except that the Employee may transfer the Employee's rights under this agreement to the Employee's *personal or legal representatives, executors, administrators, heirs, distributees, devisees, and legatees.*

. . . except that the Employee's rights under this agreement may be transferred *by will or intestate succession.*

1.53 Nevertheless, strings are sometimes necessary to ensure that a provision covers the universe of possibilities. For example, a seller might state in a share purchase agreement that the shares are free of any *lien, community property interest, equitable interest, option, pledge, security interest, or right of first refusal*. This string might include some redundancy, but don't eliminate every element except, say, *lien* unless you're confident that *lien* covers the other terms.

5.54 Consider every component of a synonym string to determine whether it conveys a meaning that is distinct, and helpfully so, from the meaning of each other component. If you use a string more than once, use identical wording each time or replace it with a defined term (see 6.2).

Reject Needless Elaboration

5.55 Contract provisions often refer not only to a general term but also to its constituent components, even though the scope of the general term is clear. This manual uses the phrase "needless elaboration" to describe this phenomenon. It's equivalent to saying "I don't eat fish, whether freshwater or saltwater," instead of just saying "I don't eat fish," which conveys the same meaning.

5.56 A contract example of needless elaboration is stating that a party is releasing *all claims whether at law or in equity*. Saying instead *all claims* would be just as comprehensive and would use fewer words. (Besides, for purposes of U.S. law, such references have a musty air to them, as most states have abolished the distinction between actions at law and suits in equity.)

5.57 Needless elaboration sometimes occurs when a provision lists elements of the general term before the general term, as in *all taxes imposed by any federal, state, or local governmental body*. Referring simply to any *governmental body* would be not only more concise but also more comprehensive, in that a jurisdiction might have a

level of government better described by a term other than *federal*, *state*, or *local*.

1.58 Needless elaboration also occurs when drafters use a general term and list examples of items that obviously fall within that general term, with the list either coming after the general term (and usually introduced by *including*) or coming before the general term. For a discussion of the confusion that can cause, see 13.264–90.

CONTRACT LANGUAGE SHOULDN'T EXPLAIN, TELL A STORY, OR PERSUADE

1.59 Because contracts serve only to regulate conduct and state facts, drafters should be cautious about using words associated primarily with expository, narrative, and persuasive prose—words such as *therefore*, *because* (see 13.73), and *furthermore*.

1.60 Don't add rhetorical emphasis to provisions that already express the desired meaning. In the following examples, the strikethrough text represents the drafter's way of saying "and we really mean it!" Such language adds unnecessary words, doesn't affect meaning, and quickly becomes grating.

No Lender has any right of action ~~whatsoever~~ against the Administrative Agent.

No benefit payable under the Plan is subject ~~in any manner whatsoever~~ to alienation, sale, transfer,

assignment, pledge, attachment, or encumbrance ~~of any kind.~~

The Consultant is ~~wholly and fully~~ responsible for any taxes owed to any governmental authority with respect to any fees the Company pays the Consultant under section 4.

The Company guarantees payment of the Guaranteed Obligations ~~strictly~~ in accordance with the terms of this agreement and the Notes.

Each Contributor makes the following representations, each ~~and every one~~ of which is accurate as of the date of this agreement and will be accurate as of the Closing Date.

This agreement is ~~in all respects~~ governed by Minnesota law.

The Depositary will ~~under no circumstances~~ [read *not*] be liable for any incidental, indirect, special, consequential, or punitive damages.

The Escrow Agent will ~~at no time~~ [read *not*] acquire any ownership interest in the Offering Proceeds.

This agreement will become effective ~~if and~~ only if Acme issues the Shares before the Termination Date.

16.61 Drafters also shouldn't use typography for rhetorical emphasis (see 16.37).

CONTRACT LANGUAGE SHOULD OMIT REPETITION

1.62 A drafter should never say the same thing twice in a contract, whether it's a party's address (see 2.69), a number (see 14.1–10), or anything else. Repetition not only adds unnecessary words, it also invites dispute. Redundancy (see 1.41) is different from repetition, in that redundancy involves surplusage in saying something as opposed to saying something twice.

CONTRACT LANGUAGE SHOULD EMPLOY USAGES CONSISTENTLY

1.63 Usages should be consistent, to avoid having unintended meaning attributed to inconsistent usages.

1.64 Within a contract, don't use the same word or phrase to convey different meanings—that might create confusion as to which meaning you intend in any one context. In traditional drafting, the word most abused in that regard is *shall*; see 3.54. And don't use two or more different words or phrases to convey the same meaning: readers, and judges, might assume that differences in wording are intended to convey differences in meaning.

1.65 Any organization would benefit if all its contracts were to draw from the same set of usages—ideally, the consistency in language and layout of a company's or a law firm's contracts would make it impossible to determine which individual had drafted what.

See the introduction for advice on how to overcome obstacles to consistency and how to use this manual (or a style guide based on it) to achieve consistency.

CHAPTER 2

THE FRONT OF THE CONTRACT

2.1 It's standard for a contract to consist of the front of the contract, the body of the contract—what the parties are agreeing to—and the back of the contract. The front consists of the title, the introductory clause, any recitals, and the lead-in. In longer contracts, it might include one or more of a cover sheet, a table of contents, and an index of definitions. (Regarding "frontloading"—the practice of pulling selected provisions out of the body of a commercial contract and placing them at the top of the contract—see 4.78.)

THE TITLE

2.2 The title of a contract is generally placed at the top center of the first page, in all capital letters (see sample 1). (If design considerations are important, you could use instead or in addition another form of emphasis, or use a different typeface or point size; see 16.64.) The title should simply state, without a definite or indefinite article, the kind of agreement involved, as in *EMPLOYMENT AGREEMENT* and *OPTION AGREEMENT*. Don't include party names in the title.

2.3 Be concise. Don't use a title that looks at a transaction from different perspectives. For example, don't use as a title *AGREEMENT OF PURCHASE AND SALE*—every purchase necessarily entails a sale, so say either *PURCHASE AGREEMENT* or *SALE AGREEMENT* (omitting the unnecessary *of* in the process). Which you opt for would presumably be a function of which side you represent.

2.4 But don't be too concise. Giving a contract the title *PURCHASE AGREEMENT* leaves the reader wondering what's being sold. Consider using a more informative title, such as *ASSET PURCHASE AGREEMENT* or *SECURITIES PURCHASE AGREEMENT*. Don't use just *AGREEMENT* unless you really can't come up with a more informative title, perhaps because the contract is unusual or because the deal consists of a grab bag of different elements.

2.5 Don't use jargon in the title. As the title for an agreement between shareholders, *BUY-SELL AGREEMENT* is not only repetitive in the manner described in 2.3 but also uninformative. Use instead *SHAREHOLDERS AGREEMENT* or some variation. (Regarding the title to use for an agreement between shareholders, see 13.598.)

2.6 If you can give a contract a standard title, do so—contract drafting doesn't prize variety for its own sake.

2.7 Don't feel that you have to track the terminology of state statutes. For example, statutes in Delaware, Nevada, New York, and some other states use the term "plan of merger," meaning essentially a document that states the terms of a merger. As a result, it's commonplace for drafters to give merger agreements a title that includes, in some manner, the phrase "plan of merger." But if you were to file in Delaware a certificate of merger that is accompanied by, or refers to, a merger agreement bearing the title *MERGER AGREEMENT* rather than the more cumbersome *AGREEMENT AND PLAN OF MERGER,* the office of the Delaware secretary of state wouldn't reject the certificate of merger for using improper terminology—they're sensibly of the view that if a merger agreement contains the information that the statute requires of a plan of merger, the title is irrelevant. The same applies to articles of merger filed in Nevada and a certificate of merger filed in New York, and it's likely that other states are equally sensible.

2.8 Similarly, don't let use of the term "plan of exchange" in state statutes governing share exchanges dissuade you from using the title *SHARE EXCHANGE AGREEMENT* rather than *SHARE EXCHANGE AGREEMENT AND PLAN OF EXCHANGE* or some such.

2.9 Most contracts use the word *agreement* in the title rather than *contract*, perhaps because *agreement* sounds more genteel than does *contract*, with its two /k/ sounds. Nevertheless, *contract* is

unobjectionable. The word *agreement* has a broader meaning than does the word *contract*, in that *agreement* can refer to an informal arrangement, but it's clear that's not the intended meaning when *agreement* is used in the title of a contract.

2.10 Some contracts use something other than *agreement* or *contract* in the title. A lease is a kind of contract. So is an insurance policy. And by tradition, contracts stating the terms of bonds, debentures, or trusts often use the term *indenture* (see *13.338*).

2.11 If a company routinely enters into a particular kind of contract, it might want to supplement the title, for example by adding additional information in parentheses immediately below the title. For example, it might be helpful to specify beneath the title *TRADEMARK LICENSE AGREEMENT* which mark is being licensed, and in which territory. (Alternatively, such information could be frontloaded; see 4.78.)

2.12 Regarding the title to give amendments or amended and restated contracts, see 18.5.

THE INTRODUCTORY CLAUSE

2.13 After the title comes the introductory clause, which states the type of agreement involved, perhaps the date of the agreement (depending on the circumstances), and the parties to the agreement (see sample 1).

SAMPLE 1 ■ TITLE AND INTRODUCTORY CLAUSE

ASSET PURCHASE AGREEMENT

This asset purchase agreement is dated November 19, 2012, and is between HASTINGS WASTE MANAGEMENT, INC., a Delaware corporation ("**Hastings**"), JORVIK RECYCLING SYSTEMS, LTD., a New York corporation ("**Hastings Sub 1**"), ROGER HASTINGS, an individual ("**Mr. Hastings**"; together with Hastings and Hastings Sub 1, the "**Hastings Parties**"), and JARROW HOLDINGS LLC, a Delaware limited liability company ("**Jarrow**").

"Know All Men by These Presents"

2.14 Occasionally the introductory clause is itself introduced by the egregiously archaic *know all men by these presents*, usually in all capitals. It's a stodgy translation of the Latinism *noverint universi*, meaning "know all persons." It means, in effect, "take notice," and as such it serves no purpose other than to mark the drafter as someone in thrall to the archaic.

Format

2.15 The introductory clause in sample 1 is formatted as a single paragraph; that's the general practice in the United States.

2.16 The elements of the introductory clause could instead be broken up, or "tabulated," so that each stands by itself. (Regarding tabulation of enumerated clauses, see 4.34.) In England and other Commonwealth nations, the preference is for tabulating the introductory clause, with some drafters also giving headings, such as *DATE* and *PARTIES*, to the different components. (That's consistent with the approach to document design for contracts in those countries; see 4.59.) This manual

doesn't recommend tabulating the introductory clause, as doing so results in the introductory clause taking up more space without making it appreciably easier to read. Also, this manual is of the view that complete sentences are easier to read than sentence fragments.

Reference to the Type of Agreement

2.17 Begin the introductory clause with *This*, then refer again to the type of agreement involved by repeating the title. Using instead just *agreement* would be unobjectionable, but this manual recommends that you use the full reference, so it appears once in the text of the contract; thereafter, use just *this agreement* (see 2.110). And beginning the introductory clause with *This* helps make it a complete sentence, so it's easier to read than would otherwise be the case.

2.18 Use all lowercase letters for the introductory clause's reference to the type of agreement. It would be distracting to emphasize it with all capital letters, as the title, which occurs immediately above, is in all capital letters (see 2.2). Don't use initial capitals in this reference or any other reference to a particular contract, wherever in a contract that reference is located: a reference to a contract shouldn't be treated like the title of a book or movie. The words *merger agreement* in a reference to "the merger agreement dated October 22, 2012, between Acme and Dynaco" are no more deserving of initial capitals than is the word

letter in "Here's the letter that Aunt Mildred sent me."

2.119 Initial capitals would be appropriate if the reference to an agreement were a defined term—if, for example, "the merger agreement dated October 22, 2012, between Acme and Dynaco" were given the defined term *the Merger Agreement*. But the introductory-clause reference to the type of agreement involved isn't a defined term. (And it shouldn't be the definition of a defined term either; see 2.110.)

What Verb to Use

2.120 To be a sentence, the introductory clause needs a verb. Use *is dated*, as it's simpler and clearer than *is made* and *is entered into* and the couplet *is made and entered into.* (Regarding couplets, see 1.42.)

Date

WHETHER TO INCLUDE

2.121 Date a contract by stating the date in the introductory clause or by providing for those signing the contract to date their signatures. If signatures are to be dated, have the contract state that it will be effective when the last party signs (see 5.5–7).

2.122 Stating the date in the introductory clause is the more usual way of dating a contract, but dating the signatures makes sense in three contexts.

2.23 First, although it's commonplace for one or more parties to sign a contract on a date other than the date stated in the introductory clause (see 2.31), that could be confusing if the discrepancy were more than a few days (see 2.34).

2.24 Second, for compliance purposes a company might decide to use dated signatures in some or all of its contracts to preclude use of an introductory-clause date that is other than the date the last party signed. For example, a company or its outside auditors might require that all the company's sales contracts include dated signatures, the aim being to ensure that revenue is recognized in the appropriate quarter. Of course, someone signing a contract could intentionally use an incorrect date when stating the date of his or her signature, but that would likely be riskier than disingenuously relying on a misleading date in the introductory clause.

2.25 And third, if your contracts are signed electronically (see 5.57), each signature would automatically be dated.

2.26 Don't include a date in the introductory clause *and* date the signatures: providing for two ways to date a contract would be to invite inconsistency and confusion. If you date the signatures but appreciate the ease of having a date to refer to on the first page of the contract, you might want to consider stamping at the top of the contract the date that's the date of the agreement. An alternative would be to place the signature blocks on the first page (see 4.83).

2.27 If you provide for dated signatures, you could conceivably allude to that in the introductory clause. But doing so in a way that articulates clearly the significance of signature dates would clog up the introductory clause. Instead, address in the boilerplate the implications of signature dates (see 5.6).

FUNCTION

2.28 The date stated in the introductory clause is presumed to be the date that the parties signed it, and by extension it's the date that the contract is effective, unless evidence ultimately indicates otherwise. Nothing is gained by defining the date in the introductory clause as *the Effective Date*—it's simpler to refer throughout the contract to *the date of this agreement*. (See also 2.39.)

FORMAT

2.29 To state dates, use whichever format seems most appropriate, the month-day-year format (*October 28, 2012*), which is the usage in the United States, or the day-month-year format (*28 October 2012*), which is the usage of other English-speaking countries and most European languages. (Because this manual is published by an American organization, this manual uses the month-day-year format to state dates.)

2.30 Don't use the format *this 24th day of October*, *2012*, which is archaic and long-winded. Don't use two digits to state the day component of a date, as in *November 01, 2012*. And don't use purely

numerical dates, as in *10/28/12*, as they're not appropriate in formal writing and can cause confusion, given the different international conventions for expressing dates numerically.

DIFFERENT FROM DATE OF SIGNING DUE TO SIGNING LOGISTICS

2.31 The introductory-clause date is notionally the date that the contract was actually signed by the parties, but often one or more parties sign the contract before or after that date.

2.32 This timing discrepancy is often due to logistics. For example, if the closing date for a transaction slips by a day or two from the scheduled date, the parties might agree that it's not worth changing the date in each of the deal documents, or that it wouldn't be feasible to do so. And a party to a contract might not get around to signing it until a day or two after the date in the introductory clause, or might find it more convenient to sign it a day or two before the date in the introductory clause.

2.33 The conventional way of reflecting that one or more parties signed a contract on a date other than the date stated in the introductory clause is to make the introductory-clause date an *as of* date. But this manual doesn't recommend that practice, as it's simply a loose professional courtesy. Drafters observe it haphazardly, in that some always use *as of* dates, regardless of when the contract is being signed, and others never use them. If the date a contract was actually signed were to become an

issue, it's unlikely that using or failing to use an *as of* date would be dispositive. Because using *as of* serves no useful purpose, omitting it would remove unnecessary words and a potential source of confusion.

2.34 If it appears that it might take more than a few days for all the parties to sign a contract, don't include a date in the introductory clause. Instead, have the parties date their signatures (see 5.5–7). Using as the date in the introductory clause the date that the contract was distributed or the date the first party signed it would be misleading, as the contract wouldn't be effective until it had been signed by all the parties. You could conceivably use a blank date in the introductory clause, with the idea of filling it in once all the parties had signed, but that would invite confusion.

DIFFERENT FROM DATE OF SIGNING DUE TO TIMING OF PERFORMANCE

2.35 The traditional conventions for addressing a discrepancy between the date of signing and the timing of performance are problematic.

2.36 Drafters sometimes use in the introductory clause a date other than the date of signing if the contract provides for an arrangement that won't come into effect until sometime after the date of signing. For example, Acme and Jones might sign Jones's employment agreement on March 1 even though Jones won't start working for Acme until two months later, on May 1. A drafter might address

this by using Jones's start date as the date in the introductory clause, in addition to or instead of the date of signing. To signal that it's not the date of signing, a drafter might refer to that date as an *as of* date (see 2.33) or as *the effective date* (see 2.28) or might use the phrase *dated for reference* or *dated for reference purposes only* (primarily Canadian usages).

2.37 To capture past performance, drafters sometimes use in the introductory clause a date earlier than the date of signing, in addition to or instead of the date of signing. For example, in commercial contexts it's commonplace for the parties to reach an informal oral or written understanding on the terms, then start the process of reflecting those terms in a contract. Due to deal complexity or need for approvals, that process can be protracted, leading the parties to agree that one or both sides will start performing before the contract has been signed. Once it has been signed, the parties might use in the introductory clause the date performance started or some earlier date, so as to paper over the fact that performance had occurred without a contract. To indicate that the date used in the introductory clause isn't the date of signing, a drafter might use one of the signals noted in 2.36.

2.38 Using in the introductory clause a date in the future to reflect delayed performance or a date in the past to encompass precontract performance or other circumstances would be misleading, as the contract would in fact come into existence once the

parties had signed it (see 2.28). Such dating also obscures the actual time frame of the transaction.

2.39 In such situations, it would be clearer to use instead in the introductory clause the date of signing and to address other timing considerations wherever makes most sense.

2.40 For example, on February 15 Acme and Widgetco propose entering into a contract that provides for Acme to pay royalties to Widgetco based on annual sales, and the arrangement is that Acme will pay royalties for that year based on sales for the entire year, not just from February 15. The drafter might be tempted to use January 1 of that year as the date in introductory clause, using the signals described in 2.36 to convey that it's not the date of signing. It would be clearer instead to use in the introductory clause the date of signing and state in the provisions governing royalties that the first year's royalties are based on sales for the entire year.

2.41 With respect to precontract performance, note it in the recitals, address in the payment provisions any payment required for precontract performance, and state somewhere in the body of the contract that precontract performance is governed by the contract. The date the parties reached an informal understanding on the terms might be important, but that's different from the date the parties entered into a contract. If stating clearly what actually happened presents a problem, something is amiss.

2.42 It's clearer not to use the term *effective date* for the start date of performance, as a contract is effective when it has been signed by all the parties. Consider using instead a term such as *start date*.

2.43 Administrative convenience isn't sufficient reason to impose a phony timeline on a contract. If for recordkeeping purposes the date a contract was entered into is less significant than some other date, you could make that other date more conspicuous by stamping it at the top of the signed contract.

BROADER IMPLICATIONS

2.44 The date given a contract can have legal implications beyond the parties' rights and obligations under that contract. It can affect a company's tax exposure, someone's rights under another contract, or any number of other matters. Playing games with the date of a contract—including by means of a date in the introductory clause—can give rise to civil or criminal liability.

2.45 Furthermore, attempting to give retroactive effect to a contract, including by using in the introductory clause a date earlier than the date of signing, can create problems if the contract is part of a series of transactions. Consider the following circumstances: Bank makes a loan to Acme, then Bank transfers the loan to Investor A. Three months later, Bank transfers the same loan to Investor B. Six months after that, Investor A transfers the loan back to Bank, effective retroactively to a date before

Bank's transfer to Investor B. If Investor B sues Acme for payment of the loan, Acme might argue that Investor B never acquired an interest in the loan, and the court might accept that argument. See *FH Partners*, *LLC v. Complete Home Concepts*, *Inc.*, No. WD 74653, 2012 WL 4074530 (Mo. Ct. App. Sept. 18, 2012).

"Between" Versus "Among"

1.46 In all cases, use *between* as the preposition in the introductory clause rather than *among* or a silly couplet (see 1.42) such as *by and between*.

1.47 It's commonly held that whereas one speaks of a contract *between* two parties, the correct preposition to use in the case of a contract involving more than two parties is *among*. But according to *The Oxford English Dictionary*, it's not only permissible but actually preferable to use *between* rather than *among* with more than two parties. That the pointless distinction between *between* and *among* is generally accepted is a good indication of the state of traditional contract language.

1.48 That said, whether you use *between* or *among* has no effect on meaning or readability, so it would be unhelpful to make an issue of it. Use *between* in your drafts. If a traditionalist insists on *among* because there are more than two parties, agreeing to make that change would be a painless concession. If the other side presents you with a draft that uses *among*, asking that it be changed to *between* would likely antagonize them.

Identifying the Parties

2.49 In the introductory clause, identify each individual who is a party by his or her full name, and identify each legal-entity party by the full name under which it was registered in its jurisdiction of organization. Include the designation of the form of entity (*Inc.*, *LLC*, *B.V.*, *GmbH*, or other). If it would help to avoid confusion, refer also to any other name by which a party is known or was previously known.

2.50 Stating party names in all capitals helps them stand out. All capitals are harder to read (see 16.22), but that's not an issue when it's used for only a few words. Using all capitals would mask use of medial capitals—that is, use of one or more inner uppercase letters not preceded by a space, with the first letter either uppercase (as in "HarperCollins") or lower case (as in "iPod"). Branding is low on the list of functions served by a contract, but if showing medial capitals in the introductory clause is important to you or a client, don't use all capitals for party names in the introductory clause.

2.51 Don't enumerate the parties—it serves no purpose.

2.52 When describing a party in the introductory clause, don't tack on *including its affiliates and direct and indirect subsidiaries* or comparable language. Because affiliates and subsidiaries aren't party to the contract and so wouldn't be bound by any of its provisions, including them in the introductory clause would create confusion.

2.53 For purposes of a template contract that's used repeatedly with little or no customization, you could replace one or more party names by referring in the introductory clause to *the other party* [or *the parties*] *named in the signature blocks below*. But such economy comes at the expense of readability.

The Order of the Parties

2.54 In at least some kinds of contracts in which the parties play traditional, clearly defined roles, one can identify loose conventions for the order in which you place the parties in the introductory clause. For example, in most one-way confidentiality agreements the disclosing party comes before the recipient; in credit agreements, the debtor almost always comes before the one or more lenders; and in mergers-and-acquisitions contracts, the seller usually comes before the buyer. Because such conventions give rise to reader expectations, it's best to abide by them.

Having a Parent Company Enter into a Contract on Behalf of an Affiliate

2.55 It's commonplace that a member of a group of affiliated business organizations wants to enter into a contract with a supplier or licensor "on behalf of" itself and other members of the corporate group. Such an arrangement would facilitate standardization throughout the group and enhance the group's buying power while limiting transaction costs.

2.56 From the perspective of the supplier or licensor, such an arrangement would be problematic, in that the other members of the corporate group would be third-party beneficiaries but wouldn't have any obligations under the contract, as they wouldn't be party to it.

2.57 Various alternatives present themselves:

- The supplier or licensor could enter into a contract with each member of the corporate group.
- The member of the corporate group could act as guarantor of the other members.
- The member of the corporate group could act as agent for the other members.
- The member of the corporate group could act as sublicensor to the other members.
- The member of the corporate group and the supplier or licensor could enter into a master agreement, with other members submitting individual statements of work under the master agreement (see 4.85).
- The supplier or licensor could permit the member of the corporate group to extend the benefit of its contract with the supplier or licensor to another member if the supplier or licensor receives a written undertaking from the other member that names the supplier or licensor as a third-party beneficiary and states that the other member will comply with the contract with the supplier or licensor as if it were party to it.

2.58 Which arrangement would work best would depend on the context.

Parties with a Limited Role

2.59 A party can be party to a contract with respect to only certain provisions. For example, in an acquisition, the buyer's parent might be party to the acquisition agreement solely to guarantee the buyer's obligations or solely to undertake to pay a termination fee. It can be helpful to reflect a party's limited role by stating in the introductory clause before the party's name, between offsetting commas, *with respect to only* [*specified provisions*]. It makes sense to put a party with a limited role last in the introductory clause.

2.60 Neglecting to highlight that a party has a limited role might not have any repercussions, as that party's role will be whatever the contract says it is. But doing so makes the matter clear to the parties without requiring them to have read the entire contract. Furthermore, a party with a limited role might unexpectedly become ensnared in a provision that wasn't intended to apply to that party but arguably does anyway, because it refers generically to "a party" or "the parties." Flagging a party's limited role could help avoid such confusion.

2.61 A party with a limited role would likely also be subject to one or more boilerplate provisions addressing governing law, notices, and related matters, whether or not they're included in the provisions specified as constituting that party's limited role.

2.62 If you highlight in the introductory clause a party's limited role, do so as well in that party's signature block (see 5.36).

Referring to Lists of Parties

2.63 The parties to a contract might be sufficiently numerous that it would be impractical to list them in the introductory clause. That's often the case with loan agreements and securities purchase agreements.

2.64 In the case of a loan agreement, one alternative would be to refer to the lenders as follows in the introductory clause: *the financial institutions listed as Lenders on the signature pages of this agreement*. That would serve to distinguish the lenders from the other parties whose names appear on the signature pages.

2.65 Another alternative would be to refer to the lenders as *the financial institutions listed on schedule A*. That would be preferable if in addition to identifying the parties in question you want to provide information about the parties that would be out of place on the signature pages, such as addresses and other contact information. Because the list in question would be on a schedule, you wouldn't need to refer to the parties in question as being *listed as Lenders*.

Describing the Parties

CORE INFORMATION

2.66 For purposes of the introductory clause, after the name of each legal-entity party, state its jurisdiction of organization and what kind of entity it is. Be concise: use, for example, *a Delaware corporation* rather than *a corporation organized and existing under the laws of the state of Delaware*.

2.67 After the name of each party that's an individual, state that he or she is an individual—*John Doe*, *an individual*.

2.68 Distinguish a U.S. legal-entity party from any other entity bearing the same name by including its jurisdiction of organization in the introductory clause. Stating its address too would serve only to clutter up the introductory clause. If the parties need to know each other's addresses for purposes of sending notices, the notices provision would be the place to state them.

2.69 In contrast to legal-entity parties, the simplest way to distinguish a party that's an individual from any other individual bearing the same name would be to state that party's address in the introductory clause. (In doing so, write out in full the name of any U.S. state rather than using a U.S. Postal Service abbreviation, but include the ZIP code.) But if the contract contains a notices provision, omit that party's address from the introductory clause and instead state it in the notices provision, along with the other party addresses. It's convenient to put all the addresses in one place, and stating a party's address twice in a contract adds

unnecessary words and invites inconsistency (see 1.62).

2.70 In many jurisdictions outside the United States, a legal entity is given a registration number at formation. If having that number would make it easier to determine the history and status of an entity, include the number in the introductory clause. By contrast, the address of a party's registered office would, like any other entity address, be superfluous in the introductory clause. In some jurisdictions outside the United States it might be mandatory to include additional information, for example a tax identification number.

2.71 If a party is serving some administrative function or is otherwise acting on behalf of one or more individuals or entities, indicate that in the introductory clause:

ACME BANK, N.A., as collateral agent for the Secured Parties (in that capacity, the "Collateral Agent")

JOHN DOE, as Shareholders' Representative

2.72 Any party that's wearing two hats in a transaction should be mentioned twice in the introductory clause, once in each capacity:

ACME CAPITAL CORPORATION (in its individual capacity and not as Administrative Agent, "Acme Capital")

ACME CAPITAL CORPORATION, as administrative agent for the Lenders (in that capacity, the "Administrative Agent")

2.73 It's redundant to use the word *solely* to emphasize that a party is acting only in a specified capacity.

PERFORMANCE BY A DIVISION

2.74 If a company's performance under a contract will be handled by a division of that company, you should make that clear. You could do so in the recitals, or you could do so in the introductory clause by supplementing the core information for that party: *ACME CORPORATION, a Delaware corporation acting through its Widgets division ("Acme")*. Because the defined-term parenthetical comes just after the reference to the division, a reader might assume that the defined term relates only to the division, not the company. But in the context, that would be an unlikely reading. Using the name of the company, not the division, in the signature block for that party would eliminate any possibility of confusion (see 5.24).

2.75 Don't make the division itself party to the contract—a division lacks the capacity to enter into a legally enforceable contract, so the company might subsequently claim that the contract isn't enforceable. And don't say that the company *is represented by* the division, as that phrase is generally used to refer to an individual or entity acting on someone's behalf.

INCIDENTAL INFORMATION

2.76 Consider the following introductory clause:

This merger agreement is dated January 18, 2013, and is between DARIUS TECHNOLOGIES, INC., a California corporation ("**Parent**"), SWORDFISH ACQUISITION, INC., a California corporation ~~and a wholly owned subsidiary of parent~~ ("**Sub**"), TROMBONE SOFTWARE, INC., a Delaware corporation ("**Target**"), ~~and the stockholders of Target, namely~~ ALAN ALPHA, an individual ("**Alpha**"), BRUCE BRAVO, an individual ("**Bravo**"), and CLARENCE CHARLIE, an individual ("**Charlie**"; together with Alpha and Bravo, the "**Stockholders**").

2.77 The strikethrough text constitutes incidental information. Don't include in the introductory clause incidental information, such as information regarding relationships among the parties and what role a party has in the transaction, as doing so clutters up the introductory clause. All such information belongs in the recitals, where it would be more accessible to the reader.

2.78 Again in the example in 2.76, using common nouns as defined terms for party names (see 2.91–97) and using defined terms to refer to parties collectively (see 2.101) can convey the essence of what otherwise might have been included in the introductory clause as incidental information.

EXTRANEOUS INFORMATION

2.79 Each of the following assertions is extraneous and shouldn't be included in the introductory clause:

that a party is represented by a duly authorized representative	address this instead in a statement of fact (but see 5.27)
that a party is duly organized and validly existing	address this instead in a statement of fact
that the agreement states the binding agreement of the parties	omit—the lead-in serves to indicate that the parties are agreeing to what's in the contract (see 2.145)

2.80 Generally, no purpose is served by stating, in the introductory clause or elsewhere, that the parties intend to be legally bound. The approach under U.S. law is summarized by section 21 of the *Restatement (Second) of Contracts*, which says, "Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract." Instead, formation of a contract requires an intentional act manifesting assent. But see 2.156 regarding the function under Pennsylvania law of a statement of intent to be legally bound.

2.81 By contrast, in England and in most civil-law countries, the existence of a contract depends, at least in theory, on the parties' intent to be bound. But under English law, a presumption applies that if a commercial agreement satisfies the other elements of a contract, the parties intended to be legally bound. See, e.g., *Edwards v. Skyways* [1964] 1 All ER 494.

2.82 As a practical matter, disputes regarding whether a party intended to be legally bound are comparable to disputes regarding whether for purposes of U.S. law the parties had actually entered into a contract. In both kinds of dispute, informal communications feature prominently. By contrast, it would be ludicrous to argue that someone who entered into a contract articulating the complete terms of a commercial relationship might not have been aware that the contract was legally binding. So unless a quirk of governing law makes it necessary or advantageous to do so, don't include in a contract a statement that the parties intend to be legally bound by the contract.

Defined Terms for Party Names

2.83 Defined terms are discussed in chapter 6, but guidelines regarding their use in the introductory clause are discussed in 2.84–114.

CREATING AND USING A DEFINED TERM FOR A PARTY NAME

2.84 Use throughout a contract a short name for each party instead of repeating its full name. Make

that short name a defined term and define it in the introductory clause, even if not defining it wouldn't present any risk of confusion.

2.85 There are instances, the short name is defined elsewhere in the contract. For example, in contracts that have as a party someone acting as shareholders' representative, some drafters use the defined term *Shareholders' Representative* in the introductory clause (see the second bullet point in 2.71) and define it elsewhere. That's not particularly problematic, but it's not necessary either.

2.86 To create a defined term for a party name, use an integrated definition, with the defined term being stated in parentheses after the party name (see 6.40). The defined term, excluding *the*, if it's used (see 2.98), should be in quotation marks and in bold for emphasis; don't bold the quotation marks. (This manual follows that convention for purposes of the samples and the indented examples of contract text, but in examples incorporated in regular paragraphs any terms being defined aren't stated in bold, to avoid distracting the reader.) Don't include introductory text in the parentheses, such as *hereinafter referred to as*—it's unnecessary. (Regarding conventions for defining terms, see chapter 6.)

2.87 When creating a defined term for the name of an entity, place the defined-term parentheses after the jurisdiction reference (see 2.66): *Excelsior Corporation, a Delaware corporation ("Excelsior")*. In an integrated definition, the term

being defined should follow the definition (see 6.41). That suggests that the parenthetical should come after *Excelsior Corporation*, but it seems appropriate to place the defined-term parenthetical after *a Delaware corporation*. That's because *Excelsior Corporation* and *a Delaware corporation* are both noun phrases referring to the same thing. And placing it there presents an advantage: if when creating the defined term for a party name you take the opportunity to create additional defined terms within the same set of parentheses (if, in other words, you "stack" two or more definitions; see 6.57), placing the parentheses after the party name would make the jurisdiction reference seem like an awkward afterthought (see sample 1).

2.88 as it would be a mistake to tack on *including its affiliates and direct and indirect subsidiaries* or similar language when describing a party, as the affiliates and subsidiaries aren't party to the contract (see 2.52), it would be a mistake to add such language to the defined-term parenthetical—*(including its affiliates and subsidiaries, "Acme")*.

2.89 Don't state in a defined-term parenthetical that the defined term includes that party's successors. (One often sees this with parties acting on someone's behalf; see 2.71.) The contract provisions governing succession should make it clear that any successor would step into the shoes of the predecessor.

2.90 Don't use all capitals or some other form of emphasis for party-name defined terms throughout a contract—it's pointless and distracting.

THE TWO KINDS OF DEFINED TERM FOR A PARTY NAME

2.91 When selecting the defined term for a party name, you have a choice between basing it on the party's name (see 2.93–95) or using a common noun such as *the Company* or *the Shareholder* (see 2.97). Generally, defined terms based on party names make a contract slightly more accessible to the reader. But common nouns work well in the following situations:

- if the parties play traditional, clearly defined roles, such as lender and borrower, or landlord and tenant
- if the contract focuses on a single entity, as is the case with a limited-liability-company operating agreement or a shareholders agreement
- if the identity of the signatories is not yet known

2.92 In some situations it makes sense to use a mix of the two approaches. For example, if a company uses a template software license agreement repeatedly, it would make sense, in terms of readability and corporate identity, to use in the template as the defined term for the company a defined term based on the company's name. But the party on the other side of the transaction would change with each transaction, so it would make

sense to use as the defined term for the other party a common noun such as *the Licensee*.

USING DEFINED TERMS BASED ON PARTY NAMES

2.93 If a party is an individual, you could use a defined term based on that individual's last name or, if the contract refers to two or more individuals with the same last name, his or her first name. Add an appropriate honorific (*Mr.*, *Ms.*, *Dr.*) if you find that the last name on its own is too stark, or as a sign of respect. Also, an honorific might help the reader distinguish legal-entity parties from parties who are individuals.

2.94 In the case of companies, select a word or two from the name or use an initialism (Sargasso Realty Holdings, Inc. could be referred to as *Sargasso Realty* or simply *Sargasso*, or it could be referred to using the initialism *SRH*).

2.95 In the interest of readability, use whenever possible a defined term consisting of one or more words from an entity's name rather than an initialism. But using an initialism for a party name might nevertheless be the best option in the following situations:

- if other parties to the contract include affiliates with similar names
- if the party's name includes that initialism
- if the party is commonly known by that initialism
- if the nature of the party's name precludes something more imaginative—it would, for example, be challenging to find a

noninitialism alternative to *BNJ* as a name-based defined term for Bank of New Jersey

2.96 Be careful about using as the defined term for a party name an initialism that has a meaning or connotations that are unrelated to that party. One can imagine a contract party not being thrilled at being lumbered with the initialism "DOG," or "SAD."

USING A COMMON NOUN AS THE DEFINED TERM FOR A PARTY NAME

2.97 If you decide to use a common noun as the defined term for a party name, you have a choice between a noun that refers to its status as a legal entity (*Company*) and one that indicates the role that the party plays in the transaction (*Seller*, *Employer*, *Lender*). To avoid confusion, don't use paired defined terms that differ only in their final syllable (*Grantee–Grantor*, *Licensee–Licensor*, *Mortgagee–Mortgagor*).

2.98 If the defined term for a party name consists of a common noun, using the definite article—*the Purchaser* rather than *Purchaser*—results in prose that's less stilted, and that's worth more than the marginal economy afforded by eliminating every instance of *the* from the defined term. Some drafters prefer to omit the definite article to avoid problems with careless search-and-replace (with *the Buyer* becoming *the Acme*) if someone decides to replace the common-noun defined term with a name-based defined term. But paying some attention is all that's

required to avoid that problem. In any event, be consistent throughout a contract in using or not using the definite article with a particular defined term.

2.99 Don't offer alternative defined terms for a party, as in *"Widgetco" or the "Company"* or as in *"Widgetco," sometimes referred to herein as the "Company"*. Doing so serves no purpose and makes the reader responsible for remembering that *Widgetco* and *the Company* are one and the same.

2.100 Regarding the defined terms *Vendor*, *Seller*, and *Supplier*, it would be appropriate to use *Vendor* for a party that's in the business of selling whatever is being sold; to use *Seller* for a party that isn't; and to use *Supplier* for a party that not only is in the business of selling whatever is being sold but also is contracting to supply it over time. These distinctions are consistent with everyday usage in business, although everyday usage isn't entirely consistent. For example, in Commonwealth countries it's standard to use *vendor* for someone selling their house. *Vendor* is perhaps slightly old-fashioned, but it's informative and widely used.

DEFINED TERMS USED TO REFER TO PARTIES COLLECTIVELY

2.101 Often it's helpful to use a collective defined term such as *the Shareholders*; sample 1 contains the collective defined term *the Hastings Parties*. Define such collective defined terms either in the singular or the plural, but not both (see 6.5).

2.102 don't use *the Parties* as a collective defined term for the parties to a contract. It ostensibly spares the drafter from having to refer throughout a contract to *the parties to this agreement* (or *the parties hereto*), but one can simply refer to *the parties*, because no reasonable reader could understand such a reference to mean anything other than the parties to that contract.

2.103 A more nuanced argument advanced in favor of using the defined term *the Parties* relates to contract provisions specifying that no rights or remedies are being conferred on anyone other than the parties. Such provisions are commonplace.

2.104 To preclude nonparties from being able to enforce any rights or remedies under a contract—something that would be an issue only if the contract contemplates intended third-party beneficiaries—you should make it clear in such provisions that only the parties who sign the contract have enforceable rights and remedies. If you refer simply to *the parties*, a court might hold that that includes persons other than the signatories, in particular intended third-party beneficiaries.

2.105 It has been suggested that you could address this issue by creating the defined term *the Parties* and defining it to mean only the signatories. But a better solution would be to state the name of each party in the provision that states that no rights or remedies are being conferred on anyone other than the parties. Another would be to refer in that provision to *the signatories*—that would be more

concise than listing all the parties, especially if there are more than two. (But regarding *signatory*, see 13.603.)

2.106 Choosing the defined term *the Parties* instead would accomplish the same goal as naming the parties or referring to *the signatories*, but in the process would force the drafter to use throughout the contract the defined term *the Parties*, even though outside that one context the defined term would serve no purpose. Given the toll that defined terms take on readability (see 6.91), in this case the cost of using the defined term *the Parties* outweighs the limited benefit, particularly given the alternatives that are available.

"PARTY OF THE FIRST PART" AND "PARTY OF THE SECOND PART"

2.107 Parties to a contract were once divided into classes, or "parts," with one party being identified in the introductory clause as *party of the first part*, the other as *party of the second part*. (Anyone other than a party to the contract was referred to as a *third party;* see 13.738.) Throughout the contract the parties were referred to by those labels. This practice had nothing to recommend it—not only was it cumbersome, it also invited confusion and litigation, given how easy it was to inadvertently transpose the labels.

2.108 In the United States this usage survives, but barely—you see it mostly in the occasional real-estate contract. Somewhat more common is use

of *party of the first part* and *party of the second part* in the introductory clause but nowhere else—the parties are also given conventional defined terms in the introductory clause, and it is those defined terms that are used throughout the contract. This usage seems particularly pointless, but it lives on; it appears to be slightly more prevalent in Commonwealth countries than in the United States.

2.109 It has been suggested that if one or both sides to a transaction consist of more than one party, using *party of the first part* and *party of the second part* in the introductory clause would be an efficient way to group the parties according to which side of the transaction they're on. But information regarding party relationships is best placed in the recitals (see 2.77). Furthermore, using common nouns as defined terms for party names and using defined terms to refer to parties collectively can efficiently convey the essence of party relationships (see 2.78).

The Defined Term "This Agreement"

2.110 It's common practice to create in the introductory clause the defined term *this Agreement*. (Analogous defined terms include *this Amendment*—see 18.6—and *this Assignment*.) But this defined term is unnecessary: the definite article *this* in references to *this agreement* makes it clear which agreement is being referred to. The title (see 2.2) and introductory clause (see 2.13) of a contract might describe that contract as being a particular kind of agreement, such as an agency agreement or a franchise agreement, but that wouldn't be an

impediment to referring thereafter to *this agreement* without having made it a defined term.

2.111 And for the same reason that it's best to use lowercase letters in any reference to an agreement (see 2.18), it's preferable not to use a capital *A* in references to *this agreement*.

2.112 The term *this agreement*, as used in a provision, could in theory be interpreted as referring to some part of a contract—a section, a subsection, a sentence, an enumerated clause—rather than the entire contract. But as a practical matter, that notion is implausible. Using *this agreement* to refer to part of a contract would require marked incompetence on the part of the drafter, and the likelihood of a party's arguing that *this agreement* refers to a part of the whole, and the likelihood of a court's accepting this argument, is remote.

2.113 Sometimes the defined term *this Agreement* is defined to include the attachments to the contract. That doesn't render the defined term any more useful—having a contract provision refer to an attachment is sufficient to make that attachment part of the contract, without a need to say so explicitly. (For a more general discussion of this issue, see 5.96–99.)

2.114 Some drafters use an initialism created from the title for purposes of a contract's references to itself—for example *this CRADA* (standing for "cooperative research and development agreement") and *this NDA* (standing for "nondisclosure

agreement"). But readers don't need to be reminded at every turn what kind of contract they're reading. And although an initialism might be shorter than *agreement*, that economy is more than offset by the alphabet-soup quality of initialisms, not to mention all the capital letters, which in quantity become distracting.

RECITALS

2.11 Most contracts of any length or complexity contain, following the title and before the lead-in, one or more paragraphs referred to collectively as "recitals." The recitals in sample 2, which accompany the introductory clause in sample 1, reflect the format this manual recommends for recitals.

SAMPLE 2 ■ RECITALS

Hastings Sub 1 is a wholly owned subsidiary of Hastings. Hastings Sub 1 owns and operates collection and hauling operations, transfer stations, landfills, and recycling facilities in the State of New York (that business, the "**Business**"). Mr. Hastings is chief executive officer of Hastings and Hastings Sub 1.

Jarrow, the Hastings Parties, Hastings Newton, Inc., a New York corporation and a wholly owned subsidiary of Hastings ("**Hastings Sub 2**"), and Raven Fund Ltd., a Bahamas corporation ("**Raven**"), are party to a letter of intent dated September 5, 2012, concerning sale to Jarrow of assets of Hastings Sub 1 and Hastings Sub 2 (the "**Letter of Intent**").

Hastings Sub 1 wants to sell to one or more Persons designated by Jarrow, and Jarrow wants to cause those Persons to purchase from Hastings Sub 1, certain assets of Hastings Sub 1.

Raven asserts a security interest in all assets owned by Hastings Sub 1, and under the restructuring agreement dated May 28, 2012, between Raven, Hastings, and certain Affiliates of Hastings, Hastings Sub 1 may not sell any of its assets to Jarrow without Raven's prior written approval.

Jarrow, the Hastings Parties, Raven, and Bratton Friedman LLP, as escrow agent, are party to a deposit agreement dated January 19, 2012 (the "**Deposit Escrow Agreement**"), in accordance with which Jarrow paid to the escrow agent on June 5, 2012, a good-faith deposit of $500,000 toward the purchase price of the assets.

Concurrently with its entry into this agreement, Hastings, Hastings Sub 2, and Jarrow are entering into an asset purchase agreement providing for purchase by Jarrow of certain assets of Hastings Sub 2.

The parties therefore agree as follows:

Function

2.116 The recitals to a contract state any background information that the parties regard as relevant. One can distinguish three kinds of recitals:

2.117 *Context recitals.* These describe the circumstances leading up to the parties' entering into the contract. Typical context recitals include recitals describing any relationships between the parties (see the first recital in sample 2), businesses operated by one or more parties (see the first recital in sample 2), and transactions entered into previously by one or more of the parties (see the second, fourth, and fifth recitals in sample 2).

2.118 *Purpose recitals.* These indicate succinctly and in broad terms what the parties wish to accomplish (see the third recital in sample 2). They shouldn't be used to shoehorn deal terms into the recitals.

2.119 *Simultaneous-transaction recitals.* If a contract is part of a broader transaction, these describe the other components of the transaction taking place concurrently with the signing of the contract (see the sixth recital in sample 2).

2.120 A complex agreement might have a dozen or more recitals. If a transaction is sufficiently straightforward that you can dispense with recitals, do so. It's unnecessary to provide recitals that simply state, for example, that Doe wants to sell something to Holdings and that Holdings wants to purchase it from Doe, given that readers could get

that information from the contract title and the initial provisions of the body of the contract.

2.121 Because courts typically look to recitals just for indications of the intent of the parties on entering into the transaction, don't address in the recitals in any detail the rights and obligations of the parties or any statements of fact. Nevertheless, it's routine for mergers-and-acquisitions contracts to cram into the recitals information that's better placed in the body of the contract.

Giving the Recitals a Heading

2.122 Many drafters give recitals a heading, but that's unnecessary.

2.123 A traditional choice of heading is *WITNESSETH*. It's ludicrously archaic and is premised on the mistaken assumption that the word is a command in the imperative mood meaning roughly, one assumes, "Now hear this!" In fact it's the remnant of a longer phrase along the lines of *This agreement witnesseth that . . .* , with *witnesseth* presumably meaning "is evidence."

2.124 Other possible headings are *RECITALS* or *BACKGROUND*. These represent an improvement over *WITNESSETH*, but recitals don't need a heading. For one thing, recitals can readily be identified based on their content and their position—after the introductory clause and before the lead-in. Also, the legal effect of recitals depends on their content rather than on how they are introduced. (For an anomalous Australian exception,

see 5.48.) And if one is giving the recitals a heading, consistency would require giving a heading to the body of the contract—a problematic notion; see 2.167—not to mention to the introductory clause and the concluding clause. For these reasons, the recitals in sample 2 don't have a heading.

2.125 If it would make those who are going to use a contract feel more comfortable, don't hesitate to give the recitals an appropriate heading.

Enumeration

2.126 There's no need to number or letter each recital. Doing so would serve a purpose only if elsewhere in the contract you wish to cross-refer to a particular recital, and that shouldn't be necessary. (In particular, see 6.79–90 regarding cross-referencing to definitions of defined terms.)

Use Simple Narrative Prose

2.127 The recitals serve a storytelling function. They're the one part of a contract that calls for simple narrative prose.

2.128 Don't begin recitals with *WHEREAS*, as this meaning of *whereas*—"in view of the fact that; seeing that"—is archaic.

2.129 Use a conventional paragraph structure for recitals, with complete sentences rather than clauses ending in semicolons. Don't feel that you have to limit yourself to the traditional one sentence per recital.

What Verb to Use in Purpose Recitals

2.130 Different verbs can be used to state in a purpose recital what the parties intend to accomplish.

2.131 If what follows the verb is another verb, here are your choices, of varying suitability (with *transfer* playing the role of the verb):

- *wants to* [*transfer*] (not a standard option, but the most straightforward)
- *desires to* [*transfer*] (a standard option, but oddly steamy)
- *wishes to* [*transfer*] (a standard option, but a little genteel)
- *intends to* [*transfer*] (inappropriate, as it suggests a plan outside of the contract)
- *seeks to* [*transfer*] (in standard English, *seek to* plus infinitive means to try; that's not the meaning intended here)
- *would like to* [*transfer*] (too genteel)
- *is desirous of* [*transferring*] (archaic)
- *is agreeable to* [*transferring*] (very awkward)

2.132 Because *wants to* is consistent with everyday English, this manual recommends *wants to*. (See the third recital in sample 2.) It would likely strike many drafters as being too blunt, but anyone offended by *wants to* is perhaps bringing to contract language a sensibility that's overly delicate.

2.133 Here are the alternatives if what follows the verb is noun-plus-verb:

• The Company *wants* the Executive to serve the Company as its chief executive officer.

• The Company *desires* that the Executive serve the Company as its chief executive officer.

• The Company *wishes* for the Executive to serve the Company as its chief executive officer.

• The Company *intends* that the Executive serve the Company as its chief executive officer.

• It is the *desire* of the Company that the Executive serve the Company as its chief executive officer.

• It is the *wish* of the Company that the Executive serve the Company as its chief executive officer.

A134 Again, *wants* represents the simplest choice.

Premature Recital References to the Agreement

A135 A purpose recital might state that the parties propose to engage in certain activities "in accordance with this agreement." But if you make a purpose recital subject to the terms of the agreement, it's no longer a general statement of intent. In effect, you're simply saying in the recital, redundantly, that the parties want to do what the contract provides.

A136 In a context recital might say that a party "has agreed" to do something or other "subject to the terms of this agreement." That suggests, incongruously, two stages of agreement—first,

agreement to enter into the contract, followed by entry into the contract.

2.137 It makes more sense to express in a purpose recital a general intent that isn't tied to the terms of the contract. Doing so poses no risk, as no rational court could say that a general expression of intent trumps the specific terms that it introduces. But obviously a purpose recital shouldn't state a purpose that's broader than what the contract seeks to accomplish (not counting any conditions, termination provisions, and other restrictions).

2.138 Don't use in a purpose recital *in accordance with this agreement* or anything comparable, such as *upon the terms and subject to the conditions set forth in this agreement*.

Incorporation by Reference

2.139 Contracts sometimes state, either in the lead-in (as part of a traditional recital of consideration; see 2.149) or in a separate section in the body of the contract, that the recitals are "incorporated by reference" into the contract. Such statements are in response to caselaw stating that recitals aren't part of the contract, or rather don't form part of the substantive provisions. See, e.g., *Jones Apparel Group, Inc. v. Polo Ralph Lauren Corp.*, 791 N.Y.S.2d 409, 410 (App. Div. 2005).

2.140 The notion of incorporating recitals by reference is presumably intended to bring within the scope of the body of the contract any substantive provisions that are contained in the recitals. But

recitals shouldn't contain substantive provisions. If a set of recitals contains substantive provisions, it would be rash to rely on incorporation by reference to clear up any resulting uncertainties. A much better fix would be to remove the substantive provisions from the recitals and place them in the body of the contract. (Regarding incorporation by reference generally, see 13.291.)

"True and Correct"

2.141 Provisions that seek to incorporate recitals by reference (see 2.139) routinely include a statement that the recitals are *true and correct*. Drafters who use this archaic couplet presumably seek to make actionable any facts stated in the recitals, so that a party would potentially have a remedy if any of those facts turn out to have been inaccurate.

2.142 Generally, recitals are used to convey background information that shouldn't be at issue. If a party is uncertain whether facts stated in the recitals are accurate, it would do well to include in the body of the contract, as well as or instead of in the recitals, statements of fact as to those matters by the appropriate party. That would provide a clearer foundation for a claim than would a statement that the recitals are *true and correct*.

Defined Terms in the Recitals

2.143 Defining terms in the recitals is unobjectionable, but don't clutter with definitions

what should be a succinct introduction to the contract.

2.144 On the other hand, don't use in the recitals defined terms that aren't defined until later in the contract, as that's inconsistent with using the recitals to introduce the reader to the transaction. In particular, if you use in the recitals a defined term that doesn't have an obvious meaning—such as *the Business*, *the Merger*, or *the Services*—and don't define it until later in the contract, you make the recitals harder to read by forcing the reader to search for and read the definition of that defined term.

THE LEAD-IN

Wording

2.145 The lead-in comes immediately after the recitals and before the body of the contract and serves to introduce the body of the contract. If a contract doesn't contain recitals, the lead-in should say *The parties agree as follows*. If the contract does contain recitals, the lead-in should say *The parties therefore agree as follows* (see sample 2).

2.146 Don't use *hereby* in the lead-in. *Hereby* is a feature of language of performance (see 3.20); the lead-in is language of agreement (see 3.16), not language of performance.

2.147 Don't refer to the parties by name in the lead-in, as doing so would serve no purpose and would just make the lead-in longer, particularly in a

contract with more than two parties. (Regarding this issue in the context of the concluding clause, see 5.4.)

2.148 Sometimes when the body of the contract would otherwise consist of a single one-sentence provision, that provision is wrapped into the lead-in, with the concluding clause following. Straightforward amendments can be handled in this manner (see 18.7).

Consideration

2.149 In many contracts, the lead-in refers, in a "recital of consideration," to consideration for the promises made by the parties to the contract. (At the risk of oversimplification, in common-law jurisdictions a contract promise is enforceable only if the party making the promise has received something of value in a bargained-for exchange—in other words, has received consideration.) Traditional recitals of consideration can take many forms; the following lead-in contains a relatively full-blown example:

NOW, THEREFORE, in consideration of the premises and the mutual covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto covenant and agree as follows.

2.150 Traditional recitals of consideration are problematic in a number of respects. Just as you should dispense with *WITNESSETH* (see 2.123) and

WHEREAS (see 2.128), you should also not begin a lead-in with the archaic *NOW, THEREFORE*. And *in consideration of the premises* is simply an obscure way of saying "therefore." Furthermore, references to the value and sufficiency of consideration are outdated: with the rise of the "bargain test of consideration" reflected in the *Restatement (Second) of Contracts*, the focus of courts has shifted from the substance of the exchange to the bargaining process.

2.151 Of greater interest is whether recitals of consideration serve any purpose, or enough of one to justify using them.

2.152 The ostensible function of a recital of consideration is to render enforceable a contract that would otherwise be unenforceable due to lack of consideration. But it's well established that a recital of consideration cannot transform into valid consideration something that cannot be consideration, and a false recital of consideration cannot create consideration where there was none. See *Murray on Contracts*, at § 61.

2.153 Sections 87 and 88 of the *Restatement (Second) of Contracts* and section 9 of the *Restatement (Third) of Suretyship* suggest that for purposes of option contracts and guaranties, a false recital of consideration would support a promise. So you could conclude that whereas in most contexts a traditional recital of consideration wouldn't be effective to create consideration where none exists, it nevertheless would be prudent to retain it so that it

could be relied on in those contexts where a false recital of consideration would support a promise.

2.154 There are three problems with this reasoning. First, the approach of the *Restatements* not only elevates form over substance but also would have the law recognize a sham.

2.155 Second, the caselaw doesn't uniformly reflect the *Restatements*' approach. In the context of options, some courts have found a false recital to be legally effective—for one, the Supreme Court of Texas; see *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 110 (Tex. 2004). But other courts have held otherwise. And in the context of guaranties, the reporter's notes to section 88 of the *Restatement (Second) of Contracts* cite only one decision of uncertain significance. Instead, it's generally held that consideration supporting the principal obligation also supports the guarantee—if Acme guarantees that it will pay back Widgetco's bank loan, the fact that the bank is lending Widgetco money is consideration for Acme's acting as guarantor.

2.156 A third, some states have adopted statutes specifying that certain contracts no longer need to be supported by consideration. For example, section 5 of the New York General Obligations Law provides that an option contract doesn't need to be supported by consideration. And under the Uniform Written Obligations Act, enacted only in Pennsylvania, any written release or promise will not be unenforceable for lack of consideration if the

signer states that it intends to be legally bound. (Unless you're dealing with a contract governed by Pennsylvania law that might not be supported by consideration, including such a statement in a contract would serve no purpose; see 2.79.)

2.157 The traditional recital of consideration will, in most contracts, be ineffective to remedy a lack of consideration; in the case of option contracts, a recital of consideration either cannot be counted on to remedy a lack of consideration (except in those few states that have adopted the *Restatements*' approach) or would be unnecessary because the requirement for consideration has been dispensed with by statute; and in the case of guarantees, separate consideration isn't required.

2.158 That doesn't mean that recitals have no bearing on consideration. Since recitals can shed light on the parties' intent (see 2.121), courts give some weight to recitals when determining whether a promise is supported by consideration. But that's not an argument for retaining the traditional recital of consideration. Given that the parties to a contract, and their lawyers, invariably give no thought to the traditional recital of consideration, a court should disregard it when determining whether a promise was supported by consideration.

2.159 In some jurisdictions a recital of consideration will establish a rebuttable presumption that the contract is supported by consideration, but that should be of no practical significance. Whether a contract was supported by consideration is a

question of fact, so evidence as to consideration, or the lack of any evidence, would be more important than the rebuttable presumption and in all likelihood would be readily available.

2.160 On those rare occasions when it's not otherwise readily apparent whether a contract is supported by consideration, don't rely on a traditional recital of consideration. Instead, ensure that the recitals contain meaningful information pertaining to consideration.

2.161 If a transaction might lack consideration, your best bet would be to remedy any lack of consideration. If a landowner proposes granting to a potential purchaser, without receiving any payment in return, an option to purchase the property, depending on the jurisdiction it might be advisable to arrange for the option holder to pay a fee for the option. And if a party to an existing contract wants the other party to agree to a disadvantageous change in the terms, that change might be enforceable only if the party agreeing to the change has received consideration. In that case, it would be best to provide for suitable consideration.

2.162 Alternatively, you could have the performing party waive consideration and acknowledge that the other party will be relying on that waiver. Most U.S. courts would probably view reliance as an independent basis for enforcing a promise, so reliance might make a promise enforceable even in the absence of consideration. See 3 *Williston on Contracts*, at § 7:2.

2.163 Depending on the jurisdiction, a third alternative, albeit an annoyingly legalistic one, to providing for consideration would be to make the contract one under seal (see 5.41).

2.164 Because the traditional recital of consideration is ineffectual, you should omit it. Doing so makes the lead-in less of a stumbling block. Once you eliminate any other archaisms and redundancies, what remains is the recommended form of lead-in.

Giving a Heading to the Body of the Contract

2.165 Some drafters insert after the lead-in and before the body of the contract a heading that serves to introduce the body of the contract. Such headings are particularly favored by drafters from Commonwealth countries, who are partial to naming the parts of a contract (see 2.16).

2.166 One option is *AGREEMENT*, but it's misleading, in that the word *agreement* is best understood as referring to the entire contract (see 2.112). In that regard, a less problematic alternative would be, for example, *OPERATIVE PROVISIONS*.

2.167 Furthermore generally, there would seem little point in introducing the body of the contract twice, by means of the lead-in *and* a heading. This manual recommends that you dispense with any such heading.

COVER SHEET, TABLE OF CONTENTS, AND INDEX OF DEFINED TERMS

2.168 If a contract is more than 20 pages long, consider providing from the first draft onwards a table of contents that lists page numbers for articles and sections and lists all attachments. Word-processing software simplifies the process of creating a table of contents and keeping it up to date.

2.169 Place a table of contents before the contract proper, and use a cover sheet so that the first page of the table of contents isn't the first thing the reader sees. The cover sheet generally contains an edited-down and spread-out version of the introductory clause, but you could include other information, notably the name, logo, and contact information of the law firm primarily responsible for drafting a contract and the name and contact information of the lawyer handling the transaction. (Regarding the implications of including a logo, see 4.111.)

2.170 One also sees cover sheets that include a warning about confidentiality, a warning about trading in shares with knowledge of the document, or a statement that preliminary drafts of the document are not binding. But the more clutter you add to a cover sheet, the less value it has as a place to put important ancillary information.

2.171 If the contract contains an index of definitions (see 6.81), place it immediately after the table of contents.

CHAPTER 3

CATEGORIES OF CONTRACT LANGUAGE

3.1 Between the recitals (see 2.115) and the concluding clause (see 5.2) is the body of the contract, which contains the provisions that the parties are agreeing to—the "deal."

3.2 A clause or sentence in the body of the contract can serve one of a number of functions. Each function requires its own category of language, each with its own issues of usage. The categories are language of agreement, performance, obligation, discretion, prohibition, policy, declaration, belief, intention, and recommendation. This chapter considers these categories of language, as well as how to express conditions by means of certain of these categories.

3.3 One category of contract language isn't somehow stronger or weaker than another. The phrases "mere condition" and "mere covenant" (and the latter phrase's more modern equivalent, "mere obligation") occur quite often in court opinions, as well as in the literature on contract law. Using the word "mere" (or "merely") in such comparisons unhelpfully suggests that one category trumps another. Instead they serve different functions:

Failure of a contract party to satisfy a condition will preclude whatever result depends on satisfaction of that condition. Failure of a contract party to comply with an obligation will entitle the other party to claim damages, and it might also relieve the other party of obligations of its own. Because conditions and obligations serve different functions, it doesn't make sense to describe one category as trumping the other.

3.4 It makes life easier for the reader if to the fullest extent possible you use a different verb structure for each category of contract language, consistent with the principle that you shouldn't use a word or phrase to convey more than one meaning and shouldn't use two or more words or phrases to convey the same meaning (see 1.64). This approach also helps the drafter figure out how to frame each provision (see 3.78). But the recommendations in this chapter don't invoke notional "rules" of grammar. Instead, they reflect standard English, with such adjustments as are justified to maximize clarity and reduce the risk of dispute.

3.5 This chapter includes tables containing one or more examples of a particular category of language, with each example being followed by variations on that example. Each initial example is identified by two numbers in a set of brackets, the first designating the number of the table and the second designating the number of the example within that table. For example, [3-3] denotes the third example in table 3. Each variation is given the

same designation as the related initial example but is distinguished by adding a lowercase letter. For example, [3-3b] denotes the second variation on [3-3].

3.6 In addition, each example and each of its variations is annotated, using the following symbols to indicate how acceptable it is:

✓✓ means that this usage is recommended

✓ means that this usage, although acceptable, can be improved upon; that it needs to be used with caution; or that how acceptable it is depends on the context in which it is used

× means that this usage isnt recommended

×× means avoid this usage

PRELIMINARY CONSIDERATIONS

Use the Third Person

3.7 This manual recommends that you draft business contracts using the third person, as in *Acme shall purchase the Shares from Doe*. That's currently standard practice.

Some contracts are in the first and second person, using *we*, *us*, and *our* for one party and *you* and *your* for the other. Using both the first and second person in a contract raises the issue of how one refers to both parties collectively if *we*, *us*, and *our* are being used for one of the parties; your only recourse would be the rather awkward and potentially confusing *both of us*. Also, it's easy to imagine a reader losing track of who *we* and *you* are.

One could get around both those problems by dropping first-person pronouns in favor of a party name, but the bigger issue is whether the first and second person are suited to business contracts. The first and second person are primarily used in consumer contracts, such as insurance policies. It's safe to assume that sophisticated business people and their attorneys can do without the intimacy that use of the first and second person seeks to foster—it quickly palls, and it has a whiff of condescension about it. Furthermore, it wouldn't work in a contract with more than two parties.

Use the Active Voice Unless the Passive Voice Is Appropriate

For purposes of general writing, it's standard advice that you should be wary of using the passive voice. That applies equally to contracts.

In a sentence in the active voice, the subject of the sentence performs the action—*Marie ate the peach*. When you use a verb in the passive voice, the subject is acted on—*The peach was eaten by*

Marie—and what in the active voice would have been the subject is instead the passive agent. (This manual uses the term *by*-agent to refer to the passive agent—in the example in the previous sentence, *Marie*.) When using the passive voice, you can intentionally or inadvertently omit the *by*-agent—*The peach was eaten*.

3.12 There are three drawbacks to using the passive voice. First, using the passive voice and including a *by*-agent adds a couple of unnecessary words. Second, using the passive voice and omitting the *by*-agent obscures who the actor is. And third, the passive voice disrupts the normal subject–verb–object order of a sentence. Those drawbacks apply to any form of writing, but in contract prose, the stakes are particularly high—the consequences of obscuring the actor's identity can be drastic. So in contract prose, use the active voice unless it's clear that there's a benefit to using the passive voice.

3.13 In general writing, sometimes you're justified in using the passive voice—among other considerations, the actor might be unimportant or unknown, or you might want to focus on the thing being acted on. That's the case with contract prose too.

3.14 Consider the following example of use of the passive voice: *if a Necessary Project Approval is revoked*. One could use the active voice instead—*if a Person revokes a Necessary Project Approval*—but that would add nothing. What

matters is whether an approval has been revoked, and it would be beside the point to shift the focus to who's doing the revoking, whether it be a government agency, a company, or an individual.

3.15 Here's another example: *No party will be bound by this amendment until the Parent, the Borrowers, and the Required Lenders have signed a counterpart.* It would serve no purpose to use instead the active voice, thereby shifting the focus from the parties to the amendment—*This amendment will bind no party . . . .*

LANGUAGE OF AGREEMENT

3.16 "Language of agreement," one or more parties state that they agree with specified contract language. Language of agreement should appear only once in a contract—in the lead-in, which states that the parties *agree as follows* (see 2.145).

3.17 Language of agreement is distinct from language of performance (see 3.19) and language of declaration (see 3.270), in that it serves to express state of mind rather than a party's taking an action or making an assertion of a fact. That's why it wouldn't make sense to use *hereby* in language of agreement—it's a feature of language of performance.

3.18 It's commonplace for drafters to preface a provision in the body of the contract with *agrees that*, as in *the parties agree that Acme shall purchase the Shares from Doe.* But *agrees that* is

redundant and so should be omitted—we know from the lead-in that the parties are agreeing to everything in the body of the contract. The same applies to *covenants that*. (*Agrees to* requires a different analysis; see 3.83.)

LANGUAGE OF PERFORMANCE

3.19 In general English usage, one can accomplish an action by means of a speech act, such as *I quit!* Such speech acts occur in contracts. One example is *Acme hereby grants the License to Smith* for another example, see [1-1]. This manual refers to such speech acts as "language of performance." They use the present tense, and they express actions accomplished by means of signing the contract.

TABLE 1 ■ LANGUAGE OF PERFORMANCE

[1-1]	✓✓	Acme hereby purchases the Assets from Doe.
[1-1a]	✓	Acme purchases the Assets from Doe.
[1-1b]	✗✗	The Assets are hereby purchased from Doe.

[1-1c]	✗✗	Acme does hereby purchase the Assets from Doe.
[1-1d]	✗✗	Acme shall purchase the Assets from Doe as of the date of this agreement.
[1-1e]	✗✗	Acme hereby irrevocably purchases the Assets from Doe.
[1-2]	✗✗	The Buyer does not hereby assume the Excluded Liabilities.
[1-2a]	✗✗	The Buyer hereby does not assume the Excluded Liabilities.
[1-2b]	✓✓	In this agreement the Buyer is not assuming any Excluded Liabilities.
[1-3]	✗	When the Company issues a Purchase Order, it will thereby hire the Contractor to perform the services stated in that Purchase Order.

[1-3a]	✓✓	When the Company issues a Purchase Order, it will be deemed to have hired the Contractor to perform the services stated in that Purchase Order.
[1-4]	✓✓	Acme hereby grants Widgetco a license to use the Marks in . . . .
[1-4a]	××	Acme hereby grants Widgetco the right to use the Marks in . . . .
[1-4b]	××	Widgetco may use the Marks in . . . .
[1-4c]	×	Acme hereby licenses to Widgetco the right to use the Marks in . . . .
[1-4d]	×	Acme hereby grants to Widgetco a license to use the Marks in . . . .

Use of "Hereby" in Language of Performance

3.20 One helpful element of language of performance is *hereby*, which signals that the act

described is being accomplished by virtue of the speech act itself. You could omit *hereby*, as in [1-1a], but this use of *hereby* is consistent with standard English. If you omit *hereby* from *Doe hereby purchases the Shares*, it would be clear from the context that the intended meaning isn't that Doe is in the habit of purchasing certain shares. But in purely grammatical terms, one couldn't exclude that meaning without using *hereby*.

3.21 In language of performance, don't replace *hereby* with *by this agreement*: the *here-* in *hereby* is best considered as relating to that particular language of performance rather than the agreement as a whole. It would be appropriate to replace *hereby* when it's used other than in language of performance (see 13.260).

Problematic Usages

3.22 Instead of the passive voice (as in [1-1b]), always use the active voice in language of performance, to make it clear who the actor is.

3.23 Don't use *do* as an auxiliary in language of performance, as in [1-1c]; it's an archaism.

3.24 Don't attempt to turn language of obligation (see 3.44) such as *Acme shall grant the License to Smith* into language of performance by adding *on the date of this agreement*, as in [1-1d]. Doing so would impose on Acme the obligation to grant the license sometime on the date of the agreement, but that would be a confusing alternative to having the

grant take place simultaneously with signing of the agreement.

3.25 careful about using *irrevocably* (meaning "unalterably") in language of performance, as in [1-1e]. Usually *irrevocably* is redundant—when a contract party takes an action, it's implicit that absent anything in the contract to the contrary, the action can't be undone. Thus, in *irrevocably purchases*, *irrevocably waives*, and *irrevocably releases*, the word *irrevocably* is redundant.

3.26 ilarly, don't use words like *unconditionally*, *absolutely*, and *forever* in language of performance.

3.27 it's appropriate to use *irrevocably* with *appoint*. That's because the power to appoint a person to a position might also include the power to remove that person. If you don't want that to be the case, you should say so, and *irrevocably* accomplishes that.

3.28 ilarly, if a party consents to ongoing conduct by another party, as opposed to a one-time action, it would be prudent to use *irrevocably*, to avoid any suggestion that the consenting party would at some point be permitted to change its mind.

Indicating Absence of Performance

3.29 occasionally helpful to state that one or more parties are *not* taking a certain action on

signing the contract. But in doing so, don't use language of performance retooled to express the negative, as in [1-2] and [1-2a]—language of performance serves to accomplish actions, and what you're seeking to express is the absence of action. For that, you need to use language of policy (see 3.240), as in [1-2b].

Future Performance

3.130 If you're looking to state the consequences of entry into a contract or issuance of a document at some point in the future, you could conceivably use language of performance, but with *will* instead of the present tense and *thereby* instead of *hereby*, as in [1-3]. But that's not how language of performance works in standard English—it's not for accomplishing actions in the future by means of a speech act now. Use instead *will be deemed*, as in [1-3a]. (Regarding *deem*, see 13.141.)

Advantages of Granting Language

3.131 Language of performance using the verb *grants*, as in *Acme hereby grants Smith the License*, offers advantages over alternative ways of conveying the same meaning.

INSTEAD OF LANGUAGE OF DISCRETION

3.132 Granting language is analogous to language of discretion. Consider [1-4], [1-4a], and [1-4b]. They all convey the same meaning, but granting language using the noun *license*, as in [1-4], offers two advantages.

3.33 First, license-granting language makes it clear that discretion is being accorded with respect to something that the licensor controls.

3.34 And second, using the concept of a license allows you also to use, as necessary, the concept of a sublicense. Articulating the notion of *A to B to C* using language of discretion would be trickier and wordier.

INSTEAD OF THE VERB "LICENSE"

3.35 Instead of the granting language in [1-4] you could use the verb *license*, as in [1-4c], to grant discretion. But using granting language plus the noun *license* allows the drafter to add adjectives as necessary: *nonexclusive*, *irrevocable*, *perpetual*, and so on. That's simpler than using adverbs to modify the verb *license*.

3.36 Another drawback to the verb *license* is that *Acme hereby licenses* on its own could mean that Acme is the licensee or that it's the licensor.

3.37 Use of the verb *lease* in language of performance raises the same issues, but evidently drafters have decided that the advantages of using the noun *license* don't apply to use of the verb *lease*—it would be unorthodox to say *Jones hereby grants Smith a lease* instead of *Jones hereby leases to Smith*.

USE "GRANT" INSTEAD OF "GRANT TO"

3.38 The only difference between [1-4] and [1-4d] is that in [1-4d], *hereby grants* is followed by

to. You see both usages in contracts, but the better choice is to omit the *to*. Consider the following sentences:

I gave John a book.

I gave a book to John.

*I gave to John a book.

3.39 The first sentence matches the structure of [1-4]. It's a ditransitive clause, with a direct and indirect object. The second sentence, by contrast, is a monotransitive clause—it has just one object—plus a prepositional phrase using *to*. See *The Cambridge Grammar of the English Language*, at 248.

3.40 When you use a monotransitive structure, the prepositional phrase conventionally comes at the end. If you have a simple direct object, it sounds odd to put the prepositional phrase before the direct object, as in the third sentence. (That's why the third sentence is marked with an asterisk.)

3.41 But if the direct object is lengthy, that can preclude putting the prepositional phrase after the direct object. That would be the case with a direct object beginning *a license to* . . . . Your only choice would be to put the prepositional phrase before the direct object, as in [1-4d]. But not only is the *to* oddly positioned, it's also superfluous, as without it you would have a conventional ditransitive structure, as in [1-4]. That's why the ditransitive structure is your best alternative.

3.42 Of course, little is riding on this distinction, but it's best to have a reasoned basis for selecting among alternative usages.

3.43 This distinction applies to other verbs, including *pay*, and applies to other categories of contract language in addition to language of performance.

LANGUAGE OF OBLIGATION

3.44 "Language of obligation" is used to state any duty that a contract imposes on one or more of the parties. In terms of structure, language of obligation falls into two categories, depending on whether the obligation is imposed on the subject of the sentence (see 3.46) or on someone other than the subject (see 3.102).

3.45 Language of obligation also serves as one way to express contract conditions (see 3.263).

Language of Obligation Imposed on the Subject of a Sentence

USING "SHALL" ONLY TO MEAN "HAS A DUTY TO"

3.46 In the example in table 2, Acme is the subject of the sentence. To state that Acme has a duty to purchase the Shares from Doe, use *shall*, as in [2-1]. This manual recommends that in contract drafting you not use *shall* to convey any other meaning.

TABLE 2 ■ LANGUAGE OF OBLIGATION IMPOSED ON SUBJECT OF SENTENCE

[2-1]	✓✓	Acme shall purchase the Shares from Doe.
[2-1a]	✗	Acme must purchase the Shares from Doe.
[2-1b]	✗	Acme will purchase the Shares from Doe.
[2-1c]	✗✗	Acme agrees to purchase the Shares from Doe.
[2-1d]	✗✗	Acme undertakes to purchase the Shares from Doe.
[2-1e]	✗✗	Acme promises to purchase the Shares from Doe.
[2-1f]	✗✗	Acme covenants to purchase the Shares from Doe.
[2-1g]	✗✗	Acme commits to purchasing the Shares from Doe.

[2-1h]	✗✗	Acme shall be obligated to purchase the Shares from Doe.
[2-1i]	✗	Acme is obligated to purchase the Shares from Doe.
[2-1j]	✗✗	Acme is responsible for purchasing the Shares from Doe.
[2-1k]	✗✗	Acme will be expected to purchase the Shares from Doe.

3.147 Courts have long recognized use of *shall* to express obligations. For purposes of business contracts, as opposed to statutes, it's unlikely that anyone could successfully argue that instead of expressing an obligation, a particular *shall is* "discretionary" and means *may* or *should*.

3.148 As an initial diagnostic test for use of *shall* in a provision, check whether the provision would still make sense if you were to replace *shall* with *has* [or *have*] *a duty to*. But just because a *shall* passes the "has a duty" test doesn't mean that the provision in question makes sense as an obligation. It might be better phrased as a condition (see 3.264–68). (Strictly speaking, it would be more appropriate to use the word *obligation* in this diagnostic test (see 3.136), but *duty* is less of a mouthful.)

3.49 Use of *shall* in contracts is a contentious subject, so the basis for the use of *shall* recommended in 3.46 is explained in 3.50–82.

THE MEANING OF "SHALL" AND "WILL"

3.50 *Shall* is a modal auxiliary verb. Unlike the other auxiliaries (*be*, *do*, *have*), the modal auxiliaries (*shall*, *will*, *must*, *can*, *may*, *should*, *would*, *could*, *might*) supply information about the mood of the main verb that follows. *Shall* was originally a full verb (like *eat*, *walk*, and *play*) conveying obligation or compulsion, but now it's used only as an auxiliary, as is the modal *will*, which originally carried the sense of volition.

3.51 Because obligations and intentions concern future conduct, and because there's no true future tense in English similar to the present tense (*works)* and past tense *(worked)*, *shall* and *will* also came to be used with future time.

3.52 The result is that *shall* and *will* have each been used to express modal meanings and to mark future time. A rule arose, at least in theory, and perhaps only in England, to distinguish these two uses: to express future time, use *shall* with the first person and *will* with the second or third person, and do the reverse to convey modal meanings. This cumbersome rule developed many exceptions.

3.53 The rule and its exceptions have largely been abandoned—in common usage, use of *shall* is now largely limited to questions in the first person that seek direction or suggest weakly—*Shall we go*

now? But in the stylized context of the language of business contracts, which generally use only the third person (see 3.7), *shall* continues to serve as the principal means of expressing obligations.

THE PROBLEM OF OVERUSE

3.54 Contract drafters use *shall* to do more than express obligations. They use it to express future time, and *shall* also creeps into contexts that have nothing to do with expressing obligations or future time. (See, for example, [8-2b], which uses *shall* in language of policy.) Many drafters are addicted to *shall*, and business contracts exhibit rampant overuse of the word, making *shall* a glaring violator of the principle that in drafting, you shouldn't use a word or phrase to convey more than one meaning (see 1.64). It's as if drafters fear that a contract provision without a *shall* would be unenforceable.

3.55 This overuse of *shall* plays a leading role in distancing contract prose from standard English, thereby making contracts harder to read. It also helps render drafters oblivious to nuances in determining how to express who is doing what to whom, and why. This obliviousness can result in disputes, particularly over whether a provision is a condition or an obligation (see 3.264–68).

THE MODEST BENEFITS OF ELIMINATING "SHALL"

3.56 One way to address overuse of *shall* is to be more disciplined in how you use the word—hence the recommendation in 3.46.

3.157 some commentators on legal writing—notably Bryan Garner—advocate doing away with *shall* because it's too prone to misuse and is inconsistent with general English usage. As noted in *Garner's Dictionary of Legal Usage*, at 953, "few lawyers have the semantic acuity to identify correct and incorrect *shall*s even after a few hours of study. That being so, there can hardly be much hope of the profession's using *shall* consistently." For the anti-*shall* view from an Australian perspective, see Michèle M. Asprey, *Plain Language for Lawyers* 205–16 (4th ed. 2010).

3.158 It might be a good idea to eliminate *shall* from court rules, statutes, and consumer contracts, but it doesn't automatically follow that the same approach should be applied to business contracts—they serve a different function and address a different audience. Instead, banning *shall* from business contracts would offer only modest benefits, and they would be outweighed by the drawbacks.

3.159 Eliminating *shall* would preclude drafters from using *shall* instead of *will* to express future time, as in *This agreement shall terminate when the Acme Contract terminates*. But that's unlikely to result in confusion as to meaning, even though it's not ideal (see 3.243). The same applies to use of *shall* to express future time when the simple present tense would be more appropriate (see 3.242), as in *This agreement shall be governed by New York law*. Furthermore, depriving drafters of *shall* would be

unlikely to make them more restrained in electing to express future time—the most likely result would be overuse of *will*.

3.60 More generally, the risks posed by *shall* can be overstated. For example, to give an indication of those risks, *Garner's Dictionary of Legal Usage*, at 953, points to the "more than 120 pages" devoted to *shall* in West's multivolume *Words and Phrases*. But of the cases cited, most involve the language of statutes, not contracts. At least in part, that's due to courts having recognized the discretionary *shall* (see 3.47) for purposes of interpreting statutes but not for purposes of interpreting contracts.

3.61 The only issue relating to overuse of *shall* that routinely results in contract disputes is uncertainty regarding whether a provision using *shall* is an obligation or a condition (see 3.264–67). Replacing *shall* with *must* or any other verb wouldn't resolve that problem. Instead, you would have to supplement the provision to make it clear that you're expressing a condition (see 3.268).

USING "MUST" INSTEAD OF "SHALL"

3.62 Anyone contemplating eliminating *shall* from contracts should consider not only the modest benefits of doing so but also the drawbacks of the alternatives available to impose an obligation on the subject of the sentence.

3.63 One alternative to using *shall* to serve this function is *must* (see [2-1a]). Asprey favors this approach.

3.64 replacing *shall* with must would result in *must* being used to express any obligation, whether it's imposed on the subject of a sentence—*The Company must reimburse the Consultant for all authorized expenses* (see 3.46)—or on someone else—*The Closing must take place at Acme's offices* (see 3.102). Furthermore, *must* also features in one way to express conditions (see 3.266). So using *must* for purposes of stating an obligation imposed on the subject of a sentence would result in *must* being used to convey different meanings. Although that's less of a problem than overuse of *shall* (see 3.54), it's not ideal (see 1.64).

USING "WILL" INSTEAD OF "MUST"

3.65 Another obstacle to using *must* as an alternative to *shall* for imposing obligations on the subject of a sentence is that many drafters consider *must* inappropriately bossy.

3.66 Garrey dismisses that objection as being "based on taste, not logic." But it's unrealistic to expect drafters to ignore issues of tone when deciding how to express obligations.

3.67 That's why in *Garner's Dictionary of Legal Usage*, at 953–54, Garner endorses use of *will* (as in [2-1b]) instead of *must:*

In private drafting—contracts as opposed to statutes, rules, and regulations—some drafters consider *must* inappropriately bossy. The word may strike the wrong tone particularly when both parties to a contract are known quantities, such as two

well-known corporations. It seems unlikely that, for example, an American car manufacturer and a Japanese car manufacturer engaging in a joint venture would want the word *must* to set forth their various responsibilities. Indeed, it seems odd to draft one's own contractual responsibilities with *must*: a lawyer for Ford Motor Company is unlikely to write *Ford must . . . Ford must . . . Ford must . . . .* The word *will* is probably the best solution here.

3.68 This assessment is puzzling in three respects. First, why should the word you use to express obligations depend on how well-known the parties are? Second, it suggests the possibility of varying the word used to express an obligation depending on whether the obligation is imposed on the drafter's client or another party—a novel, and unlikely, distinction. And third, the suggestion that *will* is "probably the best solution" is oddly wishy-washy.

3.69 And Garner's assessment doesn't address the two drawbacks of using *will* to impose obligations. The first is that in standard English *will* primarily expresses future time rather than obligations. *Will* is also used to express compulsion—*You will eat your spinach!*—but that use isn't directly analogous to expressing contract obligations. The second is that if you use *will* to impose an obligation on the subject of a sentence, you would also use it to impose an obligation on someone other than the subject of the sentence, as well as to express future time. Such multiple

meanings are exactly what currently afflict use of *shall*, and they render *will* at least as problematic an option as *must*.

EVERYDAY USE OF "SHALL"

3.70 Another objection to *shall* is that it makes no sense to perpetuate it in contracts, given that *shall* has all but disappeared from general usage (see 3.53). But because standard English isn't suited to expressing contract obligations and because of the benefit of using different verb structures for different categories of contract language, *shall* serves a real need. It shouldn't be disconcerting to have *shall* serve a broader role in contracts than it does in everyday English, given the limited and stylized nature of contract language (see 1.1).

FLIGHT FROM "SHALL"?

3.71 Those who favor eliminating *shall* from contracts are in the habit of suggesting that many have already abandoned *shall* and that it's only a matter of time before the rest follow suit. At any one time individual lawyers, or groups of lawyers, or conceivably entire organizations, might have sworn off *shall*. But there's no sign of headlong flight from *shall*. In most jurisdictions, *shall* remains drastically overused.

3.72 Australian drafters appear more willing than others to dispense with *shall*, but review of an unscientific sample of contracts drafted by Australian law firms suggests that even in Australia, a substantial proportion of contracts use *shall*.

3.73 The focus on *shall* has drawn attention away from the bigger problem—the chaotic verb structures on display in mainstream contract drafting.

3.74 Banishing *shall* would address the symptom, not the ailment. Review of some Australian contracts that don't use *shall* (see 3.72) suggests that dispensing with *shall* hardly guarantees rigorous verb use—even in the absence of *shall*, those contracts shuffle haphazardly between different verb structures to express obligations.

3.75 Limiting *shall* to mean only "has a duty to" (see 3.48) is a big step toward curing the ailment. It's well suited to the task, and the "has a duty" test provides a simple way to ensure that *shall* isn't used for any other purpose.

3.76 It's too pessimistic to say disciplined use of *shall* is beyond the reach of most lawyers (see 3.57). The test for disciplined use of *shall*—use it to mean only "has a duty to"—does require a modest amount of semantic acuity on the part of drafters, but no more than what's required for competent drafting.

3.77 Besides, it's too early to write most drafters off as being incapable of disciplined use of *shall*—the notion that clear drafting requires complying with objective standards is still relatively novel. The key to rigorous verb use is training and reliable reference materials. That might sound

unrealistic, but it's more plausible than the notion that drafters will purge their contracts of *shall* despite the uncertain benefits of doing so and the manifest shortcomings of the alternatives.

APPLYING THE "HAS A DUTY" TEST—AN EXAMPLE

3.78 To get a sense of the value of the "has a duty" test as a diagnostic tool, consider the standard arbitration clause recommended by the American Arbitration Association.

3.79 It's a piece of traditional contract drafting, with all the shortcomings that implies. In particular, it includes the following: "Any controversy or claim . . . shall be settled by arbitration administered by the American Arbitration Association." That "shall" fails the "has a duty" test, and it isn't amenable to a quick fix. It uses the passive voice, with the parties as the missing *by*-agent (see 3.11).

3.80 You could instead use the active voice—"The parties shall settle"—but it doesn't make sense to impose on the parties an obligation to arbitrate all disputes. Some disputes are more serious than others, and presumably a contract party would seek arbitration for only the most serious, as opposed to seeking mediation or informal negotiations, or simply shrugging off the grievance.

3.81 The best way to reflect that nuance would be to use language of discretion, so as to allow a party to demand arbitration, while also making it clear that arbitration is the only means of dispute resolution permitted: "As the exclusive means of

initiating adversarial proceedings to resolve any dispute . . . a party may demand that the dispute be resolved by arbitration administered by the American Arbitration Association."

3.82 For a complete analysis of the American Arbitration Association's standard arbitration clause, see Kenneth A. Adams, *The AAA Standard Arbitration Clause: Room for Improvement*, New York Law Journal, Mar. 9, 2010.

OTHER PROBLEMATIC USAGES

3.83 Some drafters rely on other usages to express obligations imposed on the subject of a sentence. One is *agrees to*, as in [2-1c]. Its only advantage is that it can't be used to express future time. Most drafters who use *agrees to* use it to impose an obligation, but some might use it as language of performance (see 3.19), with the idea that *Acme agrees to assign its rights* means the same thing as *Acme hereby assigns its rights*. In one 2007 case, a litigant attributed that meaning to *agrees to*. See *IpVenture*, *Inc. v. Prostar Computer*, *Inc.*, 503 F.3d 1324 (Fed. Cir. 2007). And it's easy to imagine those partial to *agrees to* also using it, unhelpfully, instead of *must* to express conditions (see 3.263).

3.84 Furthermore, *agrees to* is awkward when used to express an obligation that would apply only at some point in the future, as in *If X*, *then Acme agrees to Y*. That could be cured by reversing the phrases, as in *Acme agrees to X*, *if Y*, but that won't

always be feasible. And besides, *agrees to* is too clumsy to use with any frequency.

3.85 Because of these shortcomings, this manual doesn't recommend using *agrees to* to express obligations.

3.86 *Undertakes to* (see [2-1d]), *promises to* (see [2-1e]), and *covenants to* (see [2-1f]) also have the virtue that they can't be used to express future time, but they're too awkward to be plausible alternatives to *shall*. Couplets such as *covenants and agrees to* merely add redundancy to the shortcomings of each component. As for *commits to* plus gerund (see [2-1g]), it's too colloquial.

3.87 Drafters also use *shall be obligated to* (see [2-1h]). It's inconsistent with disciplined use of *shall*, in that applying the "has a duty" test (see 3.48) yields "has a duty to be obligated," which doesn't make sense. Using *is obligated to* (see [2-1i]) doesn't represent much of an improvement—it's long-winded and could be understood to mean that the obligation arises not from that language but from some other source. And *will be expected to* (see [2-1k]) is oddly circumspect, as if it would be too vulgar simply to impose an obligation. It's not clear what the consequences would be if the expectations aren't met. You see this formula most often in employment agreements.

USE THE INDICATIVE MOOD

3.88 The Construction Specifications Institute's *Project Delivery Practice Guide*, a widely used

resource on preparing architectural specifications, recommends that you use the imperative mood to express obligations in architectural specifications. This manual doesn't endorse that recommendation.

Architectural specifications are attached to construction contracts and define the requirements for products, materials, and workmanship and for project administration and performance. They're a specialized form of contract language. *Project Delivery Practice Guide* is the only resource that recommends using the imperative mood to express contract obligations.

English has three moods—the indicative mood, the imperative mood, and the subjunctive mood. (For our purposes, we can ignore the subjunctive.) The indicative mood is the most common and is used to express facts and opinions and to pose questions. The imperative mood is used to instruct or request that someone do or not do something: *Feed the dog. Don't eat the pizza. Stop!*

Here's what *Project Delivery Practice Guide* says about mood:

11.3.5.2 Sentence Structure

Two basic grammatical sentence moods can be used to clearly convey specification requirements:

- *Imperative Mood.* The imperative mood is the recommended method for instructions covering the installation of products and equipment. The verb that clearly defines the action becomes the first word in the sentence, such as:

spread adhesive with notched trowel. The imperative sentence is concise and readily understandable.

- *Indicative Mood.* The indicative mood, passive voice requires the use of shall in nearly every statement. This sentence structure can cause unnecessary wordiness and monotony, such as: adhesive shall be spread with notched trowel.

But the imperative mood isn't up to the task of expressing the full range of obligations. For one thing, a set of instructions in the imperative mood can be directed at only one person—the contractor. But architectural specifications can also impose obligations on the owner or on the architect. If you use the imperative mood for contractor obligations, you would have to switch to the indicative mood for owner or architect obligations. That would make for an odd mix.

Even if you assume that all obligations in a set of specifications are imposed on the contractor, you would likely need to do more than bark instructions. Specifications can also feature language of discretion (*The Contractor may . . .*), language of policy (*The Architect will be responsible for . . .*), and conditions (*It is a condition to acceptance of the Work that . . .*), all of them using the indicative mood. Switching back and forth from the imperative mood to the indicative mood would be awkward.

3.94 And what *Project Delivery Practice Guide* has to say about use of the indicative mood doesn't put it in proper perspective. For one thing, if you want to avoid "unnecessary wordiness," you shouldn't limit yourself to the passive voice—it's conducive to wordiness (see 3.12). It would be a simple matter to preface a set of contractor obligations with something along the lines of *The Contractor shall do the following*, using the active voice, and state the obligations as tabulated enumerated clauses. Each such enumerated clause would be in the indicative mood and would be identical to obligations stated in the imperative (*spread adhesive with a notched trowel*).

3.95 And there's no sign of anyone outside of construction specifications emulating this aspect of *Project Delivery Practice Guide*, so use of the imperative mood in architectural specifications isn't a matter of broader concern.

DON'T USE THE SIMPLE PRESENT TENSE

3.96 A model construction contract, *The New Engineering Contract*, recommends that you use the simple present tense to express obligations. This manual doesn't endorse that recommendation.

3.97 *The New Engineering Contract*, created by the Institution of Civil Engineers, a UK organization, is a guide to drafting documents for civil-engineering and construction projects. It's used in the United Kingdom and internationally. Here are

two examples of how it uses the simple present tense to express obligations (emphasis added):

. . . the Contractor *keeps* accounts of his payments of actual cost . . .

A Partner may ask another Partner to provide information that it needs to carry out work in its own contract and the other party *provides* it.

Not in standard English, expressing obligations is not one of the functions of the present tense used with the third person. It's standard to use the present tense in checklists, for example the World Health Organization's surgical safety checklist ("Nurse Verbally Confirms . . .). But checklists serve to remind users how best to carry out procedures—they don't impose obligations.

"IS RESPONSIBLE FOR"

Don't use *is responsible for* plus present participle (see [2-1j]) to express duties owed to another party. It's long-winded. It's also potentially confusing, as it's not clear whether a provision using *is responsible for* itself creates a duty or acknowledges the existence of a duty that derives from some other source.

Using *is responsible for* would, however, allow you to convey that although a party is at liberty to handle as it wishes a particular obligation that it owes to a nonparty, that party would have to bear any resulting liabilities. For example, if a transaction between Acme and Widgetco risks

creating a tax liability for Acme, Widgetco's concern, strictly speaking, shouldn't be that Acme pay the tax, but rather that Acme not look to Widgetco to pay the tax, that Acme pay the tax if any tax authority requires Widgetco to pay the tax, and that Acme reimburse Widgetco if Widgetco somehow ends up paying the tax. Consequently, it would make sense for the Acme–Widgetco contract to provide that Acme *is responsible for* paying any taxes. This use of *is responsible for* is language of policy.

3.101 Although in that context *is responsible for* would make more sense semantically, imposing an obligation on Acme to pay any taxes would have the same effect, because Widgetco would have a cause of action against Acme only if Widgetco were somehow harmed by Acme's having failed to pay any taxes.

Language of Obligation Imposed on Someone Other Than the Subject of a Sentence

3.102 When a sentence expresses an obligation, the obligation can be imposed on someone other than the subject of that sentence. There are five contexts in which this occurs.

3.103 First, it occurs when a sentence that would, in the active voice, have one or more parties to the contract as the subject is instead phrased in the passive voice (2.15), causing the active object to become the passive subject and either turning the active subject into a *by*-agent, as in [3-1], or

omitting it entirely, as in [3-2]. (For more on use of the passive voice, see 3.10–15.)

3.104 Second, it occurs when, as in [3-3], the subject of a sentence isn't a legal person and so cannot assume a duty.

3.105 Third, it occurs when, in a sentence in the active voice (see [3-4] and [3-6]) or passive voice (see [3-6c]), the active subject or *by*-agent (whether present or not), although a person or entity, isn't a party and so cannot be required to assume a duty.

3.106 Fourth, it occurs when, in a sentence in the active voice in which the subject is a party, the duty is, by means of the verb *receive*, as in [3-7] (see 3.121), in effect imposed on someone other than the subject, and the subject denotes the beneficiary of performance of that duty.

3.107 And fifth, it occurs when a main clause using *is entitled to*, meaning "has a right to," is used with a noun, as in [3-8], or with a passive complement clause, as in [3-1c] and [3-2d]. In such constructions it's implicit that another is required to provide what the subject is entitled to (see 3.122). (When *is entitled to* is used with a complement clause in the active voice, it's language of discretion; see 3.209. An exception is when it's used with *receive* see [3-7c].)

TABLE 3 ■ LANGUAGE OF OBLIGATION IMPOSED ON SOMEONE OTHER THAN SUBJECT OF SENTENCE

[3-1]	✓	Notice of any claim must be given by the Indemnified Party to the Indemnifying Party.
[3-1a]	✗✗	Notice of any claim shall be given by the Indemnified Party to the Indemnifying Party.
[3-1b]	✗	Notice of any claim will be given by the Indemnified Party to the Indemnifying Party.
[3-1c]	✗	The Indemnifying Party is entitled to be notified by the Indemnified Party of any claim.
[3-1d]	✗✗	The Indemnifying Party shall be entitled to be notified by the Indemnified Party of any claim.
[3-1e]	✓✓	The Indemnified Party shall notify the Indemnifying Party of any claim.

[3-2]	✘	The Consultant must be reimbursed for all authorized expenses.
[3-2a]	✘✘	The Consultant shall be reimbursed for all authorized expenses.
[3-2b]	✘	The Consultant will be reimbursed for all authorized expenses.
[3-2c]	✓	The Consultant must be reimbursed by the Company for all authorized expenses.
[3-2d]	✘	The Consultant is entitled to be reimbursed for all authorized expenses.
[3-2e]	✘	The Consultant shall be entitled to be reimbursed for all authorized expenses.

[3-2f] ✓✓ The Company shall reimburse the Consultant for all authorized expenses.

[3-3] ✓ The Closing must take place at Acme's offices.

[3-3a] ✗✗ The Closing shall take place at Acme's offices.

[3-3b] ✗ The Closing will take place at Acme's offices.

[3-3c] ✓ The parties shall cause the Closing to take place at Acme's offices.

[3-3d] ✓✓ The parties shall hold the Closing at Acme's offices.

[3-4] ✗ Sub must sell the Widget Assets no later than 30 days after Closing.

[3-4a]	✗✗	Sub shall sell the Widget Assets . . . .
[3-4b]	✗✗	Sub will sell the Widget Assets . . . .
[3-4c]	✓✓	Parent shall cause Sub to sell the Widget Assets . . . .
[3-4d]	✗	Parent shall procure Sub to sell the Widget Assets . . . .
[3-4e]	✗	Parent shall ensure that Sub sells the Widget Assets . . . .
[3-4f]	✗	Parent shall require Sub to sell the Widget Assets . . . .
[3-5]	✗	Each Acme employee must enter into a confidentiality agreement with Acme in the form of exhibit 2.
[3-5a]	✗✗	Each Acme employee shall enter into . . . .

[3-5b] ✗✗ Each Acme employee will enter into . . . .

[3-5c] ✗ Acme shall cause each Acme employee to enter into . . . .

[3-5d] ✓✓ Acme shall enter into a confidentiality agreement in the form of exhibit 2 with each of its current employees, unless any one or more current Acme employees refuses, in which case Acme shall terminate those one or more current employees. Acme shall not hire as an employee any person who does not enter a confidentiality agreement with Acme in the form of exhibit 2 as a condition to becoming an Acme employee.

[3-6] ✓ The arbitrator must issue the award no later than 20 days after the last day of the hearing.

[3-6a]	xx	The arbitrator shall issue the award no later than 20 days after the last day of the hearing.
[3-6b]	xx	The arbitrator will issue the award no later than 20 days after the last day of the hearing.
[3-6c]	x	The award must be issued no later than 20 days after the last day of the hearing.
[3-6d]	xx	The award shall be issued no later than 20 days after the last day of the hearing.
[3-6e]	xx	The award will be issued no later than 20 days after the last day of the hearing.
[3-6f]	x	The parties shall cause the arbitrator to issue the award no later than 20 days after the hearing.

[3-7]	✓	Jones must receive a salary of $100,000 a year.
[3-7a]	✗✗	Jones shall receive a salary of $100,000 a year.
[3-7b]	✗✗	Jones will receive a salary of $100,000 a year.
[3-7c]	✗✗	Jones is entitled to receive a salary of $100,000 a year.
[3-7d]	✓✓	Widgetco shall pay Jones a salary of $100,000 a year.
[3-8]	✗	Doe is entitled to full credit for service performed on behalf of the Company.
[3-8a]	✗✗	Doe shall be entitled to full credit for service performed on behalf of the Company.
[3-8b]	✓✓	The Purchaser shall credit Doe fully for service performed on behalf of the Company.

3.108 The first four contexts described above (see 3.103–06) require a modal auxiliary, whether *shall*, *must*, or *will*. The traditional choice—not recommended by this manual—would be to use *shall* in this context, in addition to using it to convey an obligation imposed on the subject of a sentence.

3.109 Using *shall* when the duty is imposed on someone other than the subject would preclude using *shall* to mean only "has a duty to." As discussed in 3.75, the "has a duty" test offers a straightforward way to ensure disciplined use of *shall* and coherent use of verbs generally to express the categories of contract language. Also, giving *shall* a broader role would increase the disconnect between contract language and standard English (see 3.53).

3.110 *Must*, meaning "is required to," is the best alternative to *shall* for imposing an obligation on someone other than the subject of a sentence. Using *must* in this context offers two advantages, and they mirror the disadvantages of using *shall*. First, this use of *must* is more in keeping with general English usage. Second, it enhances clarity by allowing *shall* to be reserved for imposing a duty on the subject of a sentence. But take care to distinguish this use of *must* from use of *must* to state a condition (see 3.263).

3.111 *Will* is an inferior alternative. In the context of duties imposed on someone other than the subject

of a sentence, the weaknesses of *will* are the same as those apparent in the context of duties imposed on the subject of a sentence (see 3.69): in general usage *will* expresses future time rather than obligations, and using *will* to convey obligations as well as futurity would likely result in the sort of confusion that those who advocate abandoning *shall* are hoping to avoid.

AVOIDING THE NEED FOR "MUST"

3.112 In most cases a better alternative to replacing *shall* with *must* would be not to impose a duty on someone other than the subject of the sentence. That can be accomplished in two different ways.

3.113 One way is to use the active voice rather than the passive voice. Not only does that result in clearer and more concise prose (see 3.12), it also significantly reduces the need for *must*. Consequently, of [3-1] and [3-2] and their variants, the preferred approach is that shown in [3-1e] and [3-2f].

3.114 A second way is to make explicit, in any sentence in which the active subject or *by*-agent is incapable of assuming a duty, exactly who *does* owe the duty. One does this by stating that the party owing the duty *shall cause* something to happen or someone else to take a specified action.

3.115 Depending on the context, this approach can be applied to a sentence with a subject that isn't a legal person; compare [3-3] to [3-3c]. But if the

subject is a legal person that isn't a party, this approach is appropriate only if the subject is an instrumentality of one or more of the parties. For example, it makes sense to restructure [3-4] as [3-4c]—because Sub is a wholly owned subsidiary of Parent, Parent controls Sub.

3.16 Some drafters use unhelpful variants of *shall cause*. One is *shall procure* (see [3-4d]), which is used in Commonwealth countries; it's too obscure. Another is *shall ensure* (see [3-4e]); it's overly genteel. And a third, *shall require* (see [3-4f]), could be understood as meaning that the party in question has a duty to impose a duty on the nonparty.

3.17 It's best not to use *shall cause* if the subject of the original sentence is a nonparty that isn't an instrumentality of one of the parties: a party can't be said to control nonparty individuals (for example, an employee or an arbitrator), as individuals have a way of doing as they see fit. That's the problem with [3-5c] and [3-6f].

3.18 Depending on the context, you might be able to restructure a provision that has one or more noninstrumentality nonparties as the subject so that instead the provision imposes an obligation on a party. Such restructuring might raise issues that had been glossed over; see for example [3-5d]. Alternatively, state explicitly who bears the risk for conduct by noninstrumentality nonparties.

If such restructuring isn't possible, *must* would be your best bet (see [3-6]). It might be best to specify the implications if the nonparty fails to act as anticipated—because the provision doesn't apply to a party, it might not be evident what the remedies would be.

By selecting your verbs judiciously you might be able to avoid altogether any need for *shall cause* (see [3-3d]).

DON'T USE "RECEIVE" IN LANGUAGE OF OBLIGATION

It's unhelpful to use *receive* to impose a duty on someone other than the subject of the sentence, as in [3-7]. The drawbacks are the same as those relating to use of the passive voice (see 3.12). In particular, note that [3-7] doesn't specify who is to pay Jones's annual salary. Instead, use *shall* to impose the duty directly on the relevant actor, as in [3-7d].

DON'T USE "IS ENTITLED TO" IN LANGUAGE OF OBLIGATION

Use of *is entitled to* with a noun or a passive complement clause is analogous to provisions in the passive voice. The *by*-agent is often unexpressed, as is the case in [3-2d] ([3-8] cannot accommodate a *by*-agent), and even when the *by*-agent is stated, as in [3-1c], the result is wordy. Furthermore, focusing on the entitled party could create problems for the entitled party: in response to a claim for breach brought by the entitled party, the party owing the obligation could claim that it was

not required to perform until such time as the entitled party had notified it that the entitled party sought performance. So don't use *is entitled to* in language of obligation and instead focus on the party owing the duty, as in [3-1e], [3-2f], and [3-8b].

3.123 A secondary issue is that *is entitled to* used with a noun or a passive complement clause doesn't require a modal auxiliary. More often than not, though, drafters provide, as in [3-1d], [3-2e], and [3-8a], that a party *shall be entitled to* rather than *is entitled to*. This use of *shall* is inconsistent with the limited use recommended in this manual (see 3.46). It also occurs in language of policy (see 3.243).

3.124 Regarding use of *is entitled to* in language of discretion, see 3.209.

Imposing Impossible Obligations

3.125 Before considering how to express a particular obligation, you should determine whether it makes sense to address the issue in question by means of an obligation.

3.126 What if the party that would be responsible for complying with the obligation doesn't have sufficient control to ensure compliance? What if compliance isn't feasible? Imposing the obligation regardless wouldn't make sense, could confuse readers, and could result in a court's holding that the obligation is unenforceable.

3.127 For example, if Acme wants Widgetco to obtain a landlord consent that's required for closing,

it could impose on Widgetco an obligation to obtain that consent. But under its contract with Widgetco, the landlord may withhold its consent. It would make more sense for Acme to (1) impose on Widgetco an obligation to use reasonable efforts to obtain the consent (see 8.1), (2) make it a condition to closing that the landlord has provided the consent, and (3) consider imposing on Widgetco an obligation to pay Acme a termination fee, or indemnify Acme (see 13.306), if lack of the landlord's consent results in the deal not closing.

3.128 A similar approach might represent a sensible alternative to imposing on a party receiving confidential information an obligation to destroy all electronic versions of that information, regardless of whether that's in fact possible to do.

Obligations—Some Related Terminology

3.129 Contracts use a range of terms relating to obligations, some of them more helpful than others.

USE "OBLIGATION," NOT "COVENANT"

3.130 Why not use *covenant* instead of *obligation*? *Black's Law Dictionary* defines *obligation* as "A formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons; esp., a duty arising by contract." And it defines *covenant* as "A formal agreement or promise, usu. in a contract."

A 131 such, *covenant* is a synonym of *obligation*, and many drafters use the two words interchangeably. But *covenant* has a quaint Old Testament (or *Raiders of the Lost Ark*) quality to it. (David Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage* 135 (1992), says that *covenant* is "An old synonym for contract and agreement.") When given a choice between the archaic and the more modern, it's generally best to opt for the more modern.

Don't revert to *covenant* when referring to grouped obligations that address how a party is to conduct itself between the signing and closing of a transaction, while a debt remains outstanding, or in some other context. If you switch from one word to the other depending on where you find yourself in a contract or depending on the kind of obligation involved, you're using two words to convey the same meaning (see 1.64). It would be clearer to stick with *obligation* throughout.

C *nant* occurs in the term of art *covenant not to compete*. *Noncompetition provision* would be less fusty.

Don't use the phrases *affirmative covenant* and *negative covenant*, meaning an obligation to do something and an obligation not to do something. Aside from the archaic quality that *covenant* adds to those phrases, generally when referring in a contract to obligations imposed by that or any other contract, no purpose is served by distinguishing between an

obligation to do something and an obligation not to do something. See also 3.135.

"OBLIGATION" AND "PROHIBITION"

3.135 Given that one of the categories of contract language is language of prohibition (see 3.223), in contracts one could conceivably refer to *obligations* and *prohibitions*. But that's unnecessary, and would in fact be confusing, as it's standard to use *obligation* with respect to both doing something and not doing something. See also 3.134.

"OBLIGATION" VERSUS "DUTY"

3.136 *Black's Law Dictionary* definition of *obligation* (see 3.130) suggests that it means the same thing as *duty*. And the *Restatement (Second) of Contracts* uses *duty* and *obligation* interchangeably—it uses *duty* in section 1 and uses *obligation* in section 1, comments a and b, and in section 2, comment b. But *Garner's Dictionary of Legal Usage*, at 624, distinguishes between *obligation* and *duty*:

> **obligation; duty.** Broadly speaking, the words are synonymous in referring to what a person is required to do or refrain from doing—or for the performance or nonperformance of which the person is responsible. But there are connotative nuances. An *obligation* is normally an immediate requirement with a specific reference <his child-support obligations> <Burundi's obligations under the treaty>. . . .

A *duty* may involve legal compulsion and immediacy, but the word carries an overlay of a moral or ethical imperative <parental duties> <fiduciary duties>. More specifically, *duty* = (1) that which one is required to do or refrain from doing, esp. as occupant of some position, role, or office; or (2) any one of a complex of rights and standards of care imposed by a legal relationship. Sense 2 appears primarily in tort law, in which writers use *duty* only to mean that there could be liability.

3.137 This manual concurs, which is why it refers to contract obligations yet refers to the implied duty of good faith (see 3.169). But that choice simply represents this manual's attempt to reflect prevailing usage so as to match reader expectations. There are no substantive implications to whether you use *obligation* or *duty* in a contract to refer to what a party is required to do under that contract. Just be consistent in the terminology you use.

USE "COMPLY WITH," NOT "PERFORM"

3.138 It's standard to say that one *performs* an obligation and to refer to *performance* of an obligation. But an obligation could consist of a duty not to do something (see 3.135), in which case *perform* would have to encompass sitting on your hands. That seems counterintuitive. Possible alternatives such as *discharge* and *fulfill* don't represent an improvement.

3.139 This manual recommends instead *comply with* and the noun form *compliance with*—they would cover both action and inaction.

USE "BREACH"

3.140 Refer to *breach* of an obligation—it's more sober than *violation* and more direct than *nonperformance* and *noncompliance*.

LANGUAGE OF DISCRETION

3.141 "Language of discretion" is language stating that a party has the discretion to take or not take a specified action.

Using "May" to Convey Discretion

3.142 Discretion is primarily conveyed by means of *may*, expressing permission or sanction. When used in an active construction, as in [4-1], *may* means "has discretion to," "is permitted to," or "is authorized to." (It would be unnecessarily wordy to use any of these formulations instead of *may*, as in [4-1a].) *May* can also be used in a passive construction, in which case the one or more parties that have permission are represented by a *by*-agent, as in [4-2], or are absent, as in [4-2a]. For the reasons stated in 3.12, don't use the passive; [4-2b] represents an improvement over [4-2].

TABLE 4 ■ LANGUAGE OF DISCRETION: "MAY"

[4-1]	✓✓	The indemnified party may at its expense retain separate co-counsel.
[4-1a]	✗	The indemnified party is authorized to retain at its expense separate co-counsel.
[4-1b]	✗	The indemnified party is entitled to retain at its expense separate co-counsel.
[4-1c]	✗✗	The indemnified party shall have the right to retain at its expense separate co-counsel.
[4-1d]	✗✗	The indemnified party will be free to retain at its expense separate co-counsel.
[4-1e]	✗✗	The indemnified party may but is not required to retain at its expense separate co-counsel.

[4-1f] ✗✗ The indemnified party may freely retain at its expense separate co-counsel.

[4-1g] ✗✗ The indemnified party can retain at its expense separate co-counsel.

[4-1h] ✗✗ The indemnified party may at its sole discretion retain at its expense separate co-counsel.

[4-1i] ✗✗ The indemnifying party hereby grants the indemnified party the right to retain at its expense separate co-counsel.

[4-2] ✓ The Option may be exercised by Smith any time before January 1, 2013.

[4-2a] ✓ The Option may be exercised any time before January 1, 2013.

[4-2b] ✓✓ Smith may exercise the Option any time before January 1, 2013.

3.143 With language of obligation, there are other, more long-winded alternatives to *may*. See, for example, [4-1c] and [4-1d]. In [4-1e], *but is not required to* is redundant, given that *may* expresses discretion. Similarly, in [4-1f], *freely* is redundant. And in [4-1g], *can* is inappropriate, as it serves to express physical or mental ability, not discretion.

Be Explicit as to Whether Discretion Is Limited

3.144 A grant of discretion to do one thing doesn't necessarily equal a prohibition against doing other things. If a mother tells her son that he may play video games, it wouldn't necessarily follow that she's thereby forbidding him from engaging in any alternative activity.

3.145 But the presumption that a grant of discretion doesn't also entail prohibition comes up against what this manual refers to as "the expectation of relevance." (Relevance is a principle of linguistics. According to *The Cambridge Grammar of the English Language*, at 38, "A central principle in pragmatics . . . is that the addressee of an utterance will expect it to be relevant, and will normally interpret it on that basis.") The more specific a grant of discretion is, the more likely it is that the reader would conclude that the discretion is

limited—otherwise there would be no point in being so specific. And the more likely a court would be to invoke the arbitrary principle of interpretation *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of others.

3.146 Consider the sentence *Acme may sell the Shares to Doe*. It may be that the parties had in mind that Acme could sell the shares to anyone—they addressed sale to Doe explicitly simply because for some reason it otherwise would have been uncertain whether Acme could sell the shares to Doe. But the expectation of relevance suggests that if the parties mentioned only Doe when authorizing Acme to sell the shares, it's because Acme was precluded from selling the shares to anyone else.

3.147 To avoid any uncertainty regarding the expectation of relevance, be explicit as to whether discretion is limited. If Acme has unlimited discretion to sell the shares, it would be preferable to say *Acme may sell the Shares to any Person, including Doe*. If its discretion is limited, it would be preferable to say *The only Person to whom Acme may sell the Shares is Doe*. Or you could use language of prohibition—*Acme shall not sell the Shares to anyone other than Doe*.

3.148 See 3.155–59 for a common source of ambiguity in expressing limited discretion.

A CASE STUDY

3.149 Uncertainty over whether discretion is limited can result in disputes that lead to litigation.

For example, at issue in *Arkel International, L.L.C. v. Parsons Global Services*, No. 07-474-FJP-DLD, 2008 U.S. Dist. LEXIS 1624 (M.D. La. Jan. 8, 2008), was a forum-selection clause that read in pertinent part as follows: "[E]ither party may institute suit in the Superior Court of the State of California for the County of Los Angeles, or, if mutually agreed to by the parties, the dispute shall be settled by arbitration in Pasadena, California."

3.150 The parties disagreed over whether the forum-selection clause provided for mandatory or permissive jurisdiction—in other words, whether a party could bring suit only in the specified court. The court considering this dispute held that the forum-selection clause provided for permissive jurisdiction.

3.151 If the forum-selection clause had simply stated that either party may file suit in the specified California court, it would have been reasonable to conclude that it was permissive—the countervailing expectation of relevance would have been quite weak. But instead, the provision said that either party may file suit in California or the parties may agree to arbitrate. The second alternative—arbitration—provides greater specificity and so gives greater force to the expectation of relevance—the contrast between the two alternatives specified would lose significance if unlimited other options were also available.

3.152 Imagine that you say to Frank, "You may go to the movies." That could mean "You may

engage in any number of activities, one of which is going to the movies." It could also mean "The only activity that you're permitted to engage in is going to the movies." But if you say to Frank, "You may go to the movies or you may go to the library," it's more likely that you're telling Frank that those are his only two choices.

3.153 Whoever drafted the forum-selection clause likely had mandatory jurisdiction in mind but didn't feel the need to make it explicit, perhaps because they were swayed by the increased expectation of relevance afforded by the reference to arbitration. Whatever they intended, they would have done better to make it explicit.

3.154 An English case involving language of discretion and the expectation of relevance is *Ener-G Holdings plc v. Hormell* [2012] EWCA Civ 1059 (31 July 2012).

The Ambiguity Inherent in "May . . . Only"

3.155 Drafters often use *may . . . only* to convey limited discretion. The result is alternative meanings that can give rise to ambiguity. Consider the following sentence:

Acme may close any one or more Contract Stores for any reason, and in doing so it may consider only its own interests.

3.156 This sentence is ambiguous. The drafter presumably intended it to mean that Acme may choose to consider only its own interests but would

be free to consider the interests of others. But it could also mean that the only interests Acme is permitted to consider are its own. The latter meaning seems unlikely.

3.157 Now consider the following sentence:

Widgetco may sell only the 1965 Ford Mustang.

3.158 This sentence could convey a meaning analogous to the first possible meaning of the previous example—in other words, that Widgetco may elect to sell only that car but would also be free to sell other cars instead of or in addition to the Ford Mustang, or not sell any cars. But it could also mean that the only vehicle that Widgetco is permitted to sell is the vehicle specified. In this case, the latter meaning seems the more likely.

3.159 The ambiguity engendered by *may . . . only* can't be avoided by repositioning *only* (see 13.481). Instead, you have to come up with alternative language to express the intended meaning. Here's how one could reword the two above examples to express the intended meaning:

Acme may close any one or more Contract Stores for any reason, and in doing so it may elect to consider only its own interests.

Widgetco shall not sell any vehicle other than the 1965 Ford Mustang.

Using "May" to Convey Possibility

3.160 In addition to conveying discretion, *may* can also be used to express that something might come to pass. The result is ambiguity. Consider the following provision: *The Investigator may provide the Sponsor with confidential information.* It could mean that the Investigator is authorized to provide the Sponsor with confidential information, but it could also mean that it's possible that the Investigator will do so.

3.161 Although one can usually discern from the context which meaning is intended, it would nevertheless be best to avoid this sort of ambiguity. If the intention were to convey possibility, you could restructure the provision in question to omit *may.* For example, the above example could be rephrased as *If the Investigator provides the sponsor with confidential information*, *then* . . . .

3.162 Alternatively, to convey the possibility of something coming to pass one could instead of *may* use either *might* (if it's uncertain whether the event will come to pass) or *expects to* (if it's likely that the event will come to pass and a party is the subject of the sentence). *The Cambridge Grammar of the English Language*, at 200, says that *might* "suggests a slightly lower degree of possibility" than *may*, but that shouldn't be an obstacle to the use of *might*—the parties to a contract would be less interested in parsing the likelihood of an event happening than in specifying the parties' rights and obligations if it does happen.

3.163 *May* is also used to convey possibility in restrictive relative clauses modifying a noun phrase, as in *any Person that Roe may introduce to Acme*, but in that context *may* is superfluous (see 3.335), so say instead *any Person that Roe introduces to Acme*.

"May Require"

3.164 The phrase *may require* is often used to frame as Party X's discretion what is best thought of as Party Y's obligation. Instead of this use of *may require*, use language of obligation:

The Company may require a Participant to retain [read *At the Company's written request, a Participant shall retain*] the shares purchased on that Participant's behalf in the Participant's ESPP Broker Account until sale of those shares.

The Bank may also require each Borrower to establish [read *At the Bank's written request, each Borrower shall establish*] a lockbox under the control of the Bank to which all applicable Account Debtors shall forward payments on the Accounts.

3.165 Sometimes *may require* is used to indicate possibility rather than discretion:

The issuer of these securities *may require* an opinion of counsel satisfactory to the issuer to the effect that any proposed transfer or resale is in compliance with the Act and any applicable state securities laws.

3.166 In such cases, use *might* rather than *may* (see 3.162).

3.167 The phrase *may require* is also used to convey possibility in a restrictive relative clause modifying a noun phrase. In that context *may* is superfluous; use the simple present tense instead (see 3.335):

The Borrowers shall complete and sign such applications and supplemental agreements and provide such other documentation as the Bank *may require* [read *requires*] in respect to the issuance and administration of the Letters of Credit.

Don't Use "At Its Sole Discretion" with "May"

3.168 It's commonplace for drafters to use *at its* [or *his*, *her*, or *their*] sole discretion in language of discretion, as in *Acme may at its sole discretion terminate this agreement*, and as in [4-1h]. Use of *at its sole discretion* in this manner suggests (1) that the language of discretion in question doesn't grant complete discretion and (2) that tacking on *at its sole discretion* remedies that.

IMPLIED DUTY OF GOOD FAITH

3.169 The first element of this proposition is correct—the discretion granted under a contract is limited, in that generally any party to a contract would be under a duty to exercise that discretion in good faith. Section 205 of the *Restatement (Second) of Contracts* states that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." And section 1-304 of the Uniform Commercial Code (UCC) provides that "Every contract or duty within [the

UCC] imposes an obligation of good faith in its performance and enforcement." Cases invoking the duty of good faith "are legion." *Murray on Contracts*, at § 90[A].

With respect to language of discretion specifically, "where a party has contractual discretion to promote its own interest, the good faith requirement precludes action that would contravene the reasonable expectations of the other party." *Murray on Contracts*, at § 90[A]; see also 23 *Williston on Contracts*, at § 63:22 (stating that "even where a defendant is given absolute discretion, it must exercise that discretion in good faith"). For a case that stands for this proposition, see *Gilson v. Rainin Instrument*, *LLC*, No. 04-C-852-S, 2005 WL 1899471 (W.D. Wis. Aug. 9, 2005) (stating that the implied covenant of good faith requires each party to an agreement "to exercise any discretion afforded it by the agreement in a manner consistent with the reasonable expectations of the other party").

ATTEMPTING TO CIRCUMVENT THE DUTY OF GOOD FAITH

Adding *at its sole discretion* to language of discretion represents an attempt to nullify the duty to exercise discretion in good faith. It's somewhat awkward, in that *Acme may at its sole discretion* incorporates tautology—in effect it means *Acme has the discretion*, *at its sole discretion*, *to* . . . . And it's not necessarily clear that *sole* adds anything—a grant of discretion to a party is necessarily to that party only. But evidently the intent is that *at its sole*

discretion allows a party to exercise the discretion in question without having its reasonableness challenged.

13.172 Drafters use *absolute* instead of, or in addition to, *sole*, but that wouldn't seem to offer any advantage over using *sole* on its own. Neither would using *uncontrolled*.

13.173 It wouldn't make sense to refer to *good faith discretion*—if you're willing to have your discretion be subject to the duty of good faith, it would be unnecessary to modify language of discretion to say so.

13.174 As for *reasonable discretion*, that might *curtail* a party's discretion—a reasonableness standard could be interpreted as being more stringent than a good-faith standard (see 13.364).

13.175 It wouldn't make sense to attempt to circumvent the duty of good faith by using just *at its discretion*, which simply echoes the language of discretion—*Acme may at its discretion* means *Acme has the discretion*, *at its discretion*, *to* . . .

13.176 Some drafters use a provision specifying drafting conventions, such as the following, to explain what is intended by whatever formula they use to circumvent the duty of good faith:

The terms "sole discretion" and "absolute discretion" with respect to any determination to be made a party under this agreement mean the sole and absolute discretion of that party, without regard

to any standard of reasonableness or other standard by which the determination of that party might be challenged.

13.177 Drafters also attempt to circumvent the obligation of good faith by using *for any reason or no reason*. Regarding that phrase generally, see 13.203.

CASELAW

13.178 Some courts have held that provisions that in effect state that a party may act unreasonably are enforceable.

13.179 For example, in *Cussler v. Crusader Entertainment, LLC,* No. B208738, 2010 WL 718007 (Cal. Ct. App. Mar. 3, 2010), the California Court of Appeal rejected Crusader's argument that in failing to approve Crusader's many proposed screenplays for the film "Sahara," the author Clive Cussler had breached the implied duty of good faith that under California law is read into every contract. The contract provided that Crusader would "not . . . change the Approved Screenplay . . . without Cussler's written approval exercisable in his sole and absolute discretion." (For more on this opinion and the problematic reasoning underlying it, see Kenneth A. Adams, *Whittling Away at Duty of Good Faith*, Recorder, June 28, 2011.)

13.180 In *Automatic Sprinkler Corp. of America v. Anderson*, 257 S.E.2d 283 (Ga. 1979), the court considered "whether good faith is a prerequisite in the exercise of an absolute discretion

to withhold incentive compensation." The contract at issue stated that the decision whether to pay a terminated employee incentive compensation "will rest completely in the absolute and final discretion of the Compensation Committee of the Board of Directors." The court held that the presence or absence of good faith was irrelevant.

3.181 Cases in other jurisdictions hold otherwise. For example, in *A.W. Fiur Co. v. Ataka & Co.*, 422 N.Y.S.2d 419, 422 (App. Div. 1979), the court said, "Although the contract conferred upon [a wholly owned subsidiary of the defendant] the 'absolute and exclusive right to reject any orders for any reason whatsoever', such a contract does not import the right arbitrarily to refuse to accept orders."

3.182 In the same vein, according to section 1-302 of the UCC, "The obligations of good faith, diligence, reasonableness, and care prescribed by [the UCC] may not be disclaimed by agreement." That's what *at its sole discretion* attempts to accomplish.

3.183 The policy arguments go both ways. Having a party waive the benefit of the implied duty for purposes of a particular provision would, in states that recognize such waivers, spare the other party the risk of having its exercise of discretion challenged as lacking good faith. But that certainty comes at a cost, in that a party could use the other party's waiver of the implied duty as license to sabotage the transaction.

3.184 Given the mixed caselaw, drafters might be tempted to adjust, depending on the governing law of the contract, how they approach the implied duty of good faith, the notion being that it would be appropriate to include *at its sole discretion*, or some variation, if the contract is governed by the law of California or another jurisdiction that recognizes waivers of the implied duty of good faith.

3.185 Drafters might be inclined to include *at its sole discretion* in all contracts—they know that courts in a particular jurisdiction would disregard that phrase, but they decide that retaining it is harmless, and might in fact work to their advantage if the other side is unaware of the law on the issue.

3.186 It would be preferable to eliminate from your contracts any language that could be construed as effecting a waiver of the implied duty of good faith, even if it runs in favor of your client—doing so would reduce the likelihood of confusion or dispute.

3.187 Even in jurisdictions that construe *at its sole discretion* as effecting an enforceable waiver of the implied duty of good faith, any benefit of such a waiver is more than offset by the potential mischief of an apparent endorsement of a party's acting in bad faith (see 3.183). And the language used to articulate a waiver of the implied duty is sufficiently unclear that it could result in dispute. Furthermore, the confused caselaw (at least in California) might

make it difficult to predict whether a court would hold that a particular waiver is enforceable.

3.188 Instead, address directly whatever concern you might have been tempted to address by means of a waiver of the implied duty—after all, it's unlikely that the party in question simply wants to ensure that it's free to act in bad faith.

3.189 For example, imagine that Acme wants to purchase from Widgetco a number of stores that sell widgets. The parties have in mind that as part of the purchase price, Acme would pay commissions based on future net sales of the stores. But Acme wants to be able to close stores if it sees fit. Simply saying "Acme may at any time close any one or more Contract Stores" might allow Widgetco to claim that Acme was acting in bad faith if it ultimately were to decide to close Contract Stores. And it would be reckless to assume that adding "at its sole discretion" would preclude that possibility without risk of dispute.

3.190 You could make this language of discretion more specific by making Acme's exercise of its discretion subject to conditions—for example, it may close a store only if that store fails to meet specified targets. But if Acme would prefer to avoid any meddling in its business decisions, a more promising approach would be to add specificity by having Widgetco acknowledge that certain potential adverse consequences will be irrelevant to Acme's exercise of its discretion. That could be

accomplished by something along the following lines:

Acme may close one or more Contract Stores for any reason, and in doing so it may elect to consider only its own interests and will not be required to consider the effect of any such closure on Widgetco, including any reduction in commissions that Acme pays Widgetco under this agreement.

3.191 This approach should be palatable to the other party if circumstances suggest that the party with discretion would to some extent be constrained from acting in bad faith. In the above example, closing stores presumably involves some cost to Acme.

3.192 Furthermore, a court would be less likely to view an explicit provision of that sort as an impermissible attempt to waive the obligation of good faith. For example, the above scenario is based on the facts in *VTR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773 (S.D.N.Y. 1969). In that case, the court held that "the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which otherwise would have been forbidden by an implied covenant of good faith and fair dealing."

3.193 And section 1-302 of the UCC states that although the obligations of good faith, diligence, reasonableness, and care may not be disclaimed by agreement, "The parties, by agreement, may determine the standards by which the performance

of those obligations is to be measured if those standards are not manifestly unreasonable."

3.194 If you're unable or unwilling to craft explicit language of this sort, you could use *at its discretion* and warn the client that *at its discretion* may be ineffective as a means of ensuring that it has unfettered discretion. Or you could simply omit *at its discretion*, on the grounds that it would be best to omit such an unstable phrase from your contracts, even if doing so precludes the possibility, however uncertain, of unfettered discretion. The latter approach seems more prudent.

3.195 Furthermore, in some contexts, the approaches described in 3.188–93 are unlikely to work. Consider the circumstances of the *Cussler* case, mentioned in 3.179: Assessing a screenplay is a highly subjective task, so it's unlikely that either party would have agreed to make Cussler's approval right subject to objective conditions. And Cussler's rejection of Crusader's screenplay didn't cause him to incur any direct costs, so he had little to stop him from rejecting screenplays for any reason, however justified or unjustified.

3.196 In such contexts, the prudent course to take would be to eliminate the problematic language of discretion. With respect to the *Cussler* case, dispute would have been avoided had the screenplay initially approved by the parties been the final screenplay, or if one or other party had been given unilateral control over revisions to the screenplay.

"May" and the Timing and Frequency of Permitted Actions

"AT ANY TIME"

3.197 If a contract uses *may* to grant Acme discretion to take a particular action, then absent any indication to the contrary Acme would be free to take that action whenever it wishes. It follows that *at any time* should generally be redundant in language of discretion:

Any Lender may ~~at any time~~ assign or pledge to a Federal Reserve Bank all or any portion of that Lender's rights under this agreement and any Term Notes issued to it.

3.198 But if any instance of language of discretion is particularly important, a drafter may nevertheless find it expedient to use *at any time*, if only to preclude any argument on the issue. (Regarding use of *at any time* in conditional clauses, see 3.253.)

"FROM TIME TO TIME" AND "ON ONE OR MORE OCCASIONS"

3.199 To make it explicit that a right isn't a one-time-only right, use *on one or more occasions* instead of *from time to time*.

3.200 In language of discretion, the phrase *from time to time* is used to mean, in essence, "on one or more occasions." In theory, *from time to time* serves to make it clear, with respect to a given right, that a party isn't limited to exercising that right just once.

3.201 This might not be an issue. For one thing, repeated exercise of a right isn't possible in the case of a right that by its nature can be exercised only once, as in *Acme may terminate this agreement in the following circumstances*. And if a right allows a party to engage in an ongoing process, it would be odd to state that the party may exercise that right on one or more occasions. For example, if a contract says *Acme may sell Widgets to any Person outside the Territory*, you couldn't reasonably claim that Acme had exhausted that right after having sold a single lot of widgets.

3.202 That leaves instances in which a party is granted a right to take a given action and nothing in the provision suggests how often the right may be exercised.

3.203 You might be willing to assume that absent any language indicating otherwise, a right may be exercised multiple times. Or it might be sufficiently clear, as a matter of industry practice, that the right isn't a one-time-only right that it would be odd to say so explicitly:

The Maker may ~~on one or more occasions~~ prepay all or any portion of the Principal or Interest of this Note to the Holder without premium or penalty.

3.204 But the safest approach is to make it explicit that the right isn't a one-time-only right, so as to avoid giving a desperate litigant even a weak argument to make. In such contexts, *from time to time* isn't the ideal phrase. It means "once in a

while," and although a party could conceivably exercise a right periodically, it might instead exercise it, for example, twice in quick succession. Both alternatives are better captured by the phrase *on one or more occasions*:

The Bank may *from time to time* [read *on one or more occasions*] adjust the Advance Rate based on changes in its collection experience with respect to Accounts or other factors relating to the Accounts or other Collateral.

"Hereby Grants . . . the Right To"

3.205 One sometimes sees the formula *Party X hereby grants Party Y the right to* [verb], as in [4-1i]. It's language of discretion disguised as language of performance. *Widgetco hereby grants Acme the right to sell the Assets* means the same thing as *Acme may sell the Assets*, but uses ten words rather than five.

3.206 So instead of the formula *Party X hereby grants Party Y the right to* [verb], you're always better off using *Party Y may* [verb], as in the following example:

The Borrower hereby grants to the Holder the right to [read *The Holder may*] set off against this note upon occurrence of an Event of Default all of the Holder's liabilities to the Borrower, if any, and all money or property in the Holder's possession held for or owed to the Borrower.

When Exercising Discretion Requires Cooperation

3.207 Consider the following language of discretion: *One or more Acme representatives may inspect Widgetco's financial records during business hours at Widgetco's principal office*. It doesn't simply grant discretion—it also imposes on Widgetco an unstated obligation to cooperate with Acme's representatives.

3.208 It's clearer to make explicit any such implicit obligations: *Widgetco shall permit one or more Acme representatives to inspect Widgetco's financial records during business hours at Widgetco's principal office*.

"Is Entitled To"

3.209 A second vehicle of discretion is *is entitled to* used with a complement clause in the active voice (except when it's used with *receive*; see 3.107). It conveys a specific meaning, but there's a clearer alternative.

3.210 Although more often than not *is entitled to* used with a complement clause in the active voice is, as in [4-1b], a wordier and therefore inferior alternative to *may*, in this context it can be distinguished from *may*.

3.211 As discussed in 3.107 and 3.122, when *is entitled to* is used with a noun or a complement clause in the passive voice, it's implicit that another party is obligated to provide what the subject of the sentence is entitled to. Similarly, *is entitled to* with an active complement clause is best used when one party's discretion depends on performance by

another party. For example, in [5-1], Jones's purchase of Shares would require that Acme do whatever is required of it as the seller, and in [5-2] Smith would be able to serve on Investco's board only if appointed. *Is entitled to* captures this nuance; *may* (as in [5-1b] and [5-2a]) does not. (The active-voice alternative, *will entitle*, is awkward; see [5-1a].)

TABLE 5 ■ LANGUAGE OF DISCRETION: "IS ENTITLED TO"

[5-1]	✓	On exercising the Option, Jones will be entitled to purchase a number of Shares equal to . . . .
[5-1a]	✗✗	Exercise of the Option will entitle Jones to purchase a number of Shares equal to . . . .
[5-1b]	✗	On exercising the Option, Jones may purchase a number of Shares equal to . . . .
[5-1c]	✓✓	On Jones's exercise of the Option, Acme shall sell to Jones, at Jones's

		election, a number of shares equal to . . . .
[5-2]	✓	Smith is entitled to serve on Investco's board of directors.
[5-2a]	✗	Smith may serve on Investco's board of directors.
[5-2b]	✓✓	Investco shall at Smith's option appoint Smith a member of its board of directors.

3.211 It would be much clearer to ignore this subtle distinction and instead focus on the other party's obligation, as in [5-1c] and [5-2b]. This approach is feasible in contract drafting because of the limited number of actors; in statutory drafting, it would likely be very awkward to express *a person is entitled to vote* as language of obligation.

"Is Not Required To"

3.213 Although as a matter of pure logic absence of obligation doesn't equal discretion, as a practical matter the two are comparable. This manual

recommends that you use *is not required to* plus verb to convey absence of obligation (see [6-1]). Don't use the wordier *in no event is Acme required to*, with its rhetorical emphasis (see 1.60). *May not*, meaning in this context "is authorized not to," isn't suitable, because that meaning is just one of three possible meanings conveyed by *may not* (see 3.224).

3.214 Using instead *is not obligated to* might seem an appropriate choice to express absence of obligation. By contrast, *is not required to* might seem like "elegant variation"—unnecessary use of a synonym. But British drafters prefer *is not obliged to* (see [6-1a]), which sounds too conversational to American ears. It's to avoid these dueling usages that this manual recommends *is not required to*.

3.215 *Is not required to* can be used in the active voice (see [6-1] and [6-3a]) and the passive voice (see [6-3]). Use the active voice (see 3.12).

TABLE 6 ■ LANGUAGE OF DISCRETION: "IS NOT REQUIRED TO"

[6-1]	✓✓	Acme is not required to replace the Widget Equipment.
[6-1a]	✓	Acme is not [obligated] [obliged] to replace the Widget Equipment.

[6-1b] ✗✗ Acme shall not be required to replace the Widget Equipment.

[6-1c] ✗ Acme will not be required to replace the Widget Equipment.

[6-1d] ✗✗ Widgetco shall replace the Widget Equipment.

[6-1e] ✓ Widgetco is not entitled to have the Widget Equipment replaced.

[6-1f] ✗✗ Replacement by Acme of the Widget Equipment is not required.

[6-1g] ✗✗ Acme need not replace the Widget Equipment.

[6-1h] ✗✗ Acme may refuse to replace the Widget Equipment.

[6-1i] ✗✗ Widgetco does not expect Acme to replace the Widget Equipment.

[6-2]	✓	Acme is not required to reimburse the Consultant for annual expenses in excess of $10,000.
[6-2a]	✗✗	The Consultant's annual expenses must not exceed $10,000.
[6-2b]	✓✓	Acme shall reimburse the Consultant's expenses up to $10,000 per year.
[6-3]	✗	Amounts collected from Participants are not required to be held in a segregated account.
[6-3a]	✓✓	Widgetco is not required to hold in a segregated account any amounts collected from Participants.
[6-3b]	✗✗	Amounts collected from Participants shall not be required to be held in a segregated account.

3.216 Don't use, as in [6-1b] and [6-3b], *shall not be required to*, as that use of *shall* is inconsistent with using it to mean only "has a duty to" (see 3.48). And unless you're addressing the consequences of a contingent future event (see 3.242), it's better not to use *will not be required*, as in [6-1c]: even though the obligation will continue into the future, it applies when the agreement becomes effective, so the present tense is preferable (see 3.242).

3.217 Don't confuse not imposing an obligation on Party A with imposing that obligation on Party B (see [6-1d]). The latter doesn't necessarily follow from the former.

3.218 Similarly, it doesn't make sense to impose limits on Party A if Party B's concern is simply that it not be responsible if Party A exceeds those limits. More specifically, [6-2a] prevents the consultant from incurring more than a stated amount of expenses; that's too restrictive, since Acme simply wants to limit the amount of consultant expenses that it's required to reimburse. The latter meaning is expressed by [6-2], but it's expressed even more clearly by means of an obligation with a cap (see [6-2b]). For expressing performance with limits, it's better to state what has to be done rather than what doesn't have to be done.

3.219 Example [6-1e], using *is not entitled to* and a passive complement clause, is equivalent to [6-1] viewed from the perspective of Widgetco. Provisions using *is not entitled to* and a passive complement clause are, like provisions using *is*

entitled to and a passive complement clause (see 3.122), analogous to provisions in the passive voice and so exhibit the shortcomings associated with the passive voice, namely wordiness and often, as in [6-1e], an absent *by*-agent. Instead of using *is not entitled to*, focus on the party that doesn't have the obligation. Similarly, it's best not to use *is not entitled to* plus a noun: instead of *Acme is not entitled to advance notice*, say *Roe is not required to give Acme advance notice*.

In [6-1f], the noun *replacement* is used rather than the verb *replace*, and the result is a stultifying wordiness. Use of abstract nouns at the expense of verbs is discussed generally in 17.7.

Don't use *need not*, as in [6-1g], to convey absence of obligation. Colloquially, *need* is used to indicate not only the lack of something (*I need a haircut*) but also an obligation (*You need to come to my office immediately*). But it would be unhelpful to use *need to* in a contract to express an obligation, as that function is already served by *shall* for purposes of imposing an obligation on the subject of the sentence (see 3.46). By extension, it would be unhelpful to use *need not* to preclude an obligation. Further muddying the waters is colloquial use of *need not* to mean "should not" (*Foreigners need not apply*) and "has no reason to" (*Fred need not be afraid*). The slightly old-fashioned *need not* is simply not as clear as *is not required to*.

Don't use *may refuse* (see [6-1h]) to convey absence of obligation; the discretion to refuse to do

something is different from having no obligation to do it. And don't say that one party *does not expect* the other party to do something or other (see [6-1i]). Like *will be expected to* (see 3.87), it's oddly circumspect.

LANGUAGE OF PROHIBITION

"Shall Not"

3.122 "Language of prohibition" specifies what a contract prohibits the parties from doing. Prohibition is principally conveyed by *shall not*, meaning "has a duty not to," or *must not*, meaning "is required not to." Use *shall not* (see [7-1]) and *must not* to convey prohibition where you would use *shall* and *must*, respectively, to convey obligation. As with language of obligation, the most direct way to express prohibition is by imposing the prohibition on the subject of the sentence, using *shall not* (see [7-1]), but that might not make sense if the subject of the sentence is a nonparty (see 3.112–20).

TABLE 7 ■ LANGUAGE OF PROHIBITION

[7-1]	✓✓	The Customer shall not modify the Equipment without Acme's prior written consent.

[7-1a] ✘ The Customer may not modify the Equipment without Acme's prior written consent.

[7-1b] ✘ The Customer is not entitled to modify the Equipment without Acme's prior written consent.

[7-1c] ✘✘ The Customer shall refrain from modifying the Equipment without Acme's prior written consent.

[7-1d] ✘✘ The Customer shall never modify the Equipment without Acme's prior written consent.

[7-1e] ✘✘ The Customer shall in no way modify the Equipment without Acme's prior written consent.

[7-1f] ✘✘ The Customer cannot modify the Equipment without Acme's prior written consent.

[7-1g] ✗✗ The Customer agrees not to modify the Equipment without Acme's prior written consent.

[7-2] ✗ Neither party shall assign any of its rights . . .

[7-2a] ✓ Neither party may assign any of its rights . . .

[7-2b] ✗ The parties shall not assign any of their rights . . .

[7-2c] ✓ Each party shall not assign any of its rights . . .

[7-3] ✓✓ The Licensees shall not disclose any Confidential Information.

"May Not"

3.224 *may not*, meaning "is not permitted to" (see [7-1a]), is not the best choice for language of prohibition. It seems to achieve the same effect as *shall not* and *must not*, in that depriving a party of authority to take an action would be equivalent to requiring that party not to take that action. But it suffers from ambiguity that goes beyond that afflicting *may* (see 3.160): *Acme may not transfer the Shares* can mean that Acme (1) might not transfer the Shares, (2) is authorized not to transfer the Shares, or (3) isn't authorized to transfer the Shares. Readers likely would nevertheless derive the intended meaning, but presenting them with alternative meanings makes them work harder.

"Is Not Entitled To"

3.225 as *is entitled to* with an active complement clause is best used when action by one party depends on performance by another party (see 3.211), *is not entitled to* with an active complement clause is appropriate when prohibition is based on another party's not being subject to an obligation, as in *Smith is not entitled to serve on Widgetco's board of directors*—Smith would be able to serve on Widgetco's board only if appointed. Similarly, *Acme is not entitled to convert the Shares except as provided in section 3.2* captures that nuance better than *Acme shall not convert its Shares* . . . . Outside of that context—see for example [7-1b]—there's no need for *is not entitled to* in language of prohibition.

3.226 Although in both examples in 3.225 you could use *has no obligation* or *has no right* instead

of *is not entitled to*, this manual recommends that you not do so. Using *obligation*, an abstract noun (see 17.7), makes *has no obligation rather ponderous*. As regards *has no right*, the noun *right*, one definition of which is "an interest or expectation guaranteed by law," doesn't otherwise feature in language recommended in this chapter; it would be anomalous to introduce it solely in this context.

3.227 Although this manual recommends in 3.212 that one use language of obligation rather than *is entitled to* with an active complement clause, no particular benefit would be gained from an analogous fix in the context of language of prohibition, for example rephrasing the first example in 3.225 as *Widgetco is not required to appoint Smith to its board of directors*.

Don't Use "Shall Refrain"

3.228 When someone asks you to refrain from doing something, they're being polite. The implication is that they're relying on your self-control. It's used in social contexts—*Please refrain from picking a fight with your Uncle Roger*. The consequences of failing to refrain presumably depend on the context and might be limited to mild disappointment. You also see *refrain* used when businesses deal with the public, as when a public announcement at an airport asks that you please refrain from smoking. In such contexts it's clearer a prohibition is being expressed.

3.229 For purposes of contracts, one would likely have a hard time claiming that *refrain* expresses something less than outright prohibition. But why risk having that discussion—*shall not* expresses the intended meaning more clearly than does *shall refrain from*. Furthermore, contracts are for articulating rules and not for persuading (1.59), so they're not the place for deference of the sort exemplified by *shall refrain from*.

Other Suboptimal Usages

3.230 Do not use *shall never* (see [7-1d]): the notion of perpetuity inherent in *never* is overkill in this context, as *shall not* is equally comprehensive.

3.231 If you want an obligation—for example, an obligation to keep information confidential—to continue perpetually, even after termination of the agreement, say so explicitly. Don't rely on *shall never* to convey that meaning, as *never* could just as well be understood to mean only until termination of the agreement.

3.232 Using *shall in no way* (see [7-1e]) is to indulge in rhetorical emphasis, thereby adding needless words (see 1.60). It means the same thing as *shall not*, but adds a pointless flourish. Just as using *can* in language of discretion is inappropriate (see 3.143), so is using *cannot* in language of prohibition, as in [7-1f]. And just as using *agrees to* isn't a clear way of expressing an obligation (see 3.83), *agrees not to*, as in [7-1g], isn't a clear way of expressing prohibition.

Collective Nouns

3.233 When the subject of a sentence is a collective noun such as *party* or *shareholder*, whether singular or plural, you can convey prohibition by rendering negative either the subject or the verb.

3.234 You render the subject negative by using *neither*, if the subject consists of two parties (*Neither party* . . .), or *no*, if the subject consists of more than two parties (*No Shareholder* . . .). When you render the subject negative, you have the choice of using as the verb *shall* (see [7-2]) or *may* (see [7-2a]). The drawback to using a negative subject with *shall* is that if you apply the "has a duty" test (see 3.48), it would appear to express the absence of duty rather than expressing prohibition. The drawback to using *may* is that it would be inconsistent to use *may* to express prohibition in this context and *shall not* elsewhere (see 3.223). Of the two, using *may* is the better option.

3.235 The alternative is to render the verb negative. You could do so using a plural noun, as in [7-2b] and [7-3]. As is the case whenever you use a plural noun as the subject of the sentence, you raise the question of whether the prohibition applies to the members of the group collectively as opposed to individually (see 11.4), but it's unlikely that would cause confusion. More problematic is a plural subject accompanied by the pronoun *their* and a plural object, as in [7-2b]—it could be understood to mean that the object is owned collectively. Absence

of that issue is what distinguishes [7-3] from [7-2b]. Using instead a singular noun, as in [7-2c], would allow you to avoid that confusion, at the cost of slight awkwardness.

Prohibition by Way of an Exception to Language of Discretion or Obligation

3.236 You can express prohibition by means of an exception to language of discretion, but there are clear and slightly less clear ways of doing so. Consider the following: *Widgetco may sell one or more of the Vehicles except the 1965 Ford Mustang.* As a matter of pure logic, it could be argued that the exception excludes that vehicle from the scope of Widgetco's discretion but does no more—in other words, the provision is otherwise silent regarding that vehicle, so Widgetco could sell it without being in breach of this provision. That's a weak argument, as the expectation of relevance (see 3.146) strongly suggests that the intention was to have the exception be equivalent to language of prohibition; if the intention had been to allow Widgetco to sell the Ford Mustang, it would have made sense to omit the exception. But to avoid any chance of a dispute over meaning, say instead *Widgetco may sell one or more of the Vehicles, except that it shall not sell the 1965 Ford Mustang*. Or more concisely, *Widgetco may sell one or more of the Vehicles but not the 1965 Ford Mustang*.

3.237 You can express prohibition by means of an exception to language of obligation, but you have to be more explicit than in the case of an exception to

language of discretion. If the example in 3.236 were instead to read *Widgetco shall sell all Vehicles except the 1965 Ford Mustang*, as a matter of pure logic it could be argued that the exception excludes that vehicle from the scope of Widgetco's obligation but does no more, so Widgetco could sell the Ford Mustang without breaching the obligation. But more to the point, in this case the expectation of relevance has no bearing on whether Widgetco may sell the Ford Mustang—it suggests only that the obligation doesn't apply with respect to the Ford Mustang. To avoid any chance of a dispute over meaning, say instead *Widgetco shall sell one or more of the Vehicles, except that it shall not sell the 1965 Ford Mustang*. It wouldn't be enough to negate the obligation.

Choosing Between Discretion and Prohibition for an Action Subject to a Condition

3.238 The following sentences state that for a party to be able to take the specified action, a condition has to be satisfied—that party must receive the consent of the other party:

If the Vendor receives Acme's prior written consent, the Vendor may cause one or more subcontractors to perform Services.

Unless the Vendor receives Acme's prior written consent, the Vendor shall not cause any subcontractors to perform Services.

3.239 Both sentences express the same meaning, but it would be preferable to use the second

alternative: Uncertainty over whether the discretion granted in the first alternative is limited (see 3.144) raises the possibility, however theoretical, that the Vendor could, independently of that provision, have subcontractors perform Services. Imposing instead a blanket prohibition unless Acme consents otherwise would eliminate that possibility.

LANGUAGE OF POLICY

3.240 In addition to stating what the parties are required to do, permitted to do, or prohibited from doing, a contract will usually contain "policies," which is the term this manual uses for rules that the parties must observe but that don't, at least expressly, require or permit action or inaction on their part.

3.241 There are two kinds of policy. First, those that state rules governing a thing, event, or circumstance (see [8-1], [8-7], and [8-8]). And second, those that address the scope, meaning, or duration of a contract or part of a contract (see [8-2], [8-3], [8-4], [8-5], and [8-6]).

Verbs in Language of Policy

3.242 Use the present tense for those policies that apply on effectiveness of the contract (such as [8-2], [8-3], and [8-4]), even though the policy will continue to apply in the future. Use the present tense also for those policies (such as [8-5]) that state a time of effectiveness or lapsing of effectiveness—in general usage it's standard to use the present tense in

this manner for situations that are to occur at a stated time in the future. But if the policy relates to future events that might not take place, as in [8-1] and [8-6], or the timing of which is uncertain, use *will*.

TABLE 8 ■ LANGUAGE OF POLICY

[8-1] ✗ Any attempted transfer of Shares in violation of this agreement is void.

[8-1a] ✓✓ Any attempted transfer of Shares in violation of this agreement will be void.

[8-1b] ✗✗ Any attempted transfer of Shares in violation of this agreement shall be void.

[8-2] ✓✓ The laws of the state of New York govern all matters arising out of this agreement.

[8-2a] ✗ The laws of the state of New York will govern all matters . . . .

[8-2b] ✗✗ The laws of the state of New York shall govern all matters . . . .

[8-3] ✓✓ This agreement constitutes the entire agreement of the parties with respect to the subject matter of this agreement.

[8-3a] ✗✗ This agreement shall constitute the entire agreement of the parties . . . .

[8-4] ✓✓ "GAAP" means generally accepted accounting principles, consistently applied.

[8-4a] ✗✗ "GAAP" shall mean generally accepted accounting principles, consistently applied.

[8-5] ✓✓ This agreement terminates on December 31, 2013.

[8-5a] ✗ This agreement will terminate on December 31, 2013.

[8-5b] ✗✗ This agreement shall terminate on December 31, 2013.

[8-6] ✓✓ This agreement will terminate upon the closing of a Qualified IPO.

[8-6a] ✗ This agreement terminates upon the closing of a Qualified IPO.

[8-6b] ✗✗ This agreement shall terminate upon the closing of a Qualified IPO.

[8-7] ✓ Interest is payable at a rate of 8% per year.

[8-7a] ✗✗ Interest shall be payable at a rate of 8% per year.

[8-7b] ✓✓ The Borrower shall pay interest at a rate of 8% per year.

[8-8] ✓ The Option is exercisable until midnight at the end of December 31, 2013.

[8-8a] ✗✗ The Option shall be exercisable until midnight at the end of December 31, 2013.

[8-8b] ✓✓ Smith may exercise the Option until midnight at the end of December 31, 2013.

Don't use *shall* in language of policy, as language of policy doesn't serve to impose obligations.

Passive-Type Policies

3.244 Some policies are characterized by adjectives such as *exercisable* and *payable* and have a structure that's analogous to the passive voice. This manual refers to such policies as "passive-type policies." Passive-type policies have two shortcomings. First, as with passive verb phrases (see 3.11), the agent can be expressed by a *by*-agent, but in contracts the agent is often omitted (see [8-7] and [8-8]), leaving unstated the party responsible for performing the action. Second, if a contract states that *the fee is payable by April 20, 2014*, that could, depending on the context, mean that the party in question is obligated to pay the fee by the date in question, or has discretion to pay the fee, or that timely payment of the fee is a condition. Passive-type policies should be rephrased as language of obligation (see [8-7b]), as language of discretion (see [8-8b]), or as conditional clauses.

3.245 Another example of a passive-type policy is *The First Installment is due by March 1, 2014*. It would be better expressed as language of obligation: *The Purchaser shall pay the First Installment by March 1, 2014*.

EXPRESSING CONDITIONS

3.246 This section addresses not a category of contract language but instead how to express conditions in conjunction with categories of contract language. For these purposes, "condition" means a future and uncertain event or circumstance on which

the existence of some particular legal relation depends.

3.247 This manual is concerned only with how to convey meaning in a contract, so terms of art ostensibly relating to conditions and applied in resolving disputes—for example, the distinction under English law between "promissory conditions" and "contingent conditions," and the three pages devoted to *condition* and its variants in *Black's Law Dictionary*—are irrelevant for our purposes.

3.248 In contract, use the term *condition* rather than *condition precedent*, which conveys the same meaning but adds an unnecessarily legalistic flavor. You should never need to use *condition subsequent*, meaning something that, if it occurs, would bring something else to an end—it's safe to assume that its meaning is unclear to clients and many lawyers. Without using the label *condition subsequent*, simply state that if X happens, then Y will cease.

Conditional Clauses

3.249 Conditional clauses don't fall within one of the categories of contract language. Instead, they modify language of obligation, discretion, prohibition, and policy.

STRUCTURE AND FUNCTION

3.250 A sentence containing a conditional clause consists of the conditional clause, including a subordinator, and the matrix clause. In the sentence "*If Acme has not exercised the Option by December*

31, 2017, Smith may transfer the Shares to another Person," the italicized portion is the conditional clause, with *If* as the subordinator; the remainder of the sentence is the matrix clause.

3.251 The truth of the proposition in the matrix clause is a consequence of fulfillment of the condition in the conditional clause. In general usage, the most common subordinator is *if*, with the negative subordinator *unless* the next most common. Other subordinators include *where*, *when*, *as long as*, *so long as*, and *on condition that*. When using *if* as the subordinator, it's not necessary to use *then* to begin a matrix clause that follows. And if the conditional clause is relatively short, adding *then* to the matrix clause just adds a bit of dead weight to the sentence. But if the conditional clause is complex and not lengthy enough to warrant putting it after the matrix clause (see 3.257), beginning the matrix clause with *then* might help reduce reader miscues.

VERBS IN THE CONDITIONAL CLAUSE

3.252 The present tense is acceptable in all conditional clauses; see [9-1] and [9-2]. In the interest of consistency, that's what you should use, even though the present perfect is also acceptable if, as in [9-2a], satisfying the condition is a part of the transaction as opposed to a response to a contingency.

3.253 Don't use *shall* in conditional clauses. Many drafters do; see [9-1b], [9-1c], [9-2b], [9-2c],

and [9-3a]. Because in this context *shall* cannot convey obligation, drafters presumably use it to convey futurity. Perhaps they think that if a conditional clause uses the present tense, then the matrix clause would operate only on conditions that are met at the moment the contract becomes effective. When a conditional clause uses a dynamic verb (as in *If Roe transfers the Shares*), this fear is unwarranted. When, as in [9-3], a conditional clause uses a stative verb (that is, a verb that expresses a continuing state, such as *is*), you can alleviate this fear by adding *at any time*, as in [9-3c]. Even better, you can often sidestep the issue by switching from a stative to a dynamic verb, as in [9-3d].

TABLE 9 ■ CONDITIONAL CLAUSES

[9-1]	✓✓	If Investco receives a Violation Notice, it shall promptly notify Widgetco.
[9-1a]	✗	If Investco has received a Violation Notice, ...
[9-1b]	✗✗	If Investco shall receive a Violation Notice, ...

[9-1c] ✗✗ If Investco shall have received a Violation Notice, ...

[9-1d] ✗ If Investco should receive a Violation Notice, ...

[9-2] ✓✓ If Acme receives a Notice of Consent, it may transfer the Shares.

[9-2a] ✓ If Acme has received a Notice of Consent, ...

[9-2b] ✗✗ If Acme shall receive a Notice of Consent, ...

[9-2c] ✗✗ If Acme shall have received a Notice of Consent, ...

[9-3] ✓ If the Borrower is in default, the Lender may accelerate the Loan.

[9-3a] ✗✗ If the Borrower shall be in default, ...

[9-3b] ✗✗ If the Borrower be in default, ...

[9-3c] ✓ If the Borrower is at any time in default, ...

[9-3d] ✓✓ If the Borrower defaults, ...

3.254 Using *should* in conditional clauses, as in [9-1d], conveys an unhelpful tentativeness. You could place *should* at the beginning of the conditional clause (*Should Investco receive* . . . .), but that wouldn't represent an improvement. No purpose is served by using the subjunctive, as in [9-3b].

VERBS IN THE MATRIX CLAUSE

3.255 If the verb in a matrix clause would, absent the conditional clause, be in the present tense, use *will*, as in [10-1] and [10-2], and not the present tense, as in [10-1b] and [10-2b], and not *shall*, as in [10-1a] and [10-2a], as no duty is involved.

TABLE 10 ■ CONDITIONAL CLAUSES—THE MATRIX CLAUSE

[10-1]	✓✓	If Jones ceases to be employed by the Company, the Option will terminate.
[10-1a]	✗✗	If . . . , the Option shall terminate.
[10-1b]	✗	If . . . , the Option terminates.
[10-2]	✓✓	If a Stockholder transfers all its Shares to a Person that is not a Stockholder, that transfer will be valid only if the Person acquiring those Shares agrees to be bound by the terms of this agreement.
[10-2a]	✗✗	If . . . , that transfer shall be valid only . . . .
[10-2b]	✗	If . . . , that transfer is valid only . . . .

3.256 The auxiliary verbs *shall*, *may*, and *must* are unaffected by the presence of a conditional clause.

POSITION OF THE CONDITIONAL CLAUSE

3.257 The traditional place for a conditional clause is at the beginning of a sentence, but you should place it elsewhere if doing so would make the provision easier to read. The longer the conditional clause, the more likely it is that the provision would be more readable with the matrix clause rather than the conditional clause at the front of the sentence. If both the conditional clause and matrix clause contain more than one element, you would likely be better off expressing them as two sentences.

Language of Policy Used to Express Conditions

3.258 When deal lawyers refer to conditions, they usually have in mind not conditional clauses but closing conditions, namely a list of requirements introduced by a main clause such as the following: *The obligations of Acme under this agreement are subject to satisfaction of the following conditions* . . . . Closing conditions are a specialized form of language of policy.

3.259 Traditionally, each closing condition is presented as a separate sentence using *shall* in either the modal auxiliary (*shall be*) or modal perfect (*shall have been*) form. There are two problems with this approach.

STRUCTURE

3.26 When standard closing conditions are considered apart from the main clause, it isn't evident that they're conditions. To express just one condition, rather than a list of them, the appropriate form of introduction would be *The obligations of Acme under this agreement are subject to the condition that* . . . . In spite of this, standard closing conditions are never expressed as *that*-clauses, and as a result they could conceivably be read as statements of fact (see [11-1] and [11-2]), or even language of obligation (when used with *shall*). To make it clear that one is dealing with conditions, express each closing condition as a tabulated enumerated *that*-clause (see 4.34–46).

TABLE 11 ■ LANGUAGE OF POLICY USED TO EXPRESS CONDITIONS

The Buyer's obligations under this agreement are subject to satisfaction of the following conditions:

[11-1] ✖✖ Acme's representations are accurate at the Closing as though made at the Closing; . . . .

[11-1a] ✗✗ that Acme's [statements of fact] [representations] shall be accurate . . . .

[11-1b] ✗✗ that Acme's [statements of fact] [representations] must be accurate . . . .

[11-1c] ✗✗ that Acme's [statements of fact] [representations] will be accurate . . . .

[11-1d] ✗✗ that Acme's [statements of fact] [representations] be accurate . . . .

[11-1e] ✓✓ that Acme's [statements of fact] [representations] are accurate . . . .

[11-2] ✗✗ the Buyer has received an opinion of Acme's counsel in the form of Exhibit A . . . .

[11-2a] ✗✗ that the Buyer shall have received an opinion of Acme's counsel . . . .

[11-2b] ✗✗ that the Buyer must have received an opinion of Acme's counsel . . . .

[11-2c] ✗✗ that the Buyer will have received an opinion of Acme's counsel . . . .

[11-2d] ✗✗ that the Buyer have received an opinion of Acme's counsel . . . .

[11-2e] ✓✓ that the Buyer has received an opinion of Acme's counsel . . . .

TENSE AND MOOD

[11-3] Using *shall* or *shall have* in closing conditions, as in [11-1a] and [11-2a], is inappropriate, because closing conditions aren't for expressing obligations. For the same reason, using *must* or *must have*, as in [11-1b] and [11-2b], is no improvement. Using *will* or *will have*, as in [11-1c] and [11-2c], is also inappropriate: determining whether the closing conditions have been satisfied requires that one inquire on the closing date into present, not future, circumstances; just because the conditions are specified in advance of the closing date doesn't mean that they must be expressed in future time. Instead, use as appropriate either the

present tense, as in [11-1e], or the present perfect, as in [11-2e].

3.262 Normally it would be appropriate, even desirable, to use the subjunctive in closing-condition *that*-clauses, as in [11-1d] and [11-2d], but structuring the closing conditions as tabulated *that*-clauses has the effect of making the subjunctive seem an odd choice. Use the indicative mood, as in [11-1e] and [11-2e].

Language of Obligation Used to Express Conditions

3.263 A third way to express a condition is by imposing an obligation on the subject of a sentence, but by using *must* rather than *shall*.

3.264 [12-1b] is part of a provision governing Widgetco's reimbursement of Acme's expenses. With its use of *shall*, [12-1b] is phrased as an obligation. If a court were to treat it as an obligation, failure by Acme to timely submit invoices to Widgetco would represent breach of Acme's obligation but wouldn't preclude reimbursement unless Widgetco were able to show damages caused by Acme's having submitted the invoices late.

TABLE 12 ■ LANGUAGE OF OBLIGATION USED TO EXPRESS CONDITIONS

[12-1] ✓✓ To be reimbursed, Acme must submit to Widgetco no later than 90 days after Acme receives it each invoice for expenses that Acme incurs.

[12-1a] ✗✗ Acme must submit to Widgetco. . . .

[12-1b] ✗✗ Acme shall submit to Widgetco. . . .

[12-1c] ✗✗ To be reimbursed, Acme need only submit to Widgetco. . . .

3.265 If, on the other hand, this provision were expressed as a condition, Acme wouldn't be entitled to reimbursement unless it were to timely submit the related invoices. Presumably Widgetco would prefer that arrangement as providing greater certainty.

3.266 Using *must* instead of *shall*, as in [12-1a], would suggest that Acme doesn't have a duty to timely submit invoices to Widgetco, that instead it has to timely submit invoices if it wants to be reimbursed for the related expenses. But it would be reckless to rely on *must* and nothing more, as in

[12-1a], to express a condition—when faced with uncertainty over whether a provision is a condition or an obligation, a court would likely hold that it's an obligation. See *Murray on Contracts*, at § 102; 13 *Williston on Contracts*, at § 38:13. Relying on *shall* and nothing more, as in [12-1b], would render this even more likely. Using *need only*, as in [12-1c], is too colloquial.

8.267 Consider the case of *Howard v. Federal Crop Insurance Corp.*, 540 F.2d 695 (4th Cir. 1976), which involved the following contract provision: "The tobacco stalks on any acreage of tobacco of types 11a, 11b, 12, 13, or 14 with respect to which a loss is claimed *shall not be destroyed* until the Corporation makes an inspection." (Emphasis added.) The court held that in the absence of any language plainly requiring that the provision be construed as a condition, it was to be construed as a promise, so the insureds had not automatically forfeited coverage under the policy by plowing under damaged tobacco stalks.

8.268 If you wish to use language of obligation to express a condition, you should add language that makes it clear that you're dealing with a condition. The simplest way to do that would be to add a *to* infinitive clause, as in [12-1].

8.269 A possible alternative to [12-1] would be to use language of obligation that incorporates a time limit: *Widgetco shall reimburse Acme for those expenses reflected in any invoice that Acme submits to Widgetco no later than 90 days after Acme*

receives that invoice. Besides being a mouthful, that alternative is less clear than [12-1], in that it's silent as to invoices submitted after 90 days. The principle of interpretation *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of others—might suggest to a court that Widgetco wasn't under any obligation with respect to any such invoices. But given that courts aren't fond of all-or-nothing arrangements unless the contract gives them no choice, making it explicit that late submission of an invoice precludes reimbursement would provide greater certainty.

LANGUAGE OF DECLARATION

3.270 "Language of declaration" is used by parties to declare facts by means of verbs of speaking. Language of declaration allows parties not simply to assert facts but to be seen to be asserting them—without the verb, it wouldn't be clear who is making the declaration.

3.271 Contracts contain two kinds of assertions of fact: If the declaring party has knowledge of a fact and the other party wants the declaring party to assert in the contract that the fact is accurate, the declaring party *states* that fact. (This is not a traditional usage; see 3.273.) If the other party wants the declaring party to accept in the contract that the declaring party won't be able to challenge the accuracy of a fact that the other party has knowledge of, the declaring party *acknowledges* that fact.

TABLE 13 ■ LANGUAGE OF DECLARATION

[13-1]	✓✓	Acme states that the Equipment is listed on schedule A.
[13-1a]	✗	Acme hereby states that the Equipment is listed on schedule A.
[13-1b]	✓	Acme represents that the Equipment is listed on schedule A.
[13-2]	✓✓	The Investor acknowledges that it has received a copy of each SEC Document.
[13-2a]	✗	The Investor hereby acknowledges that it has received a copy of each SEC Document.

3.272 Language of declaration is analogous to language of performance—in the former a party is making a specialized declaration by virtue of a speech act, and in the latter a party is taking an action by virtue of a speech act. But one difference is that *hereby*, which is a signal of language of performance, is less commonly used with verbs of

speaking, although one does see it, as in [13-1a] and [13-2a]. This manual recommends that you not use *hereby* with language of declaration.

Statements of Fact—Using "Represents and Warrants"

3.273 It's standard for drafters to introduce statements of fact using the word *represents*, the word *warrants*, or, most often, both words—*represents and warrants*. Both verbs have their noun counterparts—*representation* and *warranty*. (You also see *represents, warrants, covenants, and agrees*—a misbegotten mash-up of language of declaration, language of obligation, and language of agreement.)

3.274 The words *represents* (and *representation*) and *warrants* (and *warranty*) are terms of art, so they're confusing (see 1.7). And using both is pointless and aggravates the confusion. This section explains why.

MISAPPLIED TERMS OF ART

3.275 For complex reasons rooted in legal history, inaccurate statements of fact can give rise to alternative remedies—tort-based fraud and negligent misrepresentation claims and contract-based breach-of-warranty claims. (A thorough discussion of this topic can be found in Glenn D. West & W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the "Entire" Deal?*, 64 Bus. Law. 999 (2009).) Depending on the governing law,

the different remedies can have different procedural requirements, so which remedy is available can have important consequences for a claimant.

3.276 In an example of unhelpful literal-mindedness, it came to be believed that for a statement of fact to give rise to a claim for misrepresentation, it has to be a representation, and that it cannot be a representation unless it is introduced by the word *represents*. Similarly, for a statement of fact to give rise to a claim for breach of warranty, it has to be a warranty, and it cannot be a warranty unless it is introduced by the word *warrants*. This makes both *represents* and *warrants* misapplied terms of art (see 1.11).

3.277 A case exemplifying that approach is the 1625 English case *Chandelor v. Lopus*, 79 Eng. Rep. 3 (Ex. Ch. 1625). It involved a dispute between the buyer and the seller of a bezoar stone—a concretion found in the gut of certain animals and believed by some to have occult qualities. The seller had "affirmed" to the buyer that the item in question was a bezoar stone. The court held that the buyer couldn't bring against the seller a claim for breach of warranty, as the seller hadn't stated that he was "warranting" that the item was a bezoar stone.

INCONSISTENT WITH STANDARD ENGLISH

3.278 In standard English, the verb used to introduce a statement of fact serves only to identify who is making the statement and the manner in which they're making it. You could use any number

of verbs, and in whatever tense is appropriate: *Says*. *Utters*. *Proclaimed*. And so on. Misapplying *represents* and *warrants* is inconsistent with standard English, in that it freights with added significance the verb, or verbs, used to introduce a statement of fact. Only the initiated would think that the verb used could have implications for remedies.

3.279 Nevertheless, the notion that what verb you use to introduce statements of fact can affect remedies is widely accepted. See, e.g., Tina L. Stark, *Drafting Contracts: How Lawyers Do What They Do* 13 (2007) ("By virtue of [the line 'The Seller represents and warrants to the Buyer as follows'], every statement in the sections that followed would be both a representation and a warranty.").

3.280 At its simplest, that notion would simply have *representation* mean a statement of fact that can support an action for misrepresentation and *warranty* mean a statement of fact that can support an action for breach of warranty. But commentators elaborate on that analysis by shoehorning into definitions of *representation* and *warranty* components of the applicable cause of action— for example the notion that representations pertain to past facts and warranties pertain to future facts. That further muddies the waters, and from the perspective of the contract drafter the results are bewildering. See, for example, the convoluted treatment of the phrase *representations and warranties* in *Garner's Dictionary of Legal Usage*, at 775.

3.281 Other commentators acknowledge the current terminology but decline to attribute significance to it. For example, *ABA Model Stock Purchase Agreement*, at 77, states that although it follows common practice and uses both *representations* and *warranties* in the model agreement, "The technical difference between the two has proven unimportant in acquisition practice." This approach opts for expediency over rigor.

3.282 Others are sufficiently confused that if you were to ask any group of practitioners the significance of the phrase *represents and warrants*, the odds are many would be at a loss to provide an explanation, even an unconvincing one.

LACK OF SUPPORT

3.283 Not only is misapplication of *represents* and *warrants* flawed in terms of its semantics, in the United States it's not supported by any caselaw. Instead, many cases show that judges don't attribute literal-minded significance to the verb used to introduce a statement of fact. See, e.g., *Aspect Systems, Inc. v. Lam Research Corp.*, No. CV 06-1620-PHX-NVW, 2008 WL 2705154, at *9 (D. Ariz. June 26, 2008) (describing as a "warranty" a contract provision introduced by the verb "represents"); *Quality Wash Group V, Ltd. v. Hallak*, 58 Cal. Rptr. 2d 592, 596 (Ct. App. 1996), at 596 (describing as a "warranty" a provision introduced by "makes the following representations").

3.284 Furthermore, section 2-313(2) of the UCC states that "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty."

3.285 So for purposes of contracts governed by the laws of a U.S. jurisdiction, the notion that which verb you use to introduce statements of fact can affect remedies lacks any meaningful support.

3.286 The analysis offered above applies equally to use of the phrase *represents and warrants* in jurisdictions outside the United States. But it's worth considering in further detail how this issue plays out in England. English caselaw provides the literal-minded with a measure of support in the form of *Man Nutzfahrzeuge AG v. Freightliner Ltd*, [2005] EWHC 2347, 2005 WL 2893816, at *32 (QBD (Comm Ct) 2005). In that case, the court said, "By drafting the clauses in question as both representations and warranties the parties have attached different characteristics to the statements they contain which, depending on the circumstances, may give rise to different consequences and different measures of loss." But that doesn't validate misapplication of *represents* and *warrants*—instead, it simply confirms that many in the English legal profession are in thrall to it (see p. xxxiv).

3.287 Furthermore, it's not as if English practitioners are all on board with the notion that what verb you use to introduce statements of fact can affect remedies. For example, a 2007 briefing

paper by the law firm Jones Day considered the significance, from the U.K. perspective, of the words *representation* and *warranty*. After discussing implications of a literal-minded interpretation, it noted that "the simple categorization of a statement as a warranty (without any further provisions) probably has little bearing on whether the statement is susceptible to being treated as a representation." Leon N. Ferera, John R. Phillips, Julian Runnicles & Jeffery D. Schwartz, Some Differences in Law and Practice Between U.K. and U.S. Stock Purchase Agreements, Mondaq, Apr. 16, 2007.

3.288 Even in England, uncertainty surrounds *represents and warrants*.

ADDRESSING REMEDIES DIRECTLY

3.289 What's particularly frustrating about misapplication of *represents and warrants* is that it's a misbegotten way to address a legitimate issue.

3.290 It's standard for contracts to incorporate limitations on liability, but parties can attempt to circumvent those limitations by bringing tort-based fraud and negligent misrepresentation claims. And simply threatening to bring a fraud or negligent misrepresentation claim might provide a contract party enough leverage to force the other side to adjust or not assert any limitations on liability. So a contract party concerned about liability might also want to preclude the other side from being able to bring a tort-based claim.

3.291 This concern is at the heart of misapplication of *represents and warrants*, the notion being that if you want to preclude tort liability for a statement of fact, you should use *warrants*, and not *represents*, to introduce that statement of fact.

3.292 In addition to reflecting a skewed view of semantics and lacking any support (at least in the United States), misapplication of *represents and warrants* misconceives the role of the contract drafter. If a contract party, or its lawyer, wishes to preclude the possibility of its being the target of a tort claim, it should include in the contract provisions that seek to accomplish exactly that, something along the lines of the model provisions included in the article cited in 3.275.

3.293 It would be reckless to rely instead on a court's treating *warrants* as a misapplied term of art.

THE COST OF "REPRESENTS AND WARRANTS"

3.294 You could elect to stick with *represents and warrants*, but there's a cost to doing so.

3.295 One argument for not changing is that if a contract contains provisions aimed at excluding tort liability, that should render entirely irrelevant any concern that a court might base tort liability on use of the word *represents*. It follows that it shouldn't make a difference whether statements of fact are introduced using *represents and warrants*.

Alternatively, if avoiding tort liability isn't an issue for you—if the contract is for an unexceptional commercial matter rather than, say, acquisition of a company—then you should find unobjectionable the prospect that the other party might be able to choose from among contract and tort remedies. It follows that the possibility of a court's misapplying *represents and warrants* in construing the contract should hold no fears for you.

Whether or not you want to preclude tort liability, use of *represents and warrants* should have no bearing on the issue. Given the inertia that impedes change in contract language, the path of least resistance would seem to favor sticking with *represents and warrants*.

That doesn't take into account the cost of using the phrase *represents and warrants*, and the phrase *representations and warranties*, in a contract. Many readers, particularly nonlawyers, will find them utterly mystifying, another contribution to the legalistic fog. And they encourage a befuddled approach to remedies and to contract language in general. For one thing, anyone who is unaware that the best way to preclude tort liability is to address the issue directly might be inclined to waste time in discussions over whether to delete *represents*. So there are clear benefits to using something other than *represents and warrants* to introduce statements of fact.

USING "STATES"

3.299 What's the best alternative to *represents and warrants*? It would be preferable to use the simplest verb capable of introducing one or more statements of fact, namely *states*. Other alternatives, such as *asserts* and *confirms*, carry unnecessary rhetorical baggage. Consistent with using *states* would be using *statement of fact* instead of *representation*.

3.300 In addition to stating facts, one can also state opinions. But no reader could reasonably conclude that what follows *states* is anything other than a fact unless that's made explicit. Similarly, no one could reasonably question whether a party making statements using *states* is asserting that those statements are accurate. Nevertheless, when introducing a series of statements of fact, it would be informative to use the following introductory phrase, with a colon at the end: *Acme states that the following facts are accurate*.

3.301 Using *states* would represent a complete break with current practice. But contract drafting doesn't require profession-wide consensus. Instead, each drafter is free to employ—in fact, should employ—those usages that are clearest and free of unhelpful doctrinal implications (see 1.22).

USING ONLY "REPRESENTS"

3.302 If you're uncomfortable about using *states*, or if you think it would result in too much pushback (see p. xxxiii), the next-best alternative would be

represents on its own, as opposed to *warrants* on its own.

3.303 For one thing, lawyers refer informally to "representations," not "representations and warranties." For example, *ABA Model Stock Purchase Agreement*, at 77, says, "The commentary to the Model Agreement generally refers only to representations, although the Model Agreement follows common practice and uses both [representations and warranties]." Furthermore, *warranty* is at once overbroad and unhelpfully narrow—overbroad because section 2–303 of the UCC says that a warranty can be not only "an affirmation of fact" but also "a promise," in other words an obligation, and unhelpfully narrow because use of the word *warranty* on its own is primarily associated with sales of goods.

3.304 On the other hand, any literal-minded lawyer who is worried about tort liability won't want to see *represents* in a contract. By contrast, *states* has no doctrinal baggage.

3.305 Because in many contexts resistance to *states* would preclude using it, some sections of this manual offer *states* and *represents* (and *statements of fact* and *representations*) as alternatives, and chapter 9 ("Material" and "Material Adverse Change") uses just *represents* and *representations* (see 9.5), as do some other sections of this manual.

Statements of Fact—Alternatives To

3.306 Drafters routinely state as facts matters that would more logically be handled using another category of contract language.

3.307 For example, it doesn't make sense, strictly speaking, to have a party make a statement of fact regarding something over which it has no control. You could have the seller state in an asset purchase agreement that on the closing date the market price of unobtanium will be above a stated dollar amount. And doing so would in theory give the buyer a claim for damages if on the closing date the market price were less than the stated amount. But because the seller has no control over the market price, it would be rash to assume that a court would permit such a claim rather than treating it as a condition to closing. Having a party make a statement of fact regarding something over which it has no control is in effect a form of risk allocation. It would be clearer to provide for explicit risk allocation in the form of indemnification, liquidated damages, or a breakup fee.

3.308 It's standard to address by means of statements of fact matters that require a legal determination. It would, strictly speaking, make more sense to address them by means of language of belief (see 3.319).

Statements of Fact—Some Related Terminology

3.309 A party breaches an obligation, but not a statement of fact (whether you refer to it as such or as a representation). Instead, a statement of fact is

either accurate or inaccurate. If Abigail says that it's Monday but it's in fact Tuesday, Abigail hasn't "breached" anything. Instead, she's made an inaccurate statement.

3.310 This distinction is worth pointing out for its own sake, but it might also help drafters avoid a further problem, namely inappropriately lumping statements of fact with obligations. It's commonplace for contracts to provide for the possibility of cure of not only breached obligations but also "breached" representations. But once a party makes an inaccurate statement of fact, it can't subsequently make it accurate.

3.311 In the same vein, a statement of fact is either accurate or inaccurate—it cannot *become* inaccurate.

3.312 Regarding contract references to survival of statements of fact, see 13.645.

Acknowledgments

3.313 Use *acknowledge* if the party in question is accepting as accurate a fact offered by another party:

Acme *acknowledges* that the Consultant is in the business of providing services and consulting advice to others.

The parties *acknowledge* that breach of any obligation stated in this section 10.2 will cause irreparable harm to the Disclosing Party and that monetary damages will not provide an adequate remedy.

Each Shareholder *acknowledges* that the Merger Shares have not been registered under the Securities Act and are instead being issued under an exemption from registration.

3.314 Having a party acknowledge a fact would preclude it from later challenging that fact. *Understand*, *accept*, and *concede* are used as alternatives to *acknowledge*. In the interest of consistency (see 1.63), stick with *acknowledge*.

RELATION TO RECITALS

3.315 An alternative to having Party X acknowledge that a fact asserted by Party Y is correct would be to include that fact in the recitals. (Recitals too contain assertions of fact, but they don't need language of declaration—it's clear enough without it that the parties are making the recitals jointly.) If the fact in question relates to the background to the transaction, it would certainly fit in the recitals (see 2.117). But if the fact is particularly important, reinforce that importance by having one or more parties acknowledge that fact in the body of the contract (see 2.121).

INAPPROPRIATELY USED TO INTRODUCE OTHER LANGUAGE

3.316 Use acknowledge only to introduce a fact asserted by another party. Don't use it to introduce language that itself falls within a category of contract language. In the following two examples, *acknowledge* is used inappropriately to introduce

language of obligation and language of policy, respectively:

Each Lender ~~acknowledges that it~~ shall conduct its own independent investigation of the financial condition and affairs of each Borrower.

~~The parties acknowledge that this~~ [read *This*] agreement does not supersede, modify, or otherwise affect the terms of any stock options that Acme granted the Executive before the date of this agreement.

RHETORICAL EMPHASIS

3.17 Don't use *unconditionally acknowledge* or *expressly acknowledge*—they exhibit rhetorical emphasis (see 1.60).

USED IN COMBINATION WITH OTHER VERBS

3.18 Rarely makes sense to use *acknowledge* in combination with another verb. For example, rather than say *Acme acknowledges and agrees that*, you should either use *acknowledge* on its own or, if the statement that follows isn't actually an acknowledgement, dispense with both verbs. (Regarding *agrees that*, see 3.18.)

LANGUAGE OF BELIEF

3.19 It doesn't make sense to state categorically in a contract the legal implications of facts as they exist on the date of the agreement. Instead, it would be up to a court to decide what those implications

are—the best a party could do is give its opinion. In such contexts, it's preferable to use language of belief, as in [14-1], rather than language of policy, as in [14-1a].

TABLE 14 ■ LANGUAGE OF BELIEF

[14-1]	✓✓	The parties believe that this agreement complies with the requirements of section 409A of the IRS Code.
[14-1a]	✗	This agreement complies with the requirements of section 409A of the IRS Code.

3.320 It's routine for drafters to present legal opinions as statements of fact. Examples include statements regarding topics also covered by standard legal opinions delivered at closing—formation, existence, enforceability of obligations, no violations of law, and other matters.

3.321 Instead of asserting facts within the knowledge of the party making the statement, such statements serve to allocate risk. Although in many cases it would go against long-established

convention, it would be clearer, but not necessarily more convenient, to use instead language of belief, supplemented by provisions addressing indemnification, termination fees, or some other risk-allocation mechanism.

LANGUAGE OF INTENTION

3.322 Some aspects of a contract relationship can't be established by the parties in a contract. Instead, it's up to the courts to make the relevant determination. Nevertheless, it can be helpful for the parties to address such issues in a contract, using language of intention.

TABLE 15 ■ LANGUAGE OF INTENTION

[15-1]	✓✓	The parties intend that the Consultant will be an independent contractor.
[15-1a]	✗✗	The Consultant shall be an independent contractor.
[15-1b]	✗	The Consultant will be an independent contractor.

[15-1c]	✖	The Consultant acknowledges that she will be an independent contractor.
[15-1d]	✖	The Consultant believes that she will be an independent contractor.
[15-1e]	✖✖	The Consultant shall be construed to be an independent contractor.
[15-1f]	✖	The Consultant is to be construed to be an independent contractor.

For example, it's commonplace for consulting agreements to contain a provision regarding the consultant's status as an independent contractor rather than an employee. What category of contract language should you use for such provisions? If you consider the possibilities, it's clear that language of intention is the logical choice.

Obviously, it wouldn't make sense to use language of obligation, as in [15-1a]—whether the consultant is an independent contractor isn't something that's entirely within the control of the consultant.

3.325 You could use language of policy, as in [15-1b], but whether a consultant is an independent contractor or an employee isn't something the parties can decide among themselves. Instead, it depends on the governing law and the nature of the services performed, not on the label the parties choose to apply to the relationship.

3.326 Language of declaration, or more specifically an acknowledgment, as in [15-1c], wouldn't work either: you acknowledge facts, and whether someone is an independent contractor isn't an established fact that a consultant can acknowledge at the outset of the relationship.

3.327 Language of belief, as in [15-1d], would be inappropriate, as language of belief serves to express the opinion of a party regarding a legal circumstance on the date of the agreement. Whether someone is a consultant or an employee can't be determined on the date of the agreement—also a factor is how the relationship develops over time.

3.328 In such contexts drafters routinely use *shall be construed*, as in [15-1e], but besides failing the "has a duty" test (see 3.48), it's unrealistic, as it in effect seeks to impose a duty on a nonparty. And not just any nonparty, but one that will do what it feels appropriate, thank you very much—a court. Using instead *is to be construed*, as in [15-1f], is more discreet but attempts to achieve the same result.

3.329 The only remaining possibility is [15-1]—language of intention. In other words, the

parties intend that the consultant will be an independent contractor, but if the nature of the relationship were ever to become an issue, it would be up to a court to decide the consultant's status, based on the law and the facts.

3.330 If a given issue, such as a consultant's status, depends on the totality of the circumstances rather than on what label the parties apply, why bother addressing it in a contract using language of intention? Because a court might take into account how the issue is described in the contract. For example, the label the parties use is one factor that courts might consider in determining whether someone is an employee or an independent contractor. See 19 *Williston on Contracts*, at § 54:2, which includes in a list of relevant factors "whether the parties believe they are creating the relation of master and servant."

3.331 Aspects of a contract relationship are subject to judicial scrutiny in another respect. For example, in the United States, a court might override the parties' choice of governing law on the grounds that the state specified doesn't bear a reasonable relationship to the transaction, or because applying the law of that state would be contrary to public policy of the forum state. But this and analogous instances differ from those discussed in 3.322–23. In the latter instances, the nature of the relationship would be entirely a question of law and fact, whereas in the former, the selection of the parties applies, unless it fails to meet minimum legal

requirements. Given that distinction, it would be awkward to insist on using for the governing-law provision language of intention rather than language of policy: "The parties intend that the laws of the state of New York will govern . . . ." When the choice specified by the parties in a contract applies unless a court decides that it fails to meet minimum requirements, stick with language of policy.

LANGUAGE OF RECOMMENDATION

One side to a transaction might have significantly greater bargaining power than the other side; that's usually the case in, for example, a contract between a company and one of its employees. The party with the greater bargaining power might take the opportunity to include in the contract a recommendation to the other party, as in [16-1]. Presumably, the purpose of such recommendations is to avoid dispute by pointing out something the other party might otherwise miss. The alternative—letting the other party figure out such matters for itself—might ultimately work to the disadvantage of the party with the greater bargaining power, as the disparity in bargaining power might cause a court to go out of its way to cut the weaker party some slack.

TABLE 16 ■ LANGUAGE OF RECOMMENDATION

[16-1]	✓✓	The Company recommends that the Participant consult with his or her personal legal advisor if the Participant is uncertain whether the insider rules apply.
[16-1a]	✗	The Company advises the Participant to consult with his or her personal legal advisor . . . .

3.333 Because *recommends* is a verb of speaking, don't use *hereby* with *recommends* (see 3.272).

3.334 You could convey the meaning of [16-1] using *advises*, as in [16-1a], but *recommends* is preferable, as having one party give another advice suggests a relationship involving trust.

"SHALL" AND "MAY" IN RESTRICTIVE RELATIVE CLAUSES

3.335 *Shall* and *may* are used inappropriately in a construction that has no bearing on categories of contract language—the restrictive relative clause. This topic is nevertheless included in this chapter

because inappropriate uses of *shall* and *may* detract from appropriate use and create the potential for confusion.

In [17-1], the restrictive relative clause is *that Acme specifies in writing*. Drafters sometimes use *shall* in restrictive relative clauses, as in [17-1a], out of a misguided fear that the present tense cannot be used to refer to events that will happen in the future.

Sometimes this use of *shall* might represent an attempt to address a legitimate issue. Because [17-2] uses a stative verb (*owns*) rather than a dynamic verb (see 3.253), it's not clear whether the transfer restrictions apply only to shares owned on the date of the agreement or whether shares acquired subsequently are also included. Referring to *Shares that it shall own* isn't, however, the way to resolve this ambiguity; instead, as in [17-2b] make it clear that after-acquired shares are included.

TABLE 17 ■ MISUSE OF "SHALL" AND "MAY" IN RESTRICTIVE RELATIVE CLAUSES

[17-1]	✓✓	Jones shall pay the Purchase Price by wire transfer to any account that Acme specifies in writing.

[17-1a] ✗✗ . . . to any account that Acme shall specify in writing.

[17-2] ✓ Other than in accordance with the terms of this agreement, no Stockholder may transfer any Shares that it owns.

[17-2a] ✗✗ . . . any shares that it shall own.

[17-2b] ✓✓ . . . any shares that it currently owns or any additional Shares that it acquires.

[17-3] ✓✓ If Acme sells Assets to one or more Buyers that Roe introduces to Acme . . .

[17-3a] ✗✗ . . . one or more Buyers that Roe may introduce to Acme . . .

3.338 In [17-3], the restrictive relative clause is *that Roe introduces to Acme.* In this context using *may*, as in [17-3a], would be superfluous, in that the notion of possibility is adequately conveyed by the word *any* earlier in the sentence. (For other examples of this use of *may*, see 3.163 and 3.167.)

SELECTING WHICH CATEGORY OF CONTRACT LANGUAGE TO USE

3.339 Once you're attuned to the different categories of contract language, it becomes routine to ask yourself, when drafting a provision, what category of contract language you should use. Working through the possibilities gives you a better understanding of what's at stake, making you better equipped to address the issues raised. So it's not only the reader who benefits from adept handling of the categories of contract language—so does the drafter and, by extension, the client.

3.340 Here's an example of how this process can play out: Parts of the UCC require that text be "conspicuous," but the UCC provides limited guidance as to what is considered conspicuous text (see 16.29). The lack of detailed guidelines has caused some drafters to include in contracts a provision stating that text that the UCC says must be conspicuous to be enforceable was in fact conspicuous.

3.341 That raises the question which category of contract language would be most appropriate for

such a provision. Using stripped-down language, here are the possibilities, with annotations:

- *Language of agreement.* The parties agree that the text in this section 16 is conspicuous. [The lead-in is the only place for language of agreement. It's redundant elsewhere, including here.]
- *Language of policy.* The text in this section 16 is conspicuous. [Whether text is conspicuous isn't an objective fact, so language of policy wouldn't work.]
- *Language of belief.* The parties believe that the text in this section 16 is conspicuous. [This recognizes that the requirement that text be conspicuous is one set by law, but using language of belief suggests that the parties' views are irrelevant.]
- *Language of prohibition.* The parties shall not claim that the text in this section 16 is not conspicuous. [Provisions that seek to prevent a party from making an otherwise legitimate claim aren't ideal, as they can convey a sense of suppression.]
- *Language of declaration.* The parties acknowledge that the text in this section 16 is conspicuous. [This treats conspicuousness as purely an issue of fact. But it's hard to imagine a court holding that a provision fails to meet the requirements for conspicuousness, even though the parties had acknowledged that it is conspicuous.]
- *Language of declaration.* The Buyer acknowledges that the text in this section 16 is conspicuous. [This represents an improvement on the immediately preceding version, in that it makes sense to have the acknowledgment be by the party to whom the conspicuous text is

directed. It's the best way to address the issue succinctly.]

3.342 Determining how to address what's required to amend a contract provides another opportunity to consider which category of contract language is appropriate. Here are the possibilities:

- *Language of discretion.* The parties may amend this agreement only by a writing signed by both parties. [Using language of limited discretion presupposes the possibility of breach (if that discretion is exceeded) and a remedy for breach. That doesn't make sense in this context.]
- *Language of prohibition.* The parties shall not amend this agreement, except by written agreement of the parties. [Using language of obligation presupposes the possibility of breach and a remedy for breach. That doesn't make sense in this context.]
- *Condition using language of obligation.* To be effective, an amendment to this agreement must be in writing and signed by both parties. [This works.]
- *Language of policy.* No amendment to this agreement will be effective unless it is in writing and signed by both parties. [And so does this.]

3.343 Also consider the following two alternatives:

- *Language of policy.* This agreement will terminate upon Acme's giving Widgetco notice of termination. [This conveys the intended meaning, but . . . (continued below)]
- *Language of discretion.* Acme may terminate this agreement by giving Widgetco notice of termination. [. . . language of discretion seems

more apt, as termination would require Acme to exercise its discretion. And using language of discretion would allow Acme to specify that the contract terminates at some time other than the moment of receipt of notice of termination.]

3.344 For another example of the diagnostic value of the categories-of-contract-language approach, see 3.78.

CHAPTER 4

LAYOUT

4.1 How the text of the body of the contract is formatted and arranged helps determine how easy it is to read.

THE COMPONENTS OF THE BODY OF THE CONTRACT

4.2 The body of the contract is composed of sections (which can be grouped into articles), subsections, and enumerated clauses. Subdividing contract text in this manner makes it much easier to read, permits cross-referencing, and helps readers to find their way around the document.

Articles

4.3 Whether to group into articles all sections that share a theme is a function of how long the contract is. Consider grouping sections into articles once you have more than 25 or so sections.

4.4 Some contracts use the term *section* for a group of sections. But with that approach, a reference to "section 1," considered in isolation, could refer to a single provision or to a group of

provisions. Using instead *article* distinguishes the whole from its constituent parts.

4.5 UK drafters are partial to using *clause* instead of both *article* and *section*. But in general usage *clause* refers to a part of a sentence—in particular, this manual refers to "enumerated clauses" (see 4.28)—so also using *clause* instead of *article* and *section* would result in the one word conveying three different meanings.

4.6 Give each article a simple, all-encompassing heading, using all capitals; see sample 3. All capitals are harder to read (see 16.22), but that's not an issue when it's used for only a few words. Using *MISCELLANEOUS* as an article heading is acceptable—it's generally understood that it refers to a group of "boilerplate" provisions addressing governing law, notices, and other such matters.

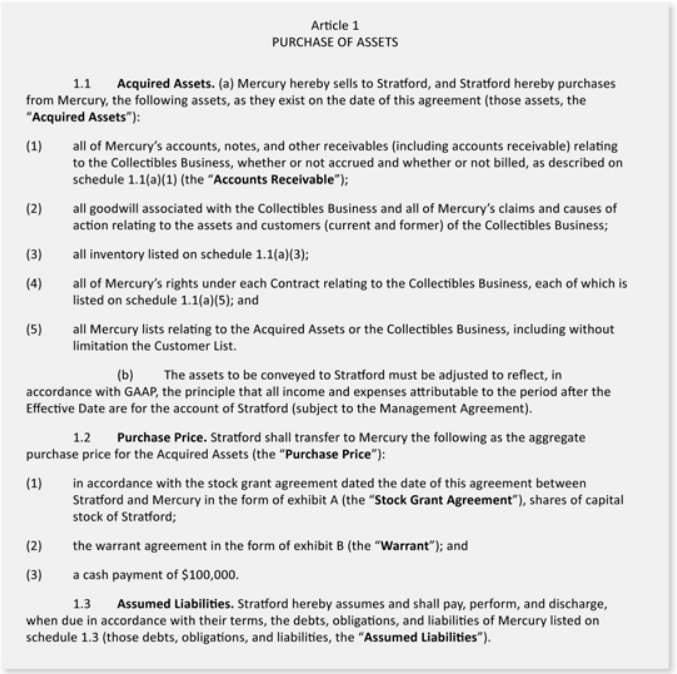
4.7 Use Arabic rather than Roman numerals for article numbers—they're easier to read. Don't use the multiple-numeration system—use *article 1*, not *article 1.0*.

Sections

FUNCTION

4.8 A section serves to contain provisions relating to a particular topic. In the United States the term *section* is standard. It's a better choice than a UK alternative, *clause* (see 4.5).

SAMPLE 3 ■ MSCD ENUMERATION SCHEME, "ARTICLES" VERSION



Article 1
PURCHASE OF ASSETS

1.1 **Acquired Assets.** (a) Mercury hereby sells to Stratford, and Stratford hereby purchases from Mercury, the following assets, as they exist on the date of this agreement (those assets, the "**Acquired Assets**"):

(1) all of Mercury's accounts, notes, and other receivables (including accounts receivable) relating to the Collectibles Business, whether or not accrued and whether or not billed, as described on schedule 1.1(a)(1) (the "**Accounts Receivable**");

(2) all goodwill associated with the Collectibles Business and all of Mercury's claims and causes of action relating to the assets and customers (current and former) of the Collectibles Business;

(3) all inventory listed on schedule 1.1(a)(3);

(4) all of Mercury's rights under each Contract relating to the Collectibles Business, each of which is listed on schedule 1.1(a)(5); and

(5) all Mercury lists relating to the Acquired Assets or the Collectibles Business, including without limitation the Customer List.

(b) The assets to be conveyed to Stratford must be adjusted to reflect, in accordance with GAAP, the principle that all income and expenses attributable to the period after the Effective Date are for the account of Stratford (subject to the Management Agreement).

1.2 **Purchase Price.** Stratford shall transfer to Mercury the following as the aggregate purchase price for the Acquired Assets (the "**Purchase Price**"):

(1) in accordance with the stock grant agreement dated the date of this agreement between Stratford and Mercury in the form of exhibit A (the "**Stock Grant Agreement**"), shares of capital stock of Stratford;

(2) the warrant agreement in the form of exhibit B (the "**Warrant**"); and

(3) a cash payment of $100,000.

1.3 **Assumed Liabilities.** Stratford hereby assumes and shall pay, perform, and discharge, when due in accordance with their terms, the debts, obligations, and liabilities of Mercury listed on schedule 1.3 (those debts, obligations, and liabilities, the "**Assumed Liabilities**").

4.9 In the boilerplate at the end of a contract, provisions addressing unrelated topics are sometimes lumped together in one section. Because that practice can make it harder for readers to find a particular provision, use it only when the provisions in question are sufficiently brief that giving each provision its own section would waste space. Take care when combining disparate provisions in a single section, as the context of one provision could influence interpretation of another provision in the same section. See, e.g., *Williams v. CDP, Inc.*,

No. 10-1396, 2012 WL 959343 (4th Cir. Mar. 22, 2012).

4.10 Don't use subsections in such omnibus sections—if the provisions are substantial enough for each to be given its own subsection, then they're substantial enough to be turned into sections. Don't combine more than two unrelated provisions in a single section—the added economy is more than offset by the potential for confusion. And give such sections an appropriate heading (see 4.18).

ENUMERATION

4.11 Number each section. Don't add *Section* in front of each section number—it takes up space without providing any benefit. If sections aren't grouped into articles, number them consecutively (*1.*, *2.*, *3.*, not *1.0*, *2.0*, *3.0*). If they're grouped into articles, number them using the multiple-numeration system (the sections of article 1 being numbered *1.1*, *1.2*, *1.3*, not *1.01*, *1.02*, *1.03*, with the unnecessary extra zero, or *1.1.*, *1.2.*, *1.3.*, with the superfluous extra period); see sample 3.

4.12 For section numbers, use the automatic-numbering feature included in word-processing software, or use specialized paragraph-numbering software. You should also use it for subsections (see 4.22) and tabulated enumerated clauses (see 4.34). Doing so would spare you having to renumber provisions whenever you add, delete, or move an enumerated block of text.

FORMAT

4.13 When formatting sections, instead of the "hanging indent" format, use the "first-line indent" format, with the enumeration one tab-setting in and the section heading another tab-setting farther in. (In sample 3, which shows text formatted as recommended in this manual, the sections use the first-line indent format. By way of contrast, the text in sample 4 is formatted using only first-line indents, staggered to show the different components, and the text in sample 5 is formatted using only staggered hanging indents.)

4.14 Using hanging indents would isolate section numbers on the margin, making them stand out more. But that benefit is outweighed by the following three considerations: First, at the section level, hanging indents waste space without making text appreciably easier to read. Second, using first-line indents for both sections and subsections better expresses their relationship (see 4.26); switching formats depending on whether a section contains subsections would result in an inconsistent format. And third, using first-line indents for sections and subsections and hanging indents for tabulated enumerated clauses is more logical than using hanging indents for all of them (see 4.47).

HEADINGS

4.15 Give each section a heading consisting of a bolded word or short phrase. (Bold the period after the heading too.) Such headings make it easier to

find one's way around a document. Use headline-style capitalization (see *The Chicago Manual of Style*, at 8.157).

4.16 The alternatives to bold are unappealing: Underlining is a hangover from typewriter days (see 16.24). Using all capitals would be too strident and harder to read (see 16.22). And adding italics to bold would be an unnecessary embellishment.

SAMPLE 4 ■ STAGGERED FIRST-LINE-INDENT FORMAT

1.1 **Acquired Assets.** (a) Mercury hereby sells to Stratford the following assets, as they exist on the date of this agreement (those assets, the "**Acquired Assets**"):

(1) all of Mercury's accounts, notes, and other receivables (including accounts receivable) relating to the Collectibles Business, whether or not accrued and whether or not billed, as described on schedule 1.1(a)(1) (the "**Accounts Receivable**");

(2) all goodwill associated with the Collectibles Business and all of Mercury's claims and causes of action relating to the assets and customers (current and former) of the Collectibles Business;

(3) all inventory listed on schedule 1.1(a)(3);

(4) all of Mercury's rights under each Contract relating to the Collectibles Business, each of which is listed on schedule 1.1(a)(5); and

(5) all Mercury lists relating to the Acquired Assets or the Collectibles Business, including but not limited to the Customer List.

(b) The assets to be conveyed to Stratford must be adjusted to reflect, in accordance with GAAP, the principle that all income and expenses attributable to the period after the Effective Date are for the account of Stratford (subject to the Management Agreement).

1.2 **Purchase Price.** Stratford shall transfer to Mercury the following as the aggregate purchase price for the Acquired Assets (the "**Purchase Price**"):

(1) in accordance with the stock grant agreement dated the date of this agreement between Stratford and Mercury in the form of exhibit A (the "**Stock Grant Agreement**"), shares of capital stock of Stratford;

(2) the warrant agreement in the form of exhibit B (the "**Warrant**"); and

(3) a cash payment of $100,000.

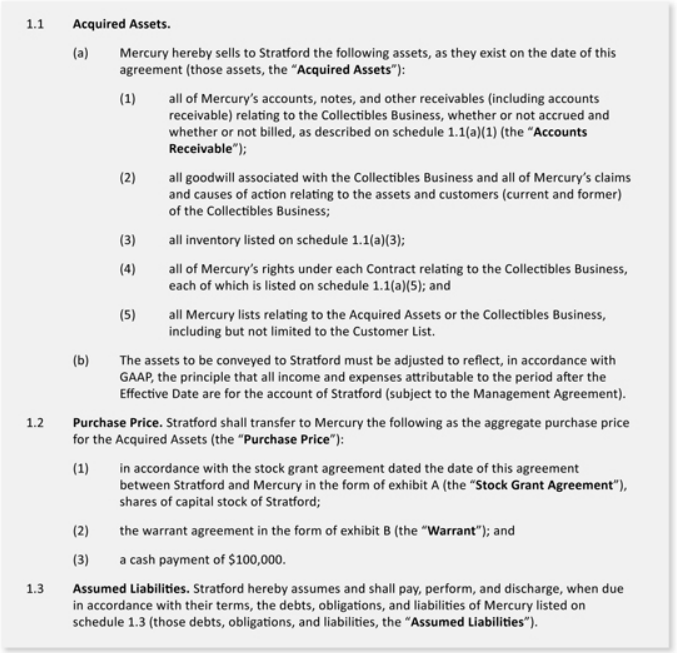
1.3 **Assumed Liabilities.** Stratford hereby assumes and shall pay, perform, and discharge, when due in accordance with their terms, the debts, obligations, and liabilities of Mercury listed on schedule 1.3 (those debts, obligations, and liabilities, the "**Assumed Liabilities**").

4.17 Many headings recur in contract after contract. Certain headings, such as *Arbitration* or *Confidentiality*, are a straightforward reflection of a section's contents. Others, such as *Further*

Assurances, are cryptic terms of art. If you need to create a heading, aim for clarity and brevity. Don't use a heading that seems to promise more than the section actually delivers or is otherwise misleading. (See 13.671 regarding using *Termination for Convenience* as a section heading.) Courts have been known to refuse to enforce provisions with uninformative or misleading headings, although that would seem unlikely in the case of a contract between ostensibly sophisticated parties represented by counsel. Longer contracts often include a provision stating that headings are for convenience only and are not intended to affect meaning (see 15.7), but don't use such a provision as an excuse for being lax in formulating headings.

If a section addresses two distinct issues (see 4.9), you could give it a heading consisting of a word or short phrase for each issue, separated by a semicolon (such as *Amendment; Waiver*).

SAMPLE 5 ■ STAGGERED HANGING-INDENT FORMAT



1.1 **Acquired Assets.**

(a) Mercury hereby sells to Stratford the following assets, as they exist on the date of this agreement (those assets, the "**Acquired Assets**"):

(1) all of Mercury's accounts, notes, and other receivables (including accounts receivable) relating to the Collectibles Business, whether or not accrued and whether or not billed, as described on schedule 1.1(a)(1) (the "**Accounts Receivable**");

(2) all goodwill associated with the Collectibles Business and all of Mercury's claims and causes of action relating to the assets and customers (current and former) of the Collectibles Business;

(3) all inventory listed on schedule 1.1(a)(3);

(4) all of Mercury's rights under each Contract relating to the Collectibles Business, each of which is listed on schedule 1.1(a)(5); and

(5) all Mercury lists relating to the Acquired Assets or the Collectibles Business, including but not limited to the Customer List.

(b) The assets to be conveyed to Stratford must be adjusted to reflect, in accordance with GAAP, the principle that all income and expenses attributable to the period after the Effective Date are for the account of Stratford (subject to the Management Agreement).

1.2 **Purchase Price.** Stratford shall transfer to Mercury the following as the aggregate purchase price for the Acquired Assets (the "**Purchase Price**"):

(1) in accordance with the stock grant agreement dated the date of this agreement between Stratford and Mercury in the form of exhibit A (the "**Stock Grant Agreement**"), shares of capital stock of Stratford;

(2) the warrant agreement in the form of exhibit B (the "**Warrant**"); and

(3) a cash payment of $100,000.

1.3 **Assumed Liabilities.** Stratford hereby assumes and shall pay, perform, and discharge, when due in accordance with their terms, the debts, obligations, and liabilities of Mercury listed on schedule 1.3 (those debts, obligations, and liabilities, the "**Assumed Liabilities**").

4.19 Although *MISCELLANEOUS* is acceptable as an article heading (see 4.6), don't use it as a section heading. Use instead a number of small sections, each with an informative heading.

4.20 Don't use *etc*. to broaden the scope of a heading, as in *Notices*, *etc*. If a section addresses more concepts than you can comfortably refer to in the heading, that's a sign that you should divide it into two or more separate sections. More generally, *etc*. is uninformative—don't use it anywhere in contracts.

4.21 Put all text in the body of the contract within a section. One exception: when Acme's

statements of fact constitute an article unto themselves, place the introductory language—for example, *Acme states to Widgetco that the following facts are accurate*—after the article heading but before the sections. That allows the statements of fact to be presented as sections, complete with headings, rather than as subsections. (Regarding using *states* and *statements of fact* instead of *represents* and *representations*, see 3.299.)

Subsections

4.22 Divide a section into two or more enumerated subsections if each subsection addresses different aspects of a single topic or the section would otherwise be too long to read comfortably (see 4.56). Don't divide a section into paragraphs that aren't enumerated.

4.23 Use the *(a)* hierarchy to designate subsections. If you run out of letters you could shift to the *(aa)* hierarchy, but if a section has 10 or more subsections, consider grouping them in two or more sections.

4.24 Don't use instead the multiple-numeration system, with the subsections of section 4.3 being numbered 4.3.1, 4.3.2, and so forth. It has four shortcomings: First, it takes up more space than the *(a)* hierarchy. Second, it's potentially confusing: considered in isolation, "section 1.1" could refer to the first section of article 1 or the first subsection of section 1. Third, it would look odd to use the multiple-numeration system if you put the first

subsection designation after the heading, as this manual recommends. And fourth, this manual recommends against using the multiple-numeration system for tabulated enumerated clauses (see 4.38), and it would look odd to start with the *1.* and *1.1* hierarchies (or the *1.*, *1.1*, and *1.1.1* hierarchies, in a contract divided into articles) and then shift to the *(1)* hierarchy for first-level tabulated enumerated clauses.

4.25 An advantage to using the multiple-numeration system is that if you find yourself on a page without section enumeration, you would know from any subsection enumeration and tabulated-enumerated-clause enumeration what section they're part of. But that advantage isn't enough to offset the disadvantages.

4.26 Except in the case of the first subsection of any section, use the first-line indent format for subsections, but place subsection designations one tab-setting further in than section numbers, to distinguish them (see sample 3). Because sections and subsections serve the same function—grouping entire sentences, by topic, into manageable blocks of text—it makes sense to have them share basically the same format. Place the first subsection designation on the same line as the section heading, with one space on each side: placing the *(a)* on a new line would waste the better part of two lines of space and would isolate the heading, as compared with the headings of sections without subsections.

4.27 Don't give headings to subsections—any benefit a reader might derive from subsection headings is more than offset by the way they detract from section headings. If you keep your sections a manageable length, you won't miss subsection headings.

Enumerated Clauses

FUNCTION

4.28 "Enumerated clauses" are the parts of a sentence in a section or subsection that are preceded by introductory text and are designated by a number or letter in parentheses, with the penultimate enumerated clause being followed by *and* or *or*. Here's a sample set of enumerated clauses with introductory text: *Schedule 3.3 lists (1) the name of each financial institution in which Acme has an account or safe-deposit box, (2) the one or more names in which each account or box is held, (3) the type of account, and (4) the name of each Person authorized to draw on or have access to each account or box.* Designating the parts of a sentence in this manner highlights and renders more readable the individual components of a list or series; use enumerated clauses whenever a list or series is anything other than a short string of very brief clauses.

4.29 Because enumerated clauses are parts of a sentence, don't begin an enumerated clause with a capital letter, unless the word otherwise requires one. For the same reason, in a set of enumerated

clauses the only period marking the end of a sentence should occur at the end of the last enumerated clause.

4.30 An enumerated clause could itself contain enumerated subclauses. And those subclauses could conceivably contain enumerated sub-subclauses, but three levels of enumerated clauses is generally a sign of undue complexity.

4.31 The alternative to using enumerated clauses is to make each enumerated clause into a separate provision, repeating each time the essence of the introductory text. Depending on the context, using that approach might yield clearer prose. For example, using as introductory text *Acme shall do the following* would result in enumerated clauses that lack a subject. It might be clearer to use instead separate provisions, each using *Acme shall*.

PUNCTUATION

4.32 Use a colon to introduce any set of enumerated clauses that is more than about three lines long. A colon allows readers to catch their breath before tackling the enumerated clauses. Because readers don't expect to pause at the end of a clause fragment, structure whatever precedes a colon as a full independent clause—in other words, it should contain a subject and verb and be capable of standing alone. You can easily turn into an independent clause any introductory statement that isn't one by incorporating *the following* or *as follows*. For example, *Since March 30, 2013, the*

Company has not: (1) incurred any obligation . . . could be rephrased as *Since March 30, 2013, the Company has not done any of the following: (1) incurred any obligation . . . .*

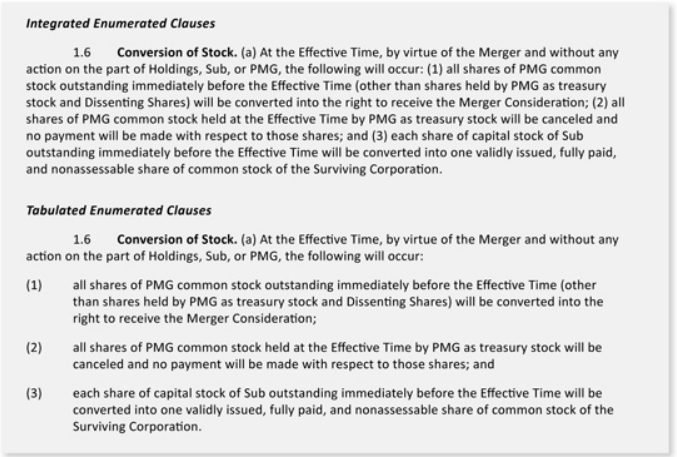
4.33 When the enumerated clauses in a sentence are long and complex or involve internal punctuation, for the sake of clarity separate them with semicolons; otherwise, separate them using commas. If the enumerated clauses in a sentence are sufficiently complex or lengthy to warrant their being preceded by a colon, then separate them using semicolons rather than commas. Use commas, not semicolons, to separate enumerated clauses not preceded by a colon.

TABULATION

4.34 A sentence containing enumerated clauses can constitute part of a paragraph, or a paragraph unto itself, but you can instead use "tabulation" to make each enumerated clause stand alone. Each enumerated clause so treated is a "tabulated enumerated clause," as opposed to an "integrated enumerated clause"; in sample 3, section 1.1(a) contains five tabulated enumerated clauses and section 1.2 contains three. The more enumerated clauses there are in a sentence, and the longer they are, the more likely it is that having them stand alone would make them easier to read. For comparison, sample 6 shows two versions of the same section, one with integrated enumerated clauses and the other with tabulated enumerated clauses.

4.35 When you tabulate a set of enumerated clauses, you have the choice of either tabulating or integrating any subclauses. But you shouldn't tabulate subclauses if the enumerated clauses are integrated. The same applies to the relationship between subclauses and sub-subclauses.

SAMPLE 6 ■ INTEGRATED AND TABULATED ENUMERATED CLAUSES



Integrated Enumerated Clauses

1.6 **Conversion of Stock.** (a) At the Effective Time, by virtue of the Merger and without any action on the part of Holdings, Sub, or PMG, the following will occur: (1) all shares of PMG common stock outstanding immediately before the Effective Time (other than shares held by PMG as treasury stock and Dissenting Shares) will be converted into the right to receive the Merger Consideration; (2) all shares of PMG common stock held at the Effective Time by PMG as treasury stock will be canceled and no payment will be made with respect to those shares; and (3) each share of capital stock of Sub outstanding immediately before the Effective Time will be converted into one validly issued, fully paid, and nonassessable share of common stock of the Surviving Corporation.

Tabulated Enumerated Clauses

1.6 **Conversion of Stock.** (a) At the Effective Time, by virtue of the Merger and without any action on the part of Holdings, Sub, or PMG, the following will occur:

(1) all shares of PMG common stock outstanding immediately before the Effective Time (other than shares held by PMG as treasury stock and Dissenting Shares) will be converted into the right to receive the Merger Consideration;

(2) all shares of PMG common stock held at the Effective Time by PMG as treasury stock will be canceled and no payment will be made with respect to those shares; and

(3) each share of capital stock of Sub outstanding immediately before the Effective Time will be converted into one validly issued, fully paid, and nonassessable share of common stock of the Surviving Corporation.

4.36 Keep integrated those enumerated clauses that are not preceded by a full independent clause and a colon and are separated by commas: such enumerated clauses should be relatively short and few in number, and it would look odd to have the introductory statement end without punctuation and the tabulated enumerated clauses end with commas.

4.37 Place tabulated enumerated clauses at the end of a sentence to avoid "dangling" text, which occurs when the first part of a sentence consists of a

series of tabulated enumerated clauses and the remainder starts flush left below the last enumerated clause; see sample 7. To eliminate dangling text, restructure the provision or integrate the enumerated clauses. Similarly, end a section or subsection after a series of tabulated enumerated clauses instead of having the remaining one or more sentences as an unenumerated block of text.

ENUMERATION

Use as the enumeration hierarchy for enumerated clauses the *(1)* series, followed by the *(A)* series for subclauses and the *(i)* series (generally referred to as "Romanette") for sub-subclauses. This hierarchy reserves the *(a)* series for subsections, to enhance the distinction between subsections and enumerated clauses. The *(1)* series takes precedence over the *(i)* series, as it's easier to read and takes up less space.

Don't use what this manual refers to as "commingled enumeration." In other words, don't use subsection enumeration for first-level tabulated enumerated clauses, too, in sections that aren't divided into subsections. Because tabulated enumerated clauses are distinct from sections and subsections, commingled enumeration adds an element of confusion to how a contract is organized. That's why this manual recommends that you reserve the *(a)* hierarchy for subsections and uses the *(1)*, *(A)*, and *(i)* hierarchies for first-, second-, and third-level enumerated clauses. That practice

has the added benefit of facilitating automated enumeration.

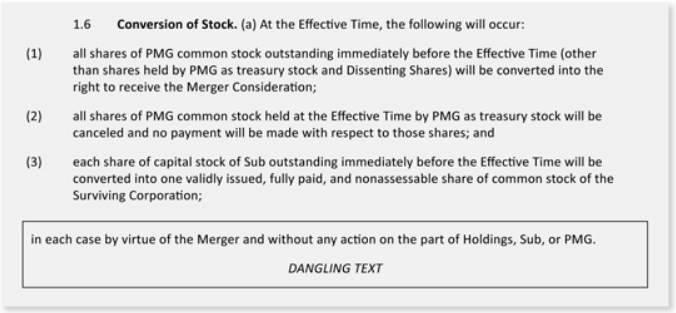
4.40 For four reasons, it's best not to use the multiple-numeration system to enumerate tabulated enumerated clauses. First, the multiple-numeration system is suited to conveying taxonomies and emphasizes that each component is subsumed within the next level up in the hierarchy. By contrast, the components of a set of first-level tabulated enumerated clauses are simply parts of a sentence within a section or subsection; the most important relationship is between the tabulated enumerated clauses, not between the set of tabulated enumerated clauses and the section or subsection in which it's located.

4.41 Second, the multiple-numeration system wouldn't work for integrated enumerated clauses, and it would be awkward to switch enumeration depending on whether your enumerated clauses are tabulated or integrated.

4.42 Third, to avoid commingled enumeration, you would have to use the *1.1.1* hierarchy for first-level tabulated enumerated clauses, even in sections without subsections. That would look odd.

4.43 And fourth, using the multiple-numeration system for second-level tabulated-enumerated clauses (for example, "6.10.4.5.3," for use in a contract divided into articles and in a section divided into subsections) would be cumbersome and could well interfere with tab settings.

SAMPLE 7 ■ TABULATED ENUMERATED CLAUSES FOLLOWED BY DANGLING TEXT



1.6 **Conversion of Stock.** (a) At the Effective Time, the following will occur:

(1) all shares of PMG common stock outstanding immediately before the Effective Time (other than shares held by PMG as treasury stock and Dissenting Shares) will be converted into the right to receive the Merger Consideration;

(2) all shares of PMG common stock held at the Effective Time by PMG as treasury stock will be canceled and no payment will be made with respect to those shares; and

(3) each share of capital stock of Sub outstanding immediately before the Effective Time will be converted into one validly issued, fully paid, and nonassessable share of common stock of the Surviving Corporation;

in each case by virtue of the Merger and without any action on the part of Holdings, Sub, or PMG.

DANGLING TEXT

4.44 Don't use bullets to enumerate tabulated enumerated clauses. Although bullets are useful in other documents, they're too informal for contracts and aren't conducive to cross-referencing.

4.45 In a set of tabulated enumerated clauses, don't have enumeration from one hierarchy followed immediately, without any intervening text, by enumeration from the next hierarchy down. For example, don't have *(2)* followed directly by *(A)* and its related clause, with the two enumerations separated only by a tab and with the *(A)* clause followed by one or more other enumerated clauses in the same hierarchy. Such arrangements are awkward and fail to make clear why the enumerated clauses couldn't all be in the same hierarchy.

4.46 Instead of using in a section or subsection two sets of tabulated enumerated clauses, each with a different enumeration hierarchy (for example the *(a)* hierarchy, but starting with "(x)," and the *(1)* hierarchy), limit yourself to one set, either by

eliminating the enumeration from one set or by placing one set in a separate section or subsection.

FORMAT

4.47 A format that wouldn't make sense would be to use staggered hanging indents for sections, subsections, and tabulated enumerated clauses, with each component being staggered further to the right: that wouldn't reflect how tabulated enumerated clauses relate to sections and subsections.

4.48 Sections and subsections are used to group entire sentences, by topic, into manageable blocks of text. By contrast, a set of tabulated enumerated clauses and the phrase introducing that set together constitute a single sentence. So tabulated enumerated clauses serve an entirely different function from sections and subsections—it doesn't make sense to have them share the same format.

4.49 Instead, tabulated enumerated clauses are analogous to bullet points. It would be best to use hanging indents, but not make them subservient to sections and subsections; you can accomplish that by putting on the left margin the enumeration for first-level tabulated enumerated clauses. That arrangement is possible if you use first-line indents for sections and subsections. That's another advantage of using first-line indents for sections and subsections (see 4.26).

4.50 For four reasons, don't use first-line indents for tabulated enumerated clauses. First, staggered

first-line indents, with the first line of tabulated enumerated clauses beginning one tab-setting further in compared to the first line of a subsection, would give the reader a misleading sense of how tabulated enumerated clauses relate to sections and subsections. Second, to avoid having the format look odd, you would need to adjust the first-line indents of a set of tabulated enumerated clauses depending on whether the section it occurs in contains subsections. Third, first-line indents are used to denote paragraphs; because a tabulated enumerated clause is only part of a sentence, it isn't a paragraph. And fourth, when you indent the first line of a tabulated enumerated clause to the third or fourth tab setting and leave the rest flush left, it looks odd.

4.51 If a tabulated enumerated clause itself contains enumerated subclauses and you choose to tabulate them, again use the hanging indent format but place each subclause one tab-setting further in from the left margin.

HEADINGS

4.52 Like subsection headings (see 4.27), headings for tabulated enumerated clauses add more clutter than they're worth.

The MSCD Enumeration Scheme

4.53 Collectively, the above recommendations regarding positioning and enumerating blocks of text amount to what this manual refers to as "the *MSCD* enumeration scheme," *MSCD* being the initialism used for this manual. The *MSCD*

enumeration scheme comes in two flavors—one that groups sections into articles and one that doesn't.

4.54 Anyone who wishes to adopt the *MSCD* enumeration scheme could conceivably do so by setting up the appropriate Microsoft Word styles. But a much simpler and more secure option is available: Payne Consulting Group, a company that provides software, training, and project-management services to law firms, businesses, and government agencies, offers both versions of the *MSCD* enumeration scheme as preloaded options in the Numbering Assistant, its inexpensive paragraph-numbering software. The Numbering Assistant allows you to quickly add, modify, and update automatic multilevel numbering schemes in Word documents. It uses native Word functionality, so you can also easily share your numbering schemes with anyone who doesn't use the software.

4.55 More information is available at www.adamsdrafting.com/resources/numbering-assistant/. If you would like a free 30-day trial of the Numbering Assistant, send an e-mail to NumberingAssistant@payneconsulting.com with the subject line "Numbering Assistant MSCD" and specify which version of Word you use. (Neither the author of this manual nor the publisher receives any proceeds from sales of the Numbering Assistant.)

Don't Make Blocks of Text Too Long or Too Short

4.56 At some point, a block of text becomes sufficiently long that it's appreciably harder to read—the reader runs out of steam, and it's easier to lose your place. If a section or subsection is more than about 15 lines long, consider dividing it into two or more sections or subsections, or tabulating any enumerated clauses it contains.

4.57 U.S. big-deal drafting is notorious for indulging in overlong blocks of text. See figure 1 for an extract from a representative example of this kind of drafting, the 2011 merger agreement providing for Google's acquisition of Motorola Mobility. Contract text that dense is difficult to read.

FIGURE 1 ■ EXTRACT FROM U.S. MERGERS-AND-ACQUISITIONS CONTRACT

SECTION 5.02. No Solicitation; Company Recommendation. (a) Subject to the terms of this Section 5.02(a), during the period commencing on the date hereof, (i) the Company shall and shall cause each of its Subsidiaries to, and shall instruct each of its and their respective directors, officers, employees, financial advisors, legal counsel, auditors, accountants or other agents (each, a "Representative") to, immediately cease any solicitation, knowing encouragement, discussions or negotiations with any Persons that may be ongoing with respect to an Acquisition Proposal (as defined below) and immediately instruct any Person (and any of such Person's Representatives) in possession of confidential information about the Company that was furnished by or on behalf of the Company in connection with any actual or potential Acquisition Proposal to return or destroy all such information and (ii) the Company and its Subsidiaries shall not, nor shall they authorize or knowingly permit their respective Representatives to, directly or indirectly, (A) solicit, initiate, propose or induce the making, submission or announcement of, or knowingly encourage or assist, an Acquisition Proposal, (B) furnish to any Person (other than Parent, Merger Sub or any designees of Parent or Merger Sub) any non-public information relating to the Company or any of its Subsidiaries in connection with any Acquisition Proposal, or in response to any other proposal or inquiry for a potential transaction that on its face, if the Company entered into such transaction, would breach (in the absence of Parent's consent, unless granted) clauses (d)(i), (d)(iii) (but only with respect to Material Contracts of the type described in clauses (iv) or (v) of Section 3.16(a)) or (j), (v) or (w) of Section 5.01 (the "Specified Transactions"), or afford to any Person access to the business, properties, assets, books, records or other non-public information, or to any personnel of the Company or any of its Subsidiaries (other than Parent, Merger Sub or any designees of Parent or Merger Sub) in connection with any Acquisition Proposal, or in response to any other proposal or inquiry for a potential Specified Transaction (in the absence of Parent's consent, unless granted), (iii) enter into, participate, engage in or continue or renew discussions or negotiations with any Person with respect to any Acquisition Proposal, or (iv) enter into, or authorize the Company or any of its Subsidiaries to enter into, any letter of intent, memorandum of understanding, agreement or understanding (whether written or oral, binding or nonbinding) of any kind providing for, or deliberately intended to facilitate an Acquisition Transaction (as defined below) (other than an Acceptable Confidentiality Agreement (as defined below) entered into in accordance with Section 5.02(b)) (a "Company Acquisition Agreement"). It is understood that any violation of the restrictions set forth in this Section 5.02(a) by any director, officer or a financial advisor of the Company or any of its Subsidiaries shall be

4.58 At the other extreme, if text is too fragmented it turns contract prose into something

resembling a shopping list, or a set of instructions for assembling a bookshelf. That can disrupt the reader's flow and concentration and make it harder to keep track of what's been covered. Consider keeping the shortest components consolidated.

4.30 The too-fragmented end of the spectrum is represented by an approach to contract layout prevalent in Commonwealth countries. Figure 2 (an extract of a lending agreement drafted by a substantial Australian law firm) exhibits the characteristics of this kind of drafting: Short subsections. Tabulation of even short enumerated clauses. And overuse of enumerated clauses at the expense of clarity (see 4.31). Note how in figure 2 just the word "Interest" is used to introduce the second set of tabulated enumerated clauses.

FIGURE 2 ■ EXTRACT FROM AUSTRALIAN LENDING AGREEMENT

4 Interest

4.1 Interest

(a) Subject to clause 4.1(d), the Borrower must pay to the Lender interest on each Advance:

(i) at the rate determined under clause 4.1(b) for each Interest Period for that Advance; and

(ii) in arrears on each Interest Payment Date for that Advance.

(b) The rate of interest for each Interest Period in respect of an Advance is the rate of interest per annum determined by the Lender to be the Base Rate for that Advance and Interest Period.

(c) Interest:

(i) accrues on a daily basis, including the first day but excluding the last day of the relevant Interest Period; and

4.31 With experience, gauging whether blocks of text are too long or too short becomes a matter of

assessing the amount of white space on a page. You then make any adjustments necessary to maintain an appropriate balance.

Using a Two-Column Format

4.61 A two-column format is an alternative to the standard one-column format. Any shortcomings in the layout and enumeration of blocks of text would be particularly evident in a two-column format, given the extra demands on the available space. But the *MSCD* enumeration scheme (see 4.53) translates well to a two-column format; see sample 8. (For a Word template of the two-column version of the *MSCD* enumeration scheme, go to www.adamsdrafting.com/resources/numbering-assistant/.)

4.62 A two-column format allows you to pack more words on a page. That's why it's used most often in commercial agreements—by reputation, salespeople tend to be more concerned about page count than the number of words. A two-column format also reduces the number of characters per line (see 16.41).

SAMPLE 8 ■ MSCD "SECTIONS" ENUMERATION SCHEME IN TWO-COLUMN FORMAT

1. **Acquired Assets**. (a) Mercury hereby sells to Stratford, and Stratford hereby purchases from Mercury, the following assets, as they exist on the date of this agreement (those assets, the "**Acquired Assets**"):

(1) all of Mercury's accounts, notes, and other receivables (including accounts receivable) relating to the Collectibles Business, whether or not accrued and whether or not billed, as described on schedule 1.1(a)(1) (the "**Accounts Receivable**");

(2) all goodwill associated with the Collectibles Business and all of Mercury's claims and causes of action relating to the assets and customers (current and former) of the Collectibles Business;

(3) all inventory listed on schedule 1.1(a)(3);

(4) all of Mercury's rights under each Contract relating to the Collectibles Business, each of which is listed on schedule 1.1(a)(5); and

(5) all Mercury lists relating to the Acquired Assets or the Collectibles Business, including without limitation the Customer List.

(b) The assets to be conveyed to Stratford must be adjusted to reflect, in accordance with GAAP, the principle that all income and expenses attributable to the period after the Effective Date are for the account of Stratford (subject to the Management Agreement).

2. **Purchase Price.** Stratford shall transfer to Mercury the following as the aggregate purchase price for the Acquired Assets (the "**Purchase Price**"):

(1) in accordance with the stock grant agreement dated the date of this agreement between Stratford and Mercury in the form of exhibit A (the "**Stock Grant Agreement**"), shares of capital stock of Stratford;

(2) the warrant agreement in the form of exhibit B (the "**Warrant**"); and

(3) a cash payment of $100,000.

3. **Assumed Liabilities.** Stratford hereby assumes and shall pay, perform, and discharge, when due in accordance with their terms, the debts, obligations, and liabilities of Mercury listed on schedule 1.3 (those debts, obligations, and liabilities, the "**Assumed Liabilities**").

4. **Acquired Assets.** (a) Mercury hereby sells to Stratford, and Stratford hereby purchases from Mercury, the following assets, as they exist on the date of this agreement (those assets, the "**Acquired Assets**"):

(1) all of Mercury's accounts, notes, and other receivables (including accounts receivable) relating to the Collectibles Business, whether or not accrued and whether or not billed, as described on schedule 1.1(a)(1) (the "**Accounts Receivable**");

(2) all goodwill associated with the Collectibles Business and all of Mercury's claims and causes of action relating to the assets and customers (current and former) of the Collectibles Business;

(3) all inventory listed on schedule 1.1(a)(3);

(4) all of Mercury's rights under each Contract relating to the Collectibles Business, each of which is listed on schedule 1.1(a)(5); and

(5) all Mercury lists relating to the Acquired Assets or the Collectibles Business, including without limitation the Customer List.

(b) The assets to be conveyed to Stratford must be adjusted to reflect, in accordance with GAAP, the principle that all income and expenses attributable to the period after the Effective Date are for the account of Stratford (subject to the Management Agreement).

5. **Purchase Price.** Stratford shall transfer to Mercury the following as the aggregate purchase price for the Acquired Assets (the "**Purchase Price**"):

(1) in accordance with the stock grant agreement dated the date of this agreement between Stratford and Mercury in the form of exhibit A (the "**Stock Grant Agreement**"), shares of capital stock of Stratford;

(2) the warrant agreement in the form of exhibit B (the "**Warrant**"); and

(3) a cash payment of $100,000.

6. **Assumed Liabilities.** Stratford hereby assumes and shall pay, perform, and discharge, when due in accordance with their terms, the debts, obligations, and liabilities of Mercury listed on schedule 1.3 (those debts, obligations, and liabilities, the "**Assumed Liabilities**").

Such a two-column format comes at a cost—the small font size it requires, which makes text harder to read. (The two-column version of the *MSCD* enumeration scheme uses 9-point Calibri rather than the 11-point Calibri used in the standard version.) And the small font size, together with the limited room in which to mark comments by hand, conveys to the other side, in a way that might not be appreciated, that comments are discouraged.

Generally, minimizing a contract's page count should be a lower priority than making sure

that it's concise, easy to read, and easy to work with. A two-column format should be the exception rather than the rule.

ARRANGING PROVISIONS IN THE BODY OF THE CONTRACT

4.65 Arranging the text of the body of the contract involves three processes that a drafter would engage in concurrently:

- *division*, or the process of creating sections, subsections, and, if applicable, articles
- *classification*, or the process of determining the section into which a given provision should be placed
- *sequence*, or the ordering of sections and, if applicable, articles

Division

4.66 For the most part, custom dictates what sections are included in standard kinds of contract.

4.67 Whether you should group sections into articles is a function of how long the contract is (see 4.3).

4.68 Whether you should divide a section into subsections depends on how long the section is and the topics it addresses (see 4.22).

Classification

4.69 Make sure each provision is in its proper place. It's not unusual, for example, to find language

of obligation tacked on to a statement of fact. Such disorder can lead to confusion and could conceivably make it more difficult to enforce the provision in question.

Sequence

4.70 Two factors come into play in determining the order of articles (if any) and sections.

4.71 On the one hand, more-important provisions should come before less-important provisions, and provisions consulted more frequently should come before provisions consulted less frequently. It makes sense to give readers easy access to what they need.

4.72 On the other hand, because most contracts aren't drafted from scratch but are based on models, the sequence of articles and sections is fundamentally similar from contract to contract. In an acquisition agreement, for example, the body of the contract is generally organized as follows: deal terms, representations, obligations, conditions to closing, termination, indemnification, and miscellaneous provisions.

4.73 Such consistency not only saves time when drafting but also enables lawyers to navigate easily around a contract and determine whether it addresses all that it should.

4.74 In some respects the conventional order of contract provisions reverses what would seem the logical order. For example, a set of representations

(in other words, statements of fact) in an acquisition agreement invariably begins with representations about basic matters such as the party's having been duly organized and its entry into the agreement having been appropriately authorized. Because such matters are rarely at issue, these representations could safely be pushed farther back. But any inefficiencies caused by retaining the conventional order would be negligible—a reader could readily move past those representations that aren't at issue.

6.75 it's unrealistic to expect drafters to jigger the order of provisions from transaction to transaction, based on how the deal terms have affected the relative significance of each provision. Instead, it's up to the drafter to decide what balance to strike between using a conventional sequence and reflecting the priorities of a deal.

6.76 Drafters sometimes approach sequence with the aim of "burying" a contentious provision by putting it with less significant provisions. In the case of consumer contracts, burying a provision could result in the provision being held unenforceable. That's less likely to happen with contracts between ostensibly sophisticated parties represented by counsel, but other adverse consequences could arise. For one thing, such gamesmanship could well sour a business relationship and wouldn't reflect well on whoever does the burying. And it's unlikely to fool anyone.

6.77 Regarding where to place the definition section, see 6.71.

FRONTLOADING AND BACKENDING

4.78 An exception to the standard approach to arranging provisions in the body of the contract (see 4.65) is what this manual refers to as "frontloading"—the process of pulling selected information out of the body of the contract and placing it at the top of the contract.

4.79 Frontloading is a common feature of commercial agreements. A company might enter into dozens, hundreds, or thousands of transactions using a particular template. With each transaction, only certain information changes—for example, in the case of a license agreement, the date of the contract, the customer's name, the product, the term, the fees, and any identification numbers. From the company's perspective that's the most pertinent information, so the company might elect to place it at the top of the contract, perhaps in a table.

4.80 Frontloading offers a number of potential advantages:

- it could make it easier for company personnel to assess the transaction in question and locate key information
- it could facilitate training salespeople in how to handle the contract process
- it would likely speed negotiations by highlighting the main terms
- it allows you to signal to the other side that negotiating anything outside of the frontloaded information would be a more time-consuming

process, perhaps involving the legal department

4.81 But the more information you frontload, the harder it can be to digest. And departing from conventional notions of sequence can disrupt a reader's expectations regarding where to find a particular provision (see 4.73). So you should take information out of its conventional context and put it on the first page only if the transactional and administrative benefits clearly warrant it. For example, if a company can readily retrieve its customers' contact information through its invoicing system, nothing would be gained by frontloading it.

4.82 Also, if when frontloading you simply repeat the information in question as opposed to moving it from the body of the contract, the result would be a contract that contains the same information in two places. That's always a bad idea (see 1.62). It wouldn't be surprising if at some point in the process the frontloaded information were revised without making conforming changes to the body of the contract, leading to inconsistency and confusion.

4.83 Frontloading the signature blocks would allow company personnel to determine, without having to turn a page, whether a contract has been signed. But it also might encourage customers to sign the contract without paying much attention to what follows the signature blocks. Dissuading customers from negotiating the boilerplate is one thing; dissuading them from reading it is a different

and more problematic notion, one that perhaps invites customers to claim later that they hadn't been aware of what they were getting into.

4.84 Instead of frontloading deal-specific information, you could put it in a schedule—this manual refers to that as "backending." Compared with frontloading, one disadvantage is that it puts the most important information at the back of the contract. But backending makes more sense if the deal-specific information is at all voluminous.

4.85 Analogous to backending is a "master" agreement structure, with the parties specifying in a contract the general terms of transactions between them and then stating in a separate document, commonly called a statement of work or a purchase order, additional terms relating to a specific project. But that structure is a function of the serial nature of transactions between the parties, whereas frontloading and backending are driven by repeat use of a template with different counterparties.

4.86 Analogous to both frontloading and backending is the practice of handling a purchase by means of a purchase order supplemented by terms printed on the back of the purchase order or stated separately. Purchase orders can also be used in conjunction with a "master" agreement structure (see 4.85).

CROSS-REFERENCES

Function

4.87 It's routine for a contract provision to refer to an article, section, subsection, or enumerated clause in that contract (in which case the reference is known as an internal cross-reference) or to a provision in another contract (in which case it's known as an external cross-reference).

4.88 Cross-references can also be categorized as "pointing" cross-references and "prioritizing" cross-references. A pointing cross-reference simply points to another section. For example, a termination provision might state that failure to satisfy one or more conditions stated elsewhere in the contract is grounds for termination.

4.89 Prioritizing cross-references indicate that in some respect one provision takes priority over another. That type of cross-reference is associated with *notwithstanding*, *subject to*, and *except as otherwise provided in*. Those phrases are discussed in 13.466–75.

4.90 Generally, the fewer cross-references in a contract, the better. A reader should be able to understand each provision on its own, without having to turn to another part of the same contract or to another contract. Prioritizing cross-references can be particularly disruptive; in quantity, they're a sign of inefficient structure.

4.91 See 6.79–90 regarding cross-references to definitions.

Wording

4.92 cross-reference, state whether a section or article is being referred to, plus its enumeration. Don't add *of this agreement* after internal cross-references, or even *hereof*. It's tiresome to encounter *hereof* at every turn, and it strains credulity to suggest that without *hereof* a contract reference to "section 4.5" could be understood as referring to a section of some other contract. This issue wouldn't even be worth addressing in a section specifying drafting conventions (see 15.15). And don't add the notation *above* or *below*, as such notations are more annoying for the drafter and reader than they are helpful.

4.93 provision can refer to itself—*this section 4*. If any such reference is to a section rather than to a subsection, you could omit the section number—*this section*. But don't do so—instead of including enumeration when referring to a subsection and omitting it when referring to a section, it's simpler always to include enumeration. And when referring to two or more sections, don't repeat the word *section*—say *sections 5 and 7*, not *section 5 and section 7*.

4.94 cross-reference to a subsection, use the word *section*—as in *this section 4(c)*—rather than the word *subsection*. It's simpler to use the same word in both contexts, and there's no risk of confusion. In the interest of consistency and to facilitate revisions, when referring to two or more subsections of the same section, repeat the section

number. For example, say *section 6(b) or 6(c)* instead of *section 6(b) or (c)*.

4.95 When referring to an enumerated clause that isn't a sentence, it's arguably preferable to refer to *clause (2) of section 4(b)* rather than *section 4(b)(2)*, since the latter suggests that you are referring to an entire provision rather than a fragment. Since nothing significant is riding on this distinction, use the more compact formula. A cross-reference to an enumerated clause could be to an enumerated clause in a section, as in *section 7(2)*, or a subsection, as in *7(b)(2)*. In the interest of consistency and to facilitate revisions, when referring to two or more enumerated clauses occurring in the same section and, if applicable, subsection, repeat the section number and, if applicable, the subsection. For example, say *sections 6(b)(2) and 6(b)(3)* instead of *sections 6(b)(2) and (3)*.

4.96 In cross-references, don't use initial capitals in the words *section* and *article* (see 17.26).

4.97 Don't use bold, italics, underlining, or any other form of typographic emphasis for internal cross-references. Doing so could conceivably come in handy if you don't use automatic cross-referencing (see 4.100) and need to check internal cross-references—emphasizing them could help ensure that you don't miss any. But using Microsoft Word's "Find and Replace" function would be a more efficient way to find cross-references. And emphasized internal

cross-references are more likely to distract readers than help them.

4.98 An internal cross-reference that consists of only the enumeration of what's being referred to gives the reader no indication of what's addressed in the specified provision. The alternative would be to include in each cross-reference the heading of the article or section in question, as in *article 12 (Indemnification)*, but this manual doesn't recommend that practice. It does give the reader a better idea of the significance of the cross-reference, and it makes inaccurate cross-references easier to catch. But in effect it involves referring to the same section twice and as such invites inconsistency (see 1.62).

4.99 An alternative way of making it easier for readers to figure out what's addressed in the provision being referred to would be to use the Word option that allows you to insert an automated cross-reference (see 4.100) as a hyperlink.

Updating

4.100 Adding, deleting, or rearranging blocks of text would likely render inaccurate some or all internal cross-references in a contract. You could painstakingly check them each time you prepare a new draft, but that's a nuisance. You could leave them inaccurate until just before signing, but cross-references, like the table of contents (see 2.168), are of greatest use when reviewing drafts and negotiating, less so after the contract has been

signed. Using Word's automatic-cross-referencing feature is a simple way to ensure that your cross-references remain up to date—it turns cross-references into field codes that adjust automatically to changes in enumeration. But it presents two challenges of its own. First, if anyone modifying a draft contract doesn't know that the cross-references are coded, chaos can result, with some cross-references being coded, some not, and some turning into error messages. Second, some software for removing metadata—potentially sensitive information automatically embedded in computer files—treats cross-reference field codes as metadata.

4.101 To avoid such problems, use automatic cross-referencing only in the master version of a draft contract. In copies you send out for comment, change the cross-reference field codes to regular text—doing so takes only a few key strokes. When preparing the next draft, you make changes to the master version, and in the process update the cross-references automatically.

4.102 If cross-references would be rendered inaccurate by deleting blocks of text, one alternative to renumbering is replacing the deleted text with the bracketed notation *Intentionally omitted* and leaving the enumeration unchanged. Even an organization that uses automatic cross-references might find this technique useful: if it handles a high volume of transactions based on a template, renumbering

template sections for a particular transaction might create confusion.

HEADERS AND FOOTERS

Page Numbers

4.103 Number the pages of a contract—except for the first page, which should be unnumbered—using Arabic numerals. If a contract has a cover sheet, use lowercase Roman numerals to number each page of the associated materials (the table of contents and the index of definitions, if present).

4.104 In general, follow standard practice and place page numbers in the center of the footer. But if the footer contains additional information, you might want to put the page numbers flush right and perhaps highlight their function by adding the word *Page*.

4.105 Don't use the notation *Page X of Y* for the contract minus the attachments. Although it tells the reader how long the document is and it precludes anyone from surreptitiously adding pages at the end of the contract after it has been signed, those advantages aren't compelling. If readers want to know how long a contract is, all they have to do is flip to the signature page once—they don't need to be constantly reminded of the number of pages. And it's unlikely that anyone would attempt, let alone successfully pull off, that sort of fraud. So the clutter that this notation adds outweighs the minor benefits.

4.106 If a contract has more than one attachment, you can number the pages consecutively, as if the attachments are all one document, or number them nonconsecutively, with each attachment being treated as a separate document. Nonconsecutive numbering makes it easier for readers to figure out where they are in a given attachment. And if attachment enumeration is added to page numbers, with *C-5* being used to designate page five of attachment C, readers would also be able to tell which attachment they're on. But that enhanced numbering would be awkward if attachments are enumerated using section numbers (see 5.75).

4.107 On the other hand, using consecutive numbering with the notation *Page X of Y* would allow readers to figure out quickly whether they have a complete set of attachments. Because a set of attachments can consist of more than one document and, unlike the rest of the contract, doesn't end with a signature page, the convention *Page X of Y* is more useful for attachments than for the rest of the contract.

4.108 Because using both consecutive and nonconsecutive numbering in a single set of attachments seems excessive, it's up to the drafter to consider which system would be appropriate for the transaction at hand.

Other Information

4.109 Headers and, more usually, footers are where you find file names and draft lines.

Q 11.10 Drafters who want working drafts kept confidential might add the notation "Confidential" to the header or footer. Adding the notation "Privileged and Confidential" to drafts being exchanged with the other side wouldn't make sense, but it might be appropriate for purposes of drafts that are to be shared only with clients and contain explanatory notes—it might help the client invoke the attorney-client privilege to shield a draft from discovery in later litigation. But it's hard to see how another notation, "Attorney Work Product," could serve any purpose, as the work-product doctrine applies to materials prepared in anticipation of litigation, not draft contracts.

A 11.11 Businesses and law firms increasingly place their logo in headers and footers, as well as on cover sheets. There's little reason to be concerned that use of an organization's logo would suggest to a court that, for purposes of the doctrine that ambiguities are to be construed against the drafter, that organization should be considered the drafter: presumably plenty of other information is available indicating who drafted what, if it comes to that.

CHAPTER 5

THE BACK OF THE CONTRACT

5.1 The body of the contract is followed by the concluding clause, the signature blocks, and any attachments. This manual refers to those components collectively as "the back of the contract."

THE CONCLUDING CLAUSE

5.2 In most contracts, the signature blocks are preceded by a sentence known as the concluding clause. You could conceivably dispense with the concluding clause, as it states the obvious, but it's best to retain it, in an appropriate form—it eases what would otherwise be an abrupt transition to the signature blocks.

The Two Kinds of Concluding Clause

5.3 You have a choice of two forms of concluding clause, one for if you state the date of the agreement in the introductory clause, the other for if you have those signing the contract date their signatures (see 2.21–26).

5.14 Use the following form of concluding clause if you state the date of the agreement in the introductory clause: *The parties are signing this agreement on the date stated in the introductory clause*. (See sample 9.) Don't name the parties, as doing so results in a less-concise concluding clause, the wordiness increasing with the number of parties. (Regarding this same issue in the context of the lead-in, see 2.147.)

5.15 If the contract anticipates that those signing will date their signatures, use the following form of concluding clause: *Each party is signing this agreement on the date stated opposite that party's signature*. (See sample 10.)

SAMPLE 9 ■ THE CONCLUDING CLAUSE AND SIGNATURE BLOCKS—DATE STATED IN INTRODUCTORY CLAUSE

The parties are signing this agreement on the date stated in the introductory clause.

HASTINGS WASTE MANAGEMENT, INC.

By: _____
Name:
Title:

JORVIK RECYCLING SYSTEMS, LTD.

By: _____
Name:
Title:

_____
ROGER HASTINGS

JARROW HOLDINGS LLC

By: Raindance Associates LLC, its manager

By: _____
Name:
Title:

5.6 And if you have those signing date their signatures, also include the following provision in the boilerplate (see sample 10):

This agreement will become effective when all parties have signed it. The date of this agreement will be the date this agreement is signed by the last party to sign it (as indicated by the date associated with that party's signature).

5.7 The above provision makes it clear that the contract becomes effective the instant all the parties have signed it, and it explains what date to give the contract. As such, it simply states what the law provides, but there's value to informing the parties of that.

Use "Signing" Rather Than "Executing and Delivering"

5.8 In most traditional contracts, the concluding clause refers to execution and delivery of the contract by the parties. For a general discussion of *execute and deliver*, see 13.190. For the reasons explained below, this manual recommends that you instead refer to "signing."

"EXECUTE"

5.9 Determining whether one should refer to execution in the introductory clause requires first establishing what it means.

5.10 *Black's Law Dictionary* says that to execute a contract means to make a document legally valid by signing it. But signing a contract isn't by itself enough to make it legally valid. Other requirements have to be satisfied—for example, the signatory can't somehow be incapacitated—and you can't circumvent those requirements simply by having the party state in the concluding clause that it's executing the contract.

5.11 Alternatively, executing a contract means having it signed in the name of a party by someone who has authority to act on that party's behalf. See Scott T. FitzGibbon, Donald W. Glazer & Steven O. Weise, *Glazer and FitzGibbon on Legal Opinions* § 9.4 (3d ed. 2011). But if you're concerned whether someone signing a contract on behalf of a party has been authorized by that party, having that individual sign under a concluding clause that refers to

execution shouldn't provide any comfort. (Regarding authorization generally, see 5.27.)

5.12 Furthermore, *execute* also means to perform or complete a contract or duty, making "to execute a contract" ambiguous.

5.13 So to the extent that *execute* conveys meaning beyond simply *sign*, that additional meaning is unhelpful for purposes of the concluding clause and simply confuses matters. *Signing* is the much clearer choice.

"DELIVER"

5.14 It serves no purpose to refer to delivery in the concluding clause. The concluding clause serves to introduce the signatures, and delivery—in other words, transfer of possession of the signed contract—happens after signing. And more to the point, delivery isn't required for a contract to be enforceable, other than a contract under seal. See 13.193.

Which Tense to Use

5.15 Most drafters would use the present perfect (*have signed* or *have caused to be signed*) in the concluding clause, but it seems odd to have the parties assert in the concluding clause that they *have signed* the contract, given that the signature blocks don't precede that assertion, but follow it. Use instead the present progressive—*the parties are signing*. The concluding clause represents a statement in anticipation of a transitional event—a

comparable sentence would be *I'm giving this letter to Dick to mail*—with the result that one avoids the sense of duration normally associated with the progressive.

5.16 It's standard practice to include in a contract a statement of fact that *This agreement has been validly executed by Acme*. If you use the present progressive in the concluding clause, consistency would require that you revise that statement of fact to read *This agreement is being validly executed by Acme*. If you use *signing* in the concluding clause (see 5.13), the statement of fact should read *This agreement is being validly signed by Acme*.

Using an "As Of" Date in the Concluding Clause

5.17 Many concluding clauses refer to the contract as being signed *as of* the date in the introductory clause, whether or not that date is an *as of* date (see 2.33). This manual recommends that you not use *as of* in association with a date in the introductory clause or in the concluding clause. Failing that, if you use or omit *as of* in one, do the same in the other.

Traditional Concluding Clauses

5.18 Traditional concluding clauses are different from those recommended in this manual. Here's a representative example of a traditional concluding clause that refers to a date stated in the introductory clause:

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound, have by their proper and duly authorized officers duly executed and delivered these presents as of the day and year first above written.

5.19 Such clauses have three shortcomings, in addition to those addressed in 5.8–16.

5.20 First, the body of the contract is a more sensible place for statements of fact regarding authorization. (If you're concerned whether the person signing for the other party is authorized, having that person tell you that they're authorized shouldn't provide any reassurance. Instead, get evidence that's more reliable, for example a board resolution.) A party might nevertheless want to refer to authorization in the concluding clause not because it's concerned whether the individual signing on behalf of the other party is authorized, but because it wants to remind its business people that they shouldn't sign the contract unless they've been authorized to do so. Any such reminder would be more noticeable if placed in the signature blocks (see 5.29).

5.21 Second, the phrase *intending to be legally bound* is ineffectual: it isn't a requirement for enforceability of a contract that the parties have, or express in writing, an intent to be legally bound. (But see 2.156.)

5.22 And third, it contains archaisms: *IN WITNESS WHEREOF* is a translation of the Latin

cuius rei testimonium and means "in testimony of which"; *these presents* is an archaic alternative to *this agreement*; and the phrase *the day and year first above written* is long-winded and imprecise. A standard alternative, *set forth above*, is also imprecise.

Avoiding Signature-Page Mix-Ups

5.23 If the parties to a contract are also parties to one or more other contracts and the concluding clause refers only to "this agreement," confusion might arise as to which contract a signature page belongs to. You can avoid that by referring in the concluding clause to the type of agreement involved instead of using *this agreement*. (For another solution, see 5.62.)

THE SIGNATURE BLOCKS

5.24 As shown in sample 9 and sample 10, the concluding clause is followed by a signature block for each party. A signature block consists of a party's name accompanied by a signature line. Don't use the name of a company division that will be performing under the contract, as the division shouldn't be party to the contract (see 2.74–75).

Format

5.25 If the party is a legal entity and not an individual, place the entity's name in all capitals above the signature line. Don't state above the entity name the defined term used for that name in the

contract, and don't note after the entity name the entity's jurisdiction of organization—doing so just adds clutter, as that information is readily available elsewhere.

5.26 Don't include two or more entity names above a signature line, to indicate that one person is signing on behalf of more than one entity. Under the laws of the U.S. states, all that's required is a manifestation of assent, so a multientity signature block might work, but it would be clearer to have a separate signature block for each entity. Under English law, a separate signature block is required for each company: section 44(6) of the Companies Act 2006 says, "Where a document is to be signed by a person on behalf of more than one company, it is not duly signed by that person for the purposes of this section unless he signs it separately in each capacity."

5.27 Include *By:* next to the signature line to indicate that the individual signing is signing as a representative and not in his or her personal capacity.

5.28 Include the name and title of the person signing on behalf of a party under the signature in lowercase letters with initial capitals. If you don't know who will be signing, use *Name:* and *Title:*. If you do know, include that person's name and title (instead of, rather than next to, *Name:* and *Title:*), to spare someone having to write them in by hand.

5.29 If a legal-entity party wants to remind whoever's signing the contract on its behalf to obtain management approval (see 5.20), that could be accomplished by including the notation *and authorized signatory* after that person's name and title in the legal entity's signature block.

5.30 For various possible reasons, a company might have two persons sign a contract on its behalf:

- It might be a function of risk management, the idea being that having two people sign the contract would make less likely entry into a contract that's inconsistent with company policies.
- The company's organizational documents might require that two people sign contracts on behalf of the company.
- The other party might insist that two officers sign on behalf of the company, to allow the other party to benefit from a statutory presumption of authority. For example, California Corporation Code § 313 states that if a contract is signed on behalf of a corporation by two officers holding positions specified in the statute, the contract isn't invalided as to the corporation by any lack of authority of the signing officers unless the other party knew that the signing officers had no authority.
- The contract might not be valid unless two people sign it. For example, English law provides that under various circumstances a contract will not be valid unless two people sign it on behalf of a company.

SAMPLE 10 ■ THE CONCLUDING CLAUSE AND SIGNATURE BLOCKS—SIGNATURES DATED

14. **Effectiveness; Date.** This agreement will become effective when all parties have signed it. The date of this agreement will be the date this agreement is signed by the last party to sign it (as indicated by the date associated with that party's signature).

Each party is signing this agreement on the date stated opposite that party's signature.

MICKELGATE SYSTEMS, INC.

Date: _____, 2013 By: _____
Benjamin Green
Chief Executive Officer

WHARRAM CORPORATION

Date: _____, 2013 By: _____
Laura Black
President

5.31 A feature of Canadian and other non-U.S. contracts is use, under signature blocks, of the notation "I have authority to bind [the Corporation]," with the notation using the defined term for that entity's name. It's not clear that that approach represents an improvement over other ways of addressing authorization (see 5.20), except that it might facilitate recording a contract in jurisdictions that require a statement of the signatory's authority.

5.32 If the signatory for a legal-entity party is itself an entity and not an individual, as is often the case when a party is a partnership or a limited liability company, a signature block within a signature block is required; see for example the signature block for Jarrow Holdings LLC in sample 9.

5.33 If the party is an individual, place his or her name under the signature line in capital letters to distinguish it from the name of any individual signing on behalf of an entity. If there's any risk of confusion, add *in his* [or *her*] *own capacity* after the person's name. As with entity signature blocks (see 5.25), don't state above an individual's signature block the defined term used for that individual's name in the contract.

5.34 If you want each person signing to note the date he or she signed (see 5.5), place to one side of each signature line (as in sample 10), or directly underneath, the notation *Date:* followed by the date, leaving one or more elements blank to be filled in by the signatory, as necessary.

5.35 Signature blocks are usually aligned one above the other on the right-hand side of the page, as in sample 9 and sample 10. To save space, you can place them side by side. In contracts with dated signatures, that would require moving each date line from the left side of the page to underneath its corresponding signature and associated information.

Parties with Limited Roles

5.36 One can be party to a contract with respect to only certain provisions. If you elect to highlight in the introductory clause a party's limited role in that contract (see 2.59), do so in that party's signature block too, by adding the phrase *with respect to only* [*specified provisions*]. That phrase, followed by a colon, could go above the party's name in the

signature block, or, preceded by a comma at the end of the party's name, it could go immediately below the party's name. The latter approach is slightly more economical.

Seals and Deeds

BACKGROUND

5.37 In medieval England, a seal—consisting of wax attached to a writing and bearing an impression—served as a marker to identify the parties to an agreement, and sealing was one of the formalities required for a binding contract. For corporate seals, sealing wax gave way to an embossed impression.

5.38 As literacy increased, signatures slowly replaced seals as identifying markers. And the value of seals as a device for formally validating contracts dwindled as requirements regarding what is a seal were relaxed. By judicial decision or statute, the presence of the word *seal* near the signature—even on a preprinted form—has been sufficient to make a contract one under seal. The same applies to use of the phrase *locus sigilli*—meaning "the place of the seal"—or its abbreviation *L.S.* Some courts have found that a recital to the effect that the parties consider the document sealed is sufficient to consider it sealed, even if no seal is present—hence the formula *signed, sealed*, *and delivered*.

5.39 These indicia of sealing are still in use, but the requirements for a contract under seal depend on the jurisdiction, and the standards can seem

arbitrary. For example, under Delaware law the word "seal" must be affixed next to the signature lines—it's not enough for the concluding clause to refer to the contract being under seal. See *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, No. 4119-VCS, 2010 WL 975581 (Del. Ch. Mar. 4, 2010).

5.140 In the U.S. states, whether or not a contract is under seal can have implications in three contexts.

5.141 First, a sealed contract is binding absent consideration, or at least sealing creates a rebuttable presumption of consideration. But if under the law of a state a contract is at risk of being held unenforceable for lack of consideration, making the contract one under seal probably wouldn't be the clearest fix, even if the law governing the contract acknowledges the distinction between sealed and unsealed instruments. For alternative fixes, see 2.161–62.

5.142 Second, sealing might have a bearing on the statute of limitations that applies to a contract, in that more than 20 U.S. jurisdictions acknowledge contracts under seal in their statutes of limitations. See 3 *Corbin on Contracts*, at § 10.18[H]. For example, Delaware has a 20-year statute of limitations for actions brought on contracts "under seal," as compared with the three-year statute of limitations for ordinary contracts.

5.143 And third, presence of a corporate seal on a contract has a bearing on authorization. For

example, section 107 of the New York Business Corporation Law says, "The presence of the corporate seal on a written instrument purporting to be executed by authority of a domestic or foreign corporation shall be prima facie evidence that the instrument was so executed." So for purposes of a contract governed by New York law, presence of a corporate seal would shift the burden of proof to whoever would argue that the person signing for that entity lacked authority. But it's not clear that this law has had the effect of encouraging use of corporate seals.

5.44 The problem with attributing significance to a legal formality such as sealing contracts is that the significance to be attributed isn't evident from the nature of the formality; hence the arbitrary nature of the caselaw regarding the requirements for a contract under seal (see 5.39). Instead of requiring contract parties to go through a formality to achieve an unrelated legal effect on the need for consideration or the duration of a statute of limitations, it would be simpler to have the contract achieve that legal effect explicitly.

5.45 Furthermore, compared with a wax seal, what currently passes for sealing can't reasonably be considered conclusive evidence that a party intended the sealed instrument to contain an enforceable promise. And it wouldn't be reasonable to expect someone signing a contract to pay attention to or understand such obscure notations. That explains why more than half the U.S. states have abolished

the distinction between sealed and unsealed instruments, and why section 2-203 of the Uniform Commercial Code has abolished the distinction for sales of goods. Even those states that haven't abolished the distinction altogether have modified it sufficiently so that a seal has little lingering vitality.

DEEDS

5.46 Signing formalities have a role to play in common-law jurisdictions outside the United States.

5.47 In England, the question is whether a contract is "under hand" or is a "deed." As in the case of a contract under seal, the legal implications of whether a contract is a deed relate to consideration and to limitations periods. But use of a seal is for the most part now no longer relevant. Instead, for a document to be a deed, it must be described as a deed or state that it is "executed as a deed," it must be signed by the appropriate one or more persons, it must be witnessed, and it must be "delivered" (in other words, the party signing the document must show, by words or by conduct, that it intends to be bound by the deed). The formalities are sufficiently complex that an entire book is devoted to describing them. See Mark Anderson & Victor Warner, *Execution of Documents* (2d ed. 2008). It seems unhelpful to have formalities play such a significant role in allowing contract parties to achieve unrelated substantive ends.

5.48 Australia recognizes the distinction between deeds and other contracts, and an Australian court

opinion highlights the problem with such formalities. In *400 George Street (Qld) Pty Ltd and Ors v. BG International Ltd* [2010] QSC 66, the Queensland Supreme Court addressed whether a lease that was "executed as a deed" was in fact a deed. The court concluded that it was not a deed, citing a list of relevant factors, one of which was that the lease used as a heading for the recitals "Background" rather than "Recitals." It's preposterous that such an ostensibly benign choice could have such nonobvious ramifications, but the greater the role of formalities in contract law, the greater the risk of such outcomes.

OTHER JURISDICTIONS

5.49 In some other jurisdictions, the corporate seal plays an important role. For example, in China, contracts are by law binding on a company if a representative signs the contract or if the company's corporate seal is applied to the contract. Some commentators recommend doing both, to reduce the possibility of arguments over authority. And the general practice in Russia is for parties to sign contracts and apply the corporate seal.

DRAFTING IMPLICATIONS

5.50 If by law a contract won't be enforceable unless signing formalities are observed, or if you would derive a legal advantage from observing signing formalities, then provide for the appropriate formalities. If that involves applying a corporate seal next to party signatures, you might want to place the

notation "Corporate seal here," or some similar notation, next to each signature block as a reminder.

5.51 Otherwise, eliminate from your contracts all references to sealing and other irrelevant signing formalities.

Witnessing Signatures

5.52 By law, signatures to certain contracts must be witnessed. For example, statutes in at least some U.S. states require that anyone taking out a mortgage sign the mortgage document in the presence of witnesses. Also, contract signatures are often witnessed even if it's not required by law, presumably to preclude any claim that the signature to a contract is not that of the person named in the signature block. In most business contexts, this isn't likely to be a concern.

5.53 If you wish to provide for a signature to be witnessed, place a signature block for the witness, preceded by the notation *Witness:*, next to the signature block of the signature being witnessed. An alternative notation is *Attest:*—a witness "attests" to a signature—but its meaning would be obscure to many readers.

Notarizing Signatures

5.54 By law, signatures to certain contracts must be notarized, in other words attested to by a notary public. For example, under Colorado law signatures to an independent contractor agreement must be notarized. See Colo. Rev. Stat. Ann. § 8-40-202.

And under the laws of some states the grantor's signature on a deed to real property must be notarized. But it's commonplace for contracts to require that signatures be notarized even if it's not required by law. As with witnessed signatures (see 5.52), presumably the aim is to avoid any dispute as to the identity of a person signing a contract.

5.55 Generally, having a contract signature notarized in the United States involves having the person who signed declare to the notary that he or she freely signed the contract—that's referred to as an "acknowledgment." The notary then adds next to that person's signature a "certificate of acknowledgment" confirming that acknowledgment occurred.

5.56 The formalities involved in having a signature notarized depend on the jurisdiction. In Louisiana and civil-law countries, notaries perform a broader range of duties than do U.S. notaries public.

Signing a Contract Electronically

5.57 It's becoming commonplace for parties to sign a contract electronically, in other words use an electronic process associated with a contract as a means of signing it. (This is different from scanning your signature to create an electronic "signature stamp.") Electronic signatures generally include the date of signing.

5.58 If signing a given contract electronically is optional rather than mandatory, you should retain the standard concluding clause (see 5.5) and dated

signature blocks (see 5.34), as well as the boilerplate language recommended in 5.6. But if signing electronically is mandatory, it would make sense to dispense with the signature blocks and use the following form of concluding clause: *Each party is signing this agreement electronically on the date stated in that party's electronic signature.*

Having Legal Counsel Sign

5.59 An unusual aspect of settlement agreements is that sometimes they contain, under the notation *APPROVED AS TO FORM AND CONTENT*, signature blocks for legal counsel to the parties. It seems odd to have attorneys formally approve a settlement agreement. It's the parties who are agreeing to settle—they certainly don't need, and shouldn't be asking for, attorney approval. If the aim is to show that the parties had the advice of attorneys, it would make more sense to have the parties state as much in the settlement agreement.

CONSENTS

5.60 The signature blocks of a contract might be followed by a consent—referred to as such or as an "acknowledgment"—in which nonparties consent to something provided for in the contract. A contract restructuring Acme's indebtedness to Widgetco might contain, after the signature blocks, a consent signed by guarantors of Acme's debt. (Strictly speaking, such a consent might be unnecessary, as

guarantees usually provide that the underlying debt may be modified without the guarantor's consent.)

BLANK SPACE AFTER THE BODY OF THE CONTRACT

5.61 When a page break would otherwise cause the concluding clause and the signature blocks to be spread over two pages, it's neater to make sure that they stay together on a single page. But this can result in the concluding clause occurring at the top of a page, leaving the previous page occupied by the end of the body of the contract followed by an expanse of blank space. This can also occur when the concluding clause and signature blocks are kept on a separate page so that a signatory can sign in advance and not have that signature page rendered obsolete by subsequent revisions. (Care should be taken that this practice doesn't result in someone signing a contract without being fully aware of what it provides.) Either way, such blank space might be disconcerting to the reader, so it can be helpful to add the following notation after the end of the body of the contract: *[SIGNATURE PAGE FOLLOWS]*.

GIVING THE SIGNATURE PAGE AN IDENTIFYING NOTATION

5.62 As an alternative to the approach suggested in 5.23, you can avoid the risk of misidentifying a signature page by stating at the bottom of the signature page the type of agreement involved,

including as necessary the date and one or more party names: *[Signature page to Acme Corporation credit agreement dated September 16, 2012]*.

5.63 A bottom-of-the-page notation is particularly useful when the signature blocks occupy more than one page, with the result that you wouldn't have the benefit of the concluding clause to identify any signature pages other than the first.

ATTACHMENTS

Kinds of Attachments

5.64 Contracts feature two kinds of attachments, those that consist of stand-alone documents and those that consist of information that could have been included in the body of the contract but instead was moved to an attachment. It's helpful to use different terms to describe the two kinds of attachment.

5.65 In the United States, the prevailing convention is to use *exhibits* for attachments consisting of stand-alone documents and *schedules* for attachments containing information, although it's not universally observed. This manual uses those terms. Other jurisdictions might use different terminology. For example, the convention in Australian is to use *annexure* instead of *exhibit*.

5.66 Instead of *exhibit* or *schedule* you can use *appendix*, *annex*, or *attachment*, all of which are generic terms for attachments.

If a contract has only a few attachments, don't feel that you have to observe the distinction between exhibits and schedules—in a given contract, it can be awkward to refer to, say, three exhibits and one schedule rather than simply four exhibits, or four attachments.

Placement of Attachments

In a contract that contains both schedules and exhibits, reader convenience suggests putting the schedules before the exhibits: the body of the contract and the schedules constitute two parts of a single text, and readers are likely to flip to the schedules more often than to the exhibits.

In the United States, the convention is to place schedules and exhibits after the signatures, but other jurisdictions might observe different conventions. For example, in Australia it's standard practice to place the signature pages after the schedules but before the exhibits (or "annexures," to use the Australian term), perhaps as a way of acknowledging that the body of the contract and the schedules constitute a single text. But that makes for an abrupt transition between the body of the contract and the schedules and makes it harder to find the signature page.

References to Attachments

When referring to an attachment, don't use *hereto*, as in *a copy of which is attached as exhibit B hereto*—it's unnecessary to do so, as it would be

unreasonable to think that the attachment is an attachment to some other contract.

5.71 Drafters often emphasize references to attachments, but it serves no purpose to do so—readers generally don't seek out references to attachments. (Regarding what text to emphasize, see 16.21.) And it's pointless to put the enumeration in quotation marks, as in *exhibit "A"*.

5.72 Don't use initial capitals in contract references to attachments, as in *as stated in Schedule 4.2*. Instead, follow the recommended practice in general writing and use all-lowercase letters in references to attachments, as in *as stated in schedule 4.2* (see 17.26).

Enumerating Attachments

5.73 Enumerating attachments serves two functions. First, the number or letter used in referring to a particular attachment tells readers where they can expect to find it among the schedules or exhibits.

5.74 Enumerating attachments can also serve to tell readers where in the body of the contract they could find at least one reference to that attachment. But it can't serve that function if schedules and exhibits are simply numbered or lettered consecutively, without regard to contract section numbers.

5.75 For attachment enumeration to serve both functions, this manual recommends that when a

contract is divided into articles and so uses the multiple-numeration system for section numbers (see 4.11), you use for each schedule and exhibit the number of the section that refers to it. If more than one section refers to a particular schedule or exhibit, use the number of the section with the primary reference.

5.76 Even if a contract isn't divided into articles and so doesn't use the multiple-numeration system, you could still enumerate schedules and exhibits using section numbers. But that could result in reader miscues: A reader who consults a schedule and notes that it's schedule 10 wouldn't be able to tell whether the schedules were keyed to section numbers or simply numbered consecutively. Figuring the system out might require flipping through the contract. Furthermore, someone who encounters in the body of the contract a reference to schedule 10 wouldn't be able to tell from that alone whether it comes after schedule 9 or might come after a schedule bearing some lower, nonconsecutive number.

5.77 This confusion would also occur if in a contract not divided into articles you were to number schedules and exhibits consecutively.

5.78 To avoid miscues of this sort, use consecutive letters (A, B, C) for schedule and exhibit references in a contract that doesn't use the multiple-numeration system for section numbers.

5.79 You could use a hybrid system for contracts divided into articles, with each schedule being given the number of the principal section that refers to that schedule but exhibits being enumerated using consecutive letters. One doesn't often see exhibits keyed to multiple-numeration section references, perhaps because in longer contracts you generally have more schedules than exhibits, and drafters might think it looks a little odd to have only four exhibits and have them numbered, say, 3.4, 3.8, 4.6, and 4.11. But keying exhibit references to multiple-numeration section references can be useful, so one might as well take advantage of it.

Exhibits

5.80 An exhibit is a stand-alone document. It can be a document that's currently in effect, such as the organizational documents of Target Co. attached as exhibits to an acquisition agreement. Or it can be a document that's to be effective sometime after signing, such as an ancillary contract to be entered into at the closing of the transaction provided for in the attaching contract. For example, someone selling all the stock of his company might require as a condition to the sale that at closing he and the company enter into an employment agreement in the form attached as an exhibit to the stock purchase agreement.

5.81 When in the body of the contract you refer to a form of document attached as an exhibit, use *in the form of exhibit A* rather than the more long-winded *in the form attached as exhibit A*

hereto. An exhibit is by definition attached, so *attached* is unnecessary.

Schedules

5.82 Schedules consist of materials that could be included in the body of the contract but instead have been moved to after the signature blocks.

DISCLOSURE SCHEDULES

5.83 One kind of schedule is that containing factual information, such as details of ongoing litigation or lists of contracts; such schedules are often referred to as "disclosure schedules." Link each disclosure schedule to the contract provision to which it relates (usually a statement of fact) by indicating in that provision that *stated in schedule X* are all instances of the thing at issue (or that *schedule X contains a list* of all such instances). Alternatively, indicate that other than as stated in the schedule there are no such instances; this approach is generally used when the thing at issue is either undesirable or present in limited quantities.

5.84 Disclosure schedules are used for four reasons:

5.85 First, the information included in schedules is often sufficiently voluminous that it would be disruptive to include it in the body of the contract.

5.86 Second, it's often the case that the party responsible for collecting factual information isn't the party whose attorneys are drafting the contract,

meaning that it simplifies matters to present that information separately.

5.87 Third, even if the party collecting the information and the party responsible for drafting are one and the same, the process of collecting information regarding a company's operations involves an entirely different process, perhaps a different time frame, and usually different personnel, than the task of drafting and negotiating the contract.

5.88 And fourth, if the information to be disclosed to the other side is sensitive, putting it in a set of schedules can help minimize the risk of wider disclosure, as schedules are routinely omitted from drafts circulated for review. Also, Item 601(b)(2) of Regulation S-K under the U.S. Securities Act of 1933 allows schedules to merger agreements to be omitted from filing and disclosure, unless they contain information material to an investment decision and that information isn't otherwise disclosed in the agreement or the disclosure document.

5.89 If a section refers to information on a schedule but it's subsequently determined that no such information is required, it's preferable to delete the reference to that schedule rather than force readers to flip to a schedule page that states *None* or *Not applicable*.

5.90 In the body of the contract, not on a cover sheet to the disclosure schedules, provisions

governing the effect of disclosure schedules. They're provisions like any other, so the best place for them is the body of the contract. (See also 5.91.)

PLACING CONTRACT SECTIONS IN SCHEDULES

5.91 In general, don't place contract sections in a schedule, as doing so makes it less convenient to refer to them. In particular, don't place contentious provisions in a schedule to "bury" them (see 4.76). And don't shunt ostensibly routine provisions into schedules; they would be sufficiently out of the way if placed at the end of the body of the contract.

5.92 But if you wish to incorporate into a negotiated contract with a minimum of effort standardized provisions that aren't subject to negotiation, sometimes the simplest course is to relegate them to a schedule. In effect, you're "frontloading" not only the provisions that are subject to negotiation but also the signature blocks (see 4.83). Also, if a contract is sufficiently long and complex, some drafters prefer to place the definition section in a schedule that you can pull out and review side by side with the rest of the contract. (But see 6.71–73 regarding placement of the definition section.) And if any deal terms—such as pricing information—are particularly sensitive, some drafters place them in a schedule to minimize the risk of wider disclosure (see 5.88).

"IN," NOT "ON"

5.93 It's worthwhile to make a principled decision regarding even minor issues. One such is

whether one says *in schedule X* or *on schedule X*. Since *in* works in all circumstances, it's the better choice.

5.94 For purposes of referring to information stated in a work, use of the preposition *on* is generally limited to references to a particular page—*the information stated on page 43*. That's understandable, as a page is a single surface. Otherwise, one uses *in*—*the information stated in* [*section 4.3*] [*chapter 6*].

5.95 In the case of a section, a schedule might occupy one page, but it could just as well occupy more than one page. It would be odd to adjust one's prepositions based on how long a schedule is. Because *in* works no matter how long the schedule, it's the better choice.

Attachments as Part of a Contract

5.96 Although many drafters assume otherwise, generally it's not necessary to state explicitly that attachments to a contract constitute part of that contract. Any attachment to a contract would be mentioned in the body of the contract, and that reference by itself would be all that's required to bring the attachment within the scope of the contract.

5.97 Omit contract language that seeks to make attachments part of the contract, such as the following:

Schedule A constitutes a part of this agreement.

All exhibits referenced in this agreement are made a part of this agreement.

All exhibits and schedules annexed hereto are expressly made a part of this agreement as though fully set forth herein.

This agreement (including any exhibits and schedules hereto) constitutes the entire agreement among the parties hereto.

5.98 2.113 and 13.291 for two other techniques that drafters use, unnecessarily, to make attachments part of the contract.

5.99 make an exception for contracts with self-contained sets of provisions placed in schedules. Contracts with a "master" agreement structure (see 4.85) can feature such schedules. Because the body of the contract doesn't otherwise mention those schedules, to make them part of the contract it's necessary to state in the body of the contract that the schedules constitute part of the contract.

Virtual Attachments

5.100 Sometimes it's useful to make an ancillary document part of a contract without physically attaching it. This manual uses the term "virtual attachment" to describe any such ancillary document. An employment agreement might include as a virtual attachment the company's employee handbook; a commercial contract might include as a virtual attachment a web page containing general terms.

5.101 To make sure that a court considers a virtual attachment to be part of a contract, say that the virtual attachment is part of the contract.

5.102 Don't say that the contract is *subject to* the virtual attachment, as a court might hold that *subject to* fails to adequately express an intention to be bound by the virtual attachment. See *Affinity Internet, Inc. v. Consolidated Credit Counseling Services, Inc.*, 920 So. 2d 1286 (Fla. Dist. Ct. App. 2006). And don't simply say that the virtual attachment can be found on a specified web page. See *Manasher v. NECC Telecom*, No. 06-10749, 2007 WL 2713845 (E.D. Mich. Sept. 18, 2007).

5.103 Also, be cautious about using definitions to bring a virtual attachment within the scope of a contract:

"Support Services" means Product support services described in the description of support services provided at the Acme Licenses website (http://www.acme.com/licenses) at any given time.

5.104 Acme's counsel might think this a low-key way to introduce Acme's ability to unilaterally amend a virtual attachment (see 5.105), but it's sufficiently wishy-washy that one could imagine a court's holding that the description of support services doesn't in fact constitute part of the contract.

5.105 A contentious issue relating to virtual attachments is whether a party may unilaterally amend a virtual attachment. A related issue is whether one party must notify the other of any such amendment, and if so, how. Discussion of these issues is beyond the scope of this manual.

CHAPTER 6

DEFINED TERMS

6.1 A contract usually contains terms for which it provides definitions. Those terms are referred to as "defined terms." Definitions of defined terms are either autonomous (see 6.15) or integrated (see 6.40).

PURPOSE

6.2 A defined term makes a contract easier to read by allowing the drafter to use throughout the contract the shorter defined term instead of the longer definition. It also ensures that whatever is defined is expressed consistently throughout the contract.

THE NATURE OF DEFINED TERMS

6.3 Defined terms are almost always nouns—common (*employee*) as well as proper (*Smith*)—and noun phrases (*material adverse change*), although occasionally one sees a verb (*transfer*) or even a prepositional phrase (*to Acme's knowledge*).

6.4 The notion that you shouldn't use in a definition the term being defined doesn't apply to contracts. It does apply to dictionaries, because it would be unhelpful for a dictionary definition of *chair* to include the word *chair*. But in a contract a defined term simply serves as a convenient substitute for the definition, and only for purposes of that contract. Consequently, repeating a contract defined term in the definition is unobjectionable. An example: *"Trademark" means a registered trademark or service mark or any trademark or service mark that is the subject of any application, registration, or renewal*.

6.5 If the defined term is a common noun, use the singular form when defining it, unless it's simpler to use the plural form; see for example how the term *the Hastings Parties* is defined in sample 1. Defining a term in the singular and using it in the plural, or vice versa, wouldn't confuse a reasonable reader, so no purpose would be served by addressing this practice in a provision specifying drafting conventions (see 15.13). And nothing is gained by using both the singular and plural form when defining a term, as in *"Note" and "Notes" mean* . . . and as in *each a "Member" and, collectively, the "Members"*.

6.6 Don't use as alternative defined terms both a word or phrase and an initialism or abbreviation, as in *"Customer Service Request" or "CSR" means* . . . . Simplicity favors using one or the other;

choosing between them involves balancing readability and concision.

6.7 To allow the reader to recognize defined terms, use initial capitals to distinguish defined terms from words for which the contract doesn't provide a definition. Do so even if the defined term is a routine one such as *Person* or *Subsidiary*. Don't use anything more emphatic—bold, italics, or all capitals—every time you use a defined term, as it's distracting.

6.8 Don't make exceptions to use of initial capitals when creating a particular defined term. If in a shareholders agreement the drafter feels that it's necessary to define *transfer*—the verb in all its forms as well as the noun—it might well be distracting for the reader to encounter *transfer* with a capital *T* at every turn. The same goes for using a capital *R* in the definition of *register*, *registered*, and *registration* (see 6.27). But if it would be awkward to state a given defined term with initial capitals, that's a sign that the drafter should consider an alternative approach rather than simply dispensing with the initial capitals.

6.9 Provide definitions for all initialisms, even those that are widely known, for example *SEC*, meaning the U.S. Securities and Exchange Commission. Contract drafting is most efficient when you apply an approach consistently—it complicates matters if the drafter starts making judgment calls regarding whether the meaning of a particular initialism is obvious. And if drafters start

dispensing with particular definitions, at some point you can expect reader confusion, either because a contract might have a broader readership than expected or because the drafter had an expansive notion of what terms have an obvious meaning.

SELECTING DEFINED TERMS

6.10 If you wish to create a defined term to express a particular meaning and it's conventional to use a particular defined term—such as *Business Day*, *the Code*, *GAAP*, *Indemnifiable Losses*—to express that meaning or something close to it, use the conventional defined term. Contract drafting favors predictability over novelty.

6.11 If you use a conventional defined term but you give it a definition that's unorthodox, alert the reader to that by modifying the defined term appropriately. For example, instead of *Net Operating Income* use *Adjusted Net Operating Income*.

6.12 If you need to create a defined term for a definition that's unique to a particular transaction, use a term that's concise yet informative. Your choice of defined term will in part depend on what's required to distinguish it from other defined terms used in that contract. The term *the Property* might work as the defined term for a property located in Acmetown if that property is the only property involved in the transaction. If other properties are involved, you'll need to be more specific and use as

the defined term, say, *the Acmetown Property*. If the other properties include other Acmetown properties, *the 144 Ninth Street Acmetown Property* might be your best choice. The need to distinguish a defined term from other defined terms in a contract can require a defined term that's a bit of a mouthful, such as *the PLM/Whitman Excluded Asset Proceeds*.

6.13 See 2.83–109 regarding selecting defined terms for party names.

TYPES OF DEFINITIONS

6.14 This manual refers to definitions as either "autonomous" or "integrated," depending on how a definition is linked to its defined term.

Autonomous Definitions

6.15 An autonomous definition is linked to its defined term by a "definitional verb." The definition, definitional verb, and defined term together constitute a sentence, but for simplicity this manual uses the term "autonomous definition" also to refer to the entire sentence.

STRUCTURE

6.16 In autonomous definitions, the defined term can be placed after the definition, as in *Any such transfer is referred to in this agreement as a "Permitted Transfer."* But it's more economical to place the defined term before the definition, as in *"Exchange Act" means the Securities Exchange Act*

of 1934. Don't put the definite article *the* or the indefinite article *a* (or *an*) before the defined term.

6.17 In the front of a single autonomous definition, add the phrase *In this agreement*, followed by a comma. Before a set of autonomous definitions, whether "on site" or in a definition section (see 6.19), say *In this agreement, the following definitions apply*, followed by a colon. It's more efficient than wordier alternatives, such as *For purposes of this agreement, the following terms have the following meanings*.

6.18 In a set of autonomous definitions, state each autonomous definition as a separate paragraph with a first-line indent. Don't add any additional text at the end of a paragraph constituting an autonomous definition. Put any set of autonomous definitions in alphabetical order. Don't enumerate them—it wastes space and distracts the reader, as alphabetical order by itself is enough of an organizing framework.

PLACEMENT

6.19 A single autonomous definition can be placed "on site" (see 6.64), either with other text in a section or subsection or, if it's more than a couple of lines long, in its own subsection. Alternatively, it can be placed in a definition section (see 6.63).

6.20 A set of autonomous definitions can constitute the entire definition section or it can be placed on site, in its own subsection.

6.21 Autonomous definitions placed on site should follow, in a section, right after the provisions that use the terms being defined. Placing definitions before the provisions that use the defined terms would cause readers to wonder why they're being provided the definitions. Placing definitions later in a section, separated by unrelated text from the provisions that use the defined terms, would force readers to work harder to consult the definitions.

EMPHASIS

6.22 Place in quotation marks and emphasize in bold a defined term linked to an autonomous definition—using quotation marks in this context is consistent with standard English, and using both conventions makes autonomous definitions easier to spot. Don't bold the quotation marks. (This manual follows that convention for purposes of the samples and the indented examples of contract text, but in examples incorporated in regular paragraphs any terms being defined aren't stated in bold, to avoid distracting the reader.)

DEFINITIONAL VERBS

6.23 If the definition gives the entire meaning of the defined term (in other words, if the definition is "full"), use *means* as the definitional verb.

6.24 An "enlarging" definition, which expresses only part of the intended meaning, uses *includes* as the definitional verb, and a "limiting" definition, which excludes something from the meaning of the defined term, uses *does not include*. Enlarging and

limiting definitions can create mischief, as they don't state the full scope of the definition. For example, protracted litigation in the United States over "Bratz" dolls concerned in part whether the defined term "inventions," as used in the employment agreement between Mattel and one of the litigants, included ideas. The definition of "inventions" was an enlarging definition, in that it used as the definitional verb "includes, but is not limited to"—hence the potential for dispute. See *Mattel, Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 909 (9th Cir. 2010).

6.25 Sometimes it can be useful to combine a full definition with an enlarging definition or a limiting definition, or both: *W means X* [*and includes Y*] [*but does not include Z*] [*and includes Y but does not include Z*]. That avoids the uncertainty inherent in using enlarging and limiting definitions on their own. (For two contexts where it would be appropriate to use a full definition with a limiting definition, see 8.62 and 9.129.)

6.26 Don't use *means and includes*—as a matter of logic, it's not feasible to express complete and incomplete meanings at the same time. And don't use *includes only*, which is equivalent to *means* but wordier and less clear.

6.27 If the definitional verb is *means*, *includes*, or *does not include*, the part of speech of the defined term should match that of the definition, whether verb, noun, or other. Whenever that's not feasible, use *refers to*, as in *"Register," "registered," and*

"registration" refer to a registration effected by preparing and filing a registration statement under the 1933 Act . . . . You should also use *refers to* if defining *transfer* as a verb or noun (see 6.8).

6.28 Another form of mismatch between the defined term and the definition is when the definition consists entirely of language suited to a substantive provision. For example, see the autonomous definition in 8.65, which uses language of obligation. A definition shouldn't include *shall*, *may*, *must*, or *will*.

6.29 Don't use a dash instead of a definitional verb, as in *"ERISA"—the Employee Retirement Income Security Act of 1974*, as a dash is less precise than a definitional verb. The same goes for using a colon instead of a definitional verb.

6.30 Use the definitional verb in the present tense, since definitional sentences are language of policy (see 3.242 and example [8-4]). No duty is being expressed, so don't use *shall mean* instead of *means* (see 3.243).

"STUFFED" DEFINITIONS

6.31 Don't "stuff" or "load" autonomous definitions by including in them language that would be better placed elsewhere.

6.32 One way to stuff a definition is to include in it language that couldn't constitute part of the definition proper, such as language of obligation, discretion, or prohibition (see 6.28). For example,

don't tack on to the definition of *Acme Financial Statements* the clause *which Acme shall deliver no later than three months after the end of each Acme fiscal year*. Instead, state that deadline elsewhere as language of obligation.

6.33 Here's another example of a stuffed autonomous definition:

"**Alternative Clearing System**" means any clearing system designated by the Company and approved by the Trustee (any such approval not to be unreasonably withheld or delayed).

6.34 In this case, the stuffing isn't only the prohibition imposed on the trustee but also the requirement that the trustee have approved the company's choice of clearing system. It would be clearer to address these issues in a substantive provision. One symptom of a stuffed definition is repetition in the substantive provisions of elements contained in the definition. In this case, some references to *Alternative Clearing System* in the substantive provisions were accompanied by duplicative references to trustee approval.

6.35 Here's a third example:

"**Committee**" means the Acme stock option committee composed of two or more members of the board of directors, which committee will be responsible for administering the Plan.

6.36 It would be preferable to limit the definition of *Committee* to "the Acme stock option committee"

and address the makeup of the committee and its function in a substantive provision.

6.37 Stuffed definitions can pervade a contract if the drafter misguidedly thinks that it's best for the operative provisions to appear simple yet be full of defined terms. The complexity is swept into definitions that are stuffed to the point of bursting. That imposes on the reader the awkward task of unpacking the complexity.

OTHER MISUSE OF AUTONOMOUS DEFINITIONS

6.38 Don't include an integrated definition (see 6.40) within an autonomous definition, as in *"Effective Date" means the date on which the Registration Statement is declared effective by the Securities and Exchange Commission (the "SEC")*. Doing so makes integrated definitions longer and harder to read. Also, a reader wouldn't necessarily think to look in an autonomous definition for the definition of another term. It would be clearer to define the term *the SEC* elsewhere and use just the defined term in the autonomous definition.

6.39 Regarding using an autonomous definition to bring a virtual attachment within the scope of a contract, see 5.103.

Integrated Definitions

6.40 The alternative to autonomous definitions (see 6.15) is "integrated" definitions.

STRUCTURE

6.41 Whereas an autonomous definition is a separate sentence, an integrated definition is part of a sentence included with the substantive provisions of a contract, with the defined term following the definition and in parentheses. An example: *Since January 1, 2012, Dynaco has filed with the SEC all reports, proxy statements, forms, and other documents that it has been required by law to file with the SEC (those documents, the "Dynaco SEC Documents").* This manual refers to such language in parentheses as a "defined-term parenthetical."

6.42 Don't introduce the defined term using a traditional word or phrase such as *hereafter* or *hereinafter referred to as*. Such introductory text is redundant, as the parentheses and the emphasis used (see 6.44) signal that a term is being defined.

6.43 In contrast to autonomous definitions (see 6.15), include in a defined-term parenthetical the definite article *the* or the indefinite article *a* (or *an*), as appropriate. An article isn't necessary unless the defined term is a common noun (see 6.3). You can drop the article from a common noun that's a party-name defined term, although this manual recommends that you not do so (see 2.98).

EMPHASIS

6.44 Place in quotation marks and state in bold any defined term that's being defined in a defined-term parenthetical. Don't bold the quotation marks. In general writing you can do without the quotation marks (see *The Chicago Manual of Style*,

at 10.3), but use them in contracts so that the conventions used for both autonomous and integrated definitions are consistent (see 6.22). To avoid distracting the reader, in this manual the terms defined in examples incorporated in regular paragraphs (as opposed to the samples and the indented examples of contract text) aren't stated in bold.

6.45 Follow standard practice and exclude the definite article *the* and the indefinite article *a* (or *an*), if present, from the quotation marks. One could argue that the article should be within the quotation marks, as it constitutes part of the defined term, but it makes sense to put within the quotation marks only what's specific to that defined term.

WHERE TO PLACE A DEFINED-TERM PARENTHETICAL

6.46 The principal source of confusion regarding integrated definitions is where to place the defined-term parenthetical and what it should consist of.

6.47 Don't place the defined-term parenthetical in the middle of the definition, as in each of the following examples. Instead, put it at the end. In each example, the mislocated text is shown in strikethrough and the text in italics shows the preferred location.

The Company's board of directors has received a written opinion ~~(the "Fairness Opinion")~~ of the Financial Advisor stating that the proposed consideration to be received by the holders of Shares

in connection with the Offer and the Merger is fair from a financial point of view to the holders of Shares *(that opinion, the* "***Fairness Opinion***"*)*.

The Company will have an irrevocable and exclusive option ~~(the "Repurchase Option")~~, for a period of 90 days from the Termination Date, to repurchase some or all of the Unvested Restricted Shares at the Repurchase Price *(that option, the* "***Repurchase Option***"*)*.

This amendment is effective on the first date ~~(the "Effective Date")~~ on which all the following conditions are satisfied *(that date, the* "***Effective Date***"*)*: . . . .

No later than 120 days after the Closing, the Company shall file with the SEC a registration statement on Form S-1 ~~(the "New Registration Statement")~~ registering for resale all Registrable Securities *(that registration statement*, *the "**New Registration Statement**")*.

Acme shall maintain confidential all information it obtains from Widgetco ~~(the "Confidential Information")~~ in the course of providing services under this agreement *(that information*, *the* "***Confidential Information***"*)*.

6.48 Usually, mid-definition defined-term parentheticals are merely awkward, but sometimes they can change meaning. Take the following example:

Schedule 3.12 contains an accurate list of all agreements, oral or written ~~("Contracts")~~, to which Dynaco is a party *(each such agreement, a "**Contract**")*.

6.49 As originally positioned, the defined term encompasses all agreements regardless of the identity of the parties. That might be appropriate in another contract, but in this case the drafter had intended that the defined term would encompass only Dynaco's agreements.

6.50 Don't place the defined term beyond the definition, as in the following examples:

The lease for Blackacre *(the "**Lease**")* must be substantially in the form of exhibit B ~~(the "Lease")~~.

The purchase price for the Shares *(the "**Purchase Price**")* is $3 million ~~(the "Purchase Price")~~.

6.51 Regarding where to place the defined-term parenthetical when creating the defined term for a party name, see 2.87.

CLARIFYING THE SCOPE OF THE DEFINITION

6.52 If it might be unclear how far back an integrated definition goes, include in the defined-term parenthetical, just before the defined term, a reference to the pertinent noun in the definition: *that litigation, the "Acme Litigation"*; *those documents, the "Dynaco SEC Documents"*; *each such consent, a "Required Consent"*. This manual refers to this technique as "clarifying the

scope" of a definition. It's featured in the examples in 6.47–48.

6.53 If a definition consists of one or more of a set of enumerated clauses, make that clear in the defined-term parenthetical: *(the litigation listed in clauses (1) through (4) of this section 4(b), the "Acme Litigation")*.

"COLLECTIVELY"

6.54 If an integrated definition encompasses an entire string of nouns, you can help make that clear by adding the word *collectively* to the defined-term parenthetical, just before the defined term and after any language clarifying the scope of the definition (see 6.52): . . . *relating to the confidential affairs of the Company, the Parent, and their respective subsidiaries and affiliates (collectively, the "Acme Entities")*.

BOOSTING A DEFINED TERM

6.55 You can supplement an integrated definition and thereby change the meaning conveyed by the defined term by adding language—generally using *together with*—to the defined-term parenthetical, just before the defined term and just after any language clarifying the scope of the definition (see 6.52) and the word *collectively* (see 6.54), if used. This manual refers to this practice as "boosting" a defined term. In the following example, the boosting language is in italics:

... the Companies' officers, directors, financial advisors, accountants, attorneys, and other Affiliates (collectively, *together with the Company*, the "**Company Group**").

6.56 For an example of inappropriate use of boosting, see 2.88.

STACKING DEFINED TERMS

6.57 You can define more than one term within a defined-term parenthetical by separating the defined terms with a semicolon and clarifying the scope of each (see 6.52): *Parent, Sub, and Target are party to a merger agreement dated October 3, 2012, providing for acquisition of Target by Parent by means of a merger of Sub into Target (that agreement, the "Merger Agreement"; that merger, the "Merger")*. This manual refers to this practice as "stacking" defined terms.

6.58 Stacking more than two defined terms is cumbersome: *Roe desires to sell to Jones 5,000 shares of common stock, par value $.01 per share, of Acme Corporation, a Delaware corporation ("Acme"; that common stock, the "Common Stock"; those shares, the "Shares")*. Instead, restructure the provision to define one or more terms separately.

6.59 You can boost (see 6.55) the second defined term in a stacked set: *(the "Endorsement Agreement"; together with the PSB Purchase Agreement and the RCO Purchase Agreement, the "Continuing Agreements")*.

6.160 As with autonomous definitions (see 6.27), in integrated definitions the part of speech of the defined term should match that of the definition. Mismatch occurs more with integrated definitions than with autonomous definitions.

6.161 Here's an example of such a mismatch: *At the Effective Time, Merger Sub will merge into Acme (the "Merger")*. Adding transition language before the defined term usually cures this; to fix the immediately preceding example, revise the defined-term parenthetical to read as follows: *(the merger thus effected, the "Merger")*. But it might be that curing a particular mismatch is best accomplished by restructuring the provision or defining the term elsewhere.

WHICH TYPE OF DEFINITION TO USE

6.162 How to present a given definition is in part a function of how long it is. If a definition is relatively succinct, it's probably more efficient to present it as an integrated definition rather than as an autonomous definition, so as to save space and avoid disrupting the reading process unnecessarily. The longer the definition, the more likely it is that it would be best to present it as an autonomous definition, to avoid clogging up the related provision. Another factor in determining which type of definition to use is whether the best place for a

given definition is "on site" or in a definition section, an issue discussed immediately below.

THE DEFINITION SECTION

6.63 A definition can be placed in a definition section, which lists autonomous definitions in alphabetical order by defined term. In longer documents, the definition section can constitute an entire article, and in particularly lengthy contracts it can be many pages long. (Regarding language to introduce the autonomous definitions in a definition section, see 6.17.)

Versus Defining Terms On Site

6.64 Alternatively, you can create a defined term "on site" by placing the definition, in the form of an integrated or autonomous definition, with a provision that uses the related defined term. An on-site autonomous definition can simply be a sentence among others in a section or subsection, or it can be placed in a separate subsection, either on its own or with other autonomous definitions (see 6.19–20). Either way, the autonomous definition should come right after the provision that uses the defined term—placing it before would likely puzzle readers (see 6.21).

6.65 Drafters have traditionally tended to favor placing definitions in definition sections. That has the disadvantage of forcing any reader who encounters an unfamiliar defined term to turn to the definition section to read the definition of that term.

From there, the reader might have to consult the definition of one or more other defined terms in the definition section before resuming reading. In a document with many, or complex, defined terms, this flipping back and forth can disrupt one's reading.

5.66 the definition section does serve a purpose, as it just adds clutter to the deal terms if you define on site a term that readers likely know the meaning of. So deciding which terms can be placed in a definition section involves assessing the degree to which they can be understood independently of their definition.

5.67 ders can be counted on to know the meaning of initialisms of relevant government agencies (for example, in the United States, *the SEC* and *the IRS*), relevant statutes (for example, in the United States, *ERISA*), and a basic business term such as *GAAP*, meaning "generally accepted accounting principles."

5.68 newhat less inherently comprehensible are defined terms that have definitions that can vary somewhat from transaction to transaction—defined terms such as *Affiliate*, *Lien*, *Government Authority*, *Business Day*, and *Subsidiary*. To know the exact meaning of such a defined term you would need to read the definition, but the defined term on its own gives a good general sense of its meaning. It's unlikely that your understanding of the provisions in which such a defined term occurs would be

meaningfully compromised if you haven't yet read the definition.

6.69 At the other end of the spectrum are defined terms such as *Equity Infusion* or *Excess Insurance Proceeds*—defined terms with a definition that is unique to the transaction, so the defined term can't be understood without consulting the definition.

6.70 Define in the definition section terms in the first and second category, so they don't unnecessarily clutter up the text. Define on-site terms in the third category, so they're readily accessible to the reader.

Where to Place the Definition Section

6.71 The definition section has traditionally been placed at the beginning of the body of the contract. This is inconsistent with the notion that provisions that are more important should come first (see 4.71). Readers generally turn first to the deal provisions rather than slogging through the definitions, and those who do tackle the definitions head-on would likely need to reread them when they encounter, often many pages later, the provisions using the defined terms.

6.72 If you pare the definition section down to those terms that are inherently familiar, no justification remains for keeping it at the beginning of the body of the contract, since readers would need to refer to it only to fine-tune their understanding. You can safely move a pared-down definition section toward the back of the contract, to the

boilerplate. When purged of terms best defined on site, the definition section might be slight enough to consist of a single section rather than an entire article. In fact, it might be slight enough for you to dispense with a definition section entirely and define on site those few defined terms that would otherwise have been defined in the definition section.

6.73 It's best not to place the definition section in an attachment (see 5.91–92). Offering readers the convenience of being able to pull out the definition section and read it side by side with the rest of the contract is trivial compared with putting on site, in conjunction with the relevant provisions, the definitions that readers would need to consult.

The Two-Column Definition Section

6.74 In contracts drafted in Commonwealth countries, the definition section is commonly presented in two columns, with the defined terms in the first column and the definitions in the second column. This manual recommends against using a two-column format for the definition section.

6.75 The rationale for the two-column format is that keeping the defined term apart from the rest of the definition makes it easier to scan through the defined terms and find the one you're looking for. (If you use a paragraph structure and the definition is more than one line long, the defined term will have text immediately below it.)

6.76 A version of the two-column format omits the definitional verb, making it implicit that

means is the connection between the first column and the second column. But that precludes using other definitional verbs, including *refers to* (see 6.27).

6.77 If you do use the definitional verb with the two-column format, whatever nominal advantage is presented by stating the defined term free of any surrounding text is offset by the awkwardness of chopping a sentence in two.

6.78 The two-column definition section is consistent with an approach to layout that places undue emphasis on breaking up text (see 4.59).

CROSS-REFERENCES TO DEFINITIONS

6.79 Cross-referencing in general is discussed in 4.87–101, but it's an issue that also arises in the context of definitions.

The Index of Definitions

6.80 Definition sections have traditionally been used to provide, in addition to definitions, cross-references to sections where other terms are defined. But definition sections aren't suited to this task. For one thing, the cross-references are rather cumbersome (the typical format is *"Material Permits" has the meaning given that term in section 3.4*). Furthermore, because the cross-references are interspersed with autonomous definitions and occur throughout the definition section, it's likely that any reader consulting the definition section to see where

a particular term is defined would have to flip through some pages.

6.81 A much more efficient vehicle for helping readers quickly find their way around definitions is an index of definitions that lists the defined terms in two columns in alphabetical order and indicates the page where the definition of each term is located. (A page number is more useful than a section number. For one thing, readers told the page on which a section occurs would be able to turn to it more quickly than they would if they were given just the section number. Also, sections routinely occupy more than one page.)

6.82 The conventional term for such indexes is "index of defined terms." But seeing as they don't state the page number of each page where a defined term is used, "index of definitions" is a more accurate term.

6.83 Place an index of definitions after the table of contents (see 2.171). If a contract is too short to warrant a table of contents, you can assume that it's also too short to warrant an index of definitions.

6.84 You could instead place an index of definitions at the end of a definition section and include only those terms defined on site. But such an index would be less accessible and less useful than a comprehensive index of definitions placed after the table of contents, so this option is perhaps best reserved for those times when you want to use an

index of definitions even though the contract doesn't have a table of contents.

6.85 Generate an index of definitions using Microsoft Word's indexing feature. As with any word-processing function that uses field codes, ensuring that an index of definitions remains accurate through the drafting and negotiating process usually requires that one person retain control of the draft (see 4.101).

Referring to the Definition Section

6.86 If a definition section is located someplace other than at the beginning of the body of the contract (see 6.71), the first section of the contract sometimes states that all or some defined terms are defined in a specified section, namely the definition section. Such provisions run counter to the principle that more-important provisions should come before less-important provisions (see 4.71). Furthermore, such a provision would serve little purpose if, as recommended in 6.67, the definition section contains only definitions of terms with inherently familiar meanings. Omit such provisions and instead include in longer contracts an index of definitions.

If a Defined Term Is Used Before It Is Defined

6.87 The convention has it that a defined term should be defined where it's first used, so that the reader doesn't have to flip through the following pages looking for the definition. But in contracts that follow that convention, sometimes a defined term is used upstream of the definition, perhaps because the

first use of that defined term is an incidental one. And sometimes revisions to a contract result in a defined term being inserted upstream of its definition and it's not thought worthwhile to relocate the definition. In such situations it's commonplace to add in parentheses, after the first use of the defined term, the unhelpfully imprecise *as defined below*, the more precise *as defined in section X*, or some other variation.

6.88 The problem with this approach is that it assumes that readers start at the top of the contract and work their way methodically through to the end. Instead, it's likely that most readers skim through the text and focus on whichever provisions happen to be of interest to them.

6.89 This has two implications. First, defining a term when it's first used doesn't necessarily help readers. Unless it makes more sense to define it in a definition section (see 6.67), define a term on site, right after the provision that makes the most extensive use of that defined term (see 6.64).

6.90 Second, parenthetical cross-references to where a term is defined are of little value. For readers jumping from one provision to another, it would be a matter of luck whether any such parentheticals happen to be of use. Also, it's tedious to have to check drafts to ensure that every defined term that precedes its definition is given a cross-reference the first time it's used. One could include many more such cross-reference parentheticals, but they would clog up the contract.

Instead, in general drop such cross-references in favor of an index of definitions (see 6.80), using them only when, in the absence of an index of definitions, a defined term stranded in a far corner of the contract might have a reader wondering where it's defined.

USE DEFINED TERMS EFFICIENTLY

6.91 Don't create a defined term if you don't use it after having defined it. And usually it's not worthwhile to create a defined term if you use it only once or twice. Defined terms make prose harder to read and creating a defined term adds clutter, so create a defined term only if the efficiencies it offers more than offset the drawbacks.

6.92 That said, sometimes a concept is sufficiently complex that the only sensible course is to state it separately as an autonomous definition—even if it's only used once—rather than working it into a provision.

6.93 Also, if in revising a template contract for a transaction you end up deleting all but one or two instances of a defined term, it might not be worthwhile to go back and eliminate that defined term on grounds of insufficient use.

6.94 Be alert to provisions that fail to take into account the full meaning of a defined term. For example, in a reference to *Change in Control of the Company*, the words *of the Company* would be

redundant if, as is usually the case, *Change of Control* is defined with respect to the Company.

6.05 Defined terms can be combined. For example, a drafter might combine the defined terms *Licensee* and *Software* to yield the defined term *Licensee Software*. But generally it's best not to combine defined terms—on first encountering a combined defined term, readers might be uncertain whether it has its own definition or whether you're meant to deduce its meaning by combing the definitions of its constituent defined terms. If you nevertheless create a combined defined term, giving it its own meaning would reduce the potential for confusion.

CHAPTER 7

SOURCES OF UNCERTAINTY IN CONTRACT LANGUAGE

7.0 Confusing contract language leads to uncertainty, and uncertainty can lead to disputes. This chapter provides an introduction to the different kinds of uncertainty in contract language, in particular ambiguity and vagueness.

7.1 Chapter 1 considers the characteristics of optimal contract language. This chapter 7 might seem the reverse image of chapter 1, with deviation from the characteristics of optimal contract language creating the different kinds of uncertainty. But the connection is less clear cut than that. Some of the characteristics of optimal contract language—notably omitting archaisms—relate primarily to making contract prose easier to read rather than avoiding uncertainty. And not all sources of uncertainty are a function of suboptimal contract language. For example, two separate provisions in a contract might be models of clarity, but if they conflict, the result is uncertainty.

7.2 Uncertainty in contract language arises from five sources—ambiguity, undue generality, conflict, failure to address an issue, and vagueness.

The first four are pernicious, whereas the last—vagueness—is an essential drafting tool when used with restraint.

7.4 Courts tend to attribute all uncertainty to ambiguity, the result of using *ambiguous* and *ambiguity* to convey a broader meaning than that understood by linguists (see 7.5)—witness how *Black's Law Dictionary* defines *ambiguity* as "An uncertainty of meaning or intention, as in a contractual term or statutory provision." But the broader meaning isn't particularly helpful, as each source of uncertainty operates differently from the others. Lump them together and you risk misunderstanding them.

AMBIGUITY

7.5 From a linguist's perspective, a contract provision is ambiguous if it's capable of conveying two or more inconsistent meanings. If a group of people read a contract provision and some think it means one thing and the rest think it means something else, that provision is ambiguous.

7.6 It's commonplace for practitioners to refer to "creative ambiguity," in other words the practice of deliberately including in a contract an ambiguous provision, with the aim of permitting the client to invoke, after signing, the hidden, alternative meaning if doing so would provide an advantage.

7.7 But such gamesmanship seems antithetical to a successful contract relationship, and it might

violate lawyer ethics rules. Furthermore, if the other side thinks that a provision means one thing, and you're aware of that and do nothing to suggest that the provision means anything else, then a court might well hold that that precludes you from arguing that the provision in fact does mean something else. See, e.g., *United Rentals, Inc. v. RAM Holdings Inc.*, 937 A.2d 810, 836 (Del. Ch. 2007) (invoking "the forthright negotiator principle," namely that "a court may consider the subjective understanding of one party that has been objectively manifested and is known or should be known by the other party").

7.8 Different kinds of ambiguity occur in contracts. Some are addressed elsewhere in this manual:

- for discussion of ambiguity in references to time, see chapter 10;
- for discussion of the ambiguity that this manual considers under the rubric "the part versus the whole," see chapter 11;
- for discussion of syntactic ambiguity, which arises principally out of the order in which words and phrases are used and how they relate to each other, see chapter 12; and
- for ambiguity associated with language of discretion, see 3.155–63.

7.9 Two other kinds of ambiguity are discussed in the following sections.

Lexical Ambiguity

7.10 Lexical ambiguity occurs when a word has more than one meaning and the context is

insufficient to allow readers to determine with certainty which meaning is intended. Lexical ambiguity is a function of the endlessly fluid nature of English, but it can be aggravated by redundancy (see 1.41) and inconsistency (see 1.63). Here are some cases involving lexical ambiguity:

- *Mosser Construction, Inc. v. Travelers Indemnity Co.*, 430 F. App'x 417 (6th Cir. 2011) (considering whether "subcontractor" means any supplier to a contractor or something more and holding that it's ambiguous).
- *Provident Bank v. Tennessee Farmers Mutual Insurance Co.*, 234 Fed. App'x 393 (6th Cir. 2007) (holding that it was unclear whether the term "foreclosure" referred to foreclosure proceedings or to a foreclosure sale).
- *Jones v. Francis Drilling Fluids*, 613 F. Supp. 2d 858 (S.D. Tex. 2008) (considering whether the word "offshore," in connection with an oil rig, refers to a location in the Gulf of Mexico or in inland waters and holding that it could convey either meaning).
- *Graev v. Graev*, 898 N.E.2d 909 (N.Y. 2008) (holding that the word "cohabitation" as used in a separation agreement did not have a plain meaning).

The words at issue in those cases aren't routinely used in contracts, so spotting the potential for lexical ambiguity can require some imagination. But lexical ambiguity is also to be found in words and phrases that are utterly standard in contracts, for example *represents* (see 3.273), *best efforts* (see chapter 8), *material* (see 9.3–12), *year* (see 10.63), and *willful* (see 13.761).

7.12 A drafter should be concerned not only with lexical ambiguity itself, but also the potential for dispute over ambiguity—winning a fight over ambiguity is a distant second to avoiding a fight. In the well-known case of *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960), the court held that the buyer, Frigaliment, had failed to sustain its burden of proving that the word "chicken" in the contract at issue referred only to chickens suitable for broiling and frying and did not include stewing chickens. But even if in that context the word "chicken" wasn't ambiguous, both parties would have been better off if the drafter had found a way of expressing the intent of the parties in a manner that precluded dispute.

Antecedent Ambiguity

7.13 In the sentence *John is late because he overslept*, the antecedent of *he* is *John*. Confusion can arise if it's not clear what the antecedent is of a given element. For example, in *John read Bill's e-mail, and he is furious*, the antecedent of *he* could be either *John* or *Bill*.

7.14 This kind of ambiguity arises in contracts. For example, in *Loso v. Loso*, 132 Conn. App. 257 (App. Ct. 2011), the following contract language was at issue:

The defendant agrees to pay for one-half the cost of Sarah's college educational expenses for a four year degree net of scholarships or grants, subject to the

limitation that said cost shall not exceed the tuition for a full-time residential student at UCONN-Storrs.

7.15 Was the defendant's liability capped at half the tuition for a full-time residential student at UCONN-Storrs (the meaning sought by the defendant), or was it capped at the full amount of that tuition? In other words, was the antecedent of "said cost" "one-half the cost" or "the cost" of Sarah's expenses? Disagreeing with the lower court, the appellate court held that the defendant's liability was capped at the full amount of the tuition. Furthermore, it said that the language was "clear and unambiguous"—an assessment that many would take issue with.

7.16 The drafter should have made the intended meaning clear enough to preclude a fight. Here's how the provision at issue could have been drafted to achieve the meaning sought by the defendant:

The defendant shall pay half the cost of Sarah's college educational expenses for a four-year degree net of any scholarships and grants, up to an amount equal to half the tuition for a full-time residential student at UCONN-Storrs.

7.17 Another example of uncertainty over an antecedent can be found in *Weichert Co. of Maryland, Inc. v. Faust*, 419 Md. 306 (2011). The dispute involved whether the word "hereunder" located in a fee-shifting provision, itself located in a subsection of a provision dealing with nonsolicitation, applied just to that section or to the

entire agreement. The court held that because the fee-shifting provision was located in a subsection, the term "hereunder" referred only to that section.

7.118 And an English case, *Rainy Sky S. A. and others v. Kookmin Bank*, [2011] UKSC 50, involved uncertainty over what was the antecedent of "such sums" in the phrase "all such sums due to you under the contract."

7.119 As with all forms of ambiguity, the only solution is to be aware of the sources of such ambiguity and, when alternatives present themselves, to be specific as to which antecedent you're referring to. It's perhaps no coincidence that the three examples of antecedent ambiguity cited above involve minor archaisms—*said* (see 13.590), the *here-* and *there-* word *hereunder* (see 13.260), and *such* used instead of *those* (see 13.635). Drafters working in a fog of traditional contract language might be particularly prone to missing this sort of ambiguity.

UNDUE GENERALITY

7.120 If because of a lack of detail it's unclear what a contract provision applies to, that provision can be described as overly general. As a result of undue generality, more falls within the scope of a provision than the parties had anticipated, and that can lead to confusion as to what the parties had actually intended. For example, *Acme shall*

purchase the Ford Mustang from Widgetco is overly general if Widgetco owns more than one such car.

7.21 Overly general contract language was famously at issue in *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 159 Eng. Rep. 375 (Ex. 1864). The contract in question provided for purchase of cotton from a ship named "Peerless" that was to depart from Bombay. It transpired that two ships named "Peerless" were to depart from Bombay a couple of months apart—the buyer had one ship in mind, the seller the other. In failing to provide sufficient detail to distinguish the two ships, the contract was overly general.

7.22 A more recent case involving undue generality is *In re C.P.Y.*, 364 S.W.3d 411 (Tex. App. 2012), a dispute over alimony. The husband was required to pay the wife alimony until, among other events, she returned to work "on a full-time basis." The wife got work as a contract attorney, so the husband sought an order declaring that he no longer had to pay alimony. The court held that the phrase "full-time basis" is ambiguous, but it would be more accurate to say that it's overly general, in that it's not specific enough, for reasons described in 13.239.

7.23 The term "latent ambiguity" has been used to describe such situations. (*Black's Law Dictionary* defines latent ambiguity as "An ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed," and it

goes on to allude to *Raffles v. Wichelhaus*.) But invoking ambiguity in this context only confuses matters, as ambiguity plays no part in creating the uncertainty that arises from undue generality—overly general provisions don't convey alternative meanings.

CONFLICT

7.24 Conflict occurs when two or more components of a contract aren't compatible. It can be caused by careless repetition (see 1.62), for example when the words and digits used to state a number don't match (see 14.1–10).

7.25 Entire provisions can conflict. For example, *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007), a high-profile case involving an abortive acquisition, involved conflict between two provisions on remedies. See Kenneth A. Adams, *Merger Pacts: Contract Drafting, Cerberus Litigation*, New York Law Journal, Feb. 19, 2008.

FAILURE TO ADDRESS AN ISSUE

7.26 Uncertainty can occur if by oversight a drafter fails to address an issue that it transpires should have been addressed. (That's different from the parties electing not to address an issue to facilitate reaching an agreement.)

Consider *Sabatini v. Roybal*, 150 N.M. 478 (Ct. App. 2011), which addressed use of the phrase "private garage" in a contract. The lower court had held that for purposes of a restriction on building, "private garage" meant a garage capable of holding no more than a reasonable number of vehicles for use by a single family, rather than the 100-foot-by-50-foot structure built by the Roybals.

After noting that the phrase "private garage" was ambiguous, the court of appeals reversed, holding that the Roybals' garage complied with the restrictive covenant, as (1) the garage was used to store the Roybals' vehicles and was not available for use by the public and (2) the phrase "private garage" didn't incorporate any limits on size.

But "private garage" isn't ambiguous, as it doesn't present alternative meanings. Instead, it's clear that the garage wasn't to be used by the public, but the drafter failed to address another issue likely to arise in a Santa Fe, New Mexico, subdivision—was there any limit on the size of the garage?

Avoiding this sort of uncertainty is more challenging than is avoiding the sorts of uncertainty discussed above, in that instead of eliminating that which is problematic you have to figure out what's missing.

7.31 That type of failure to address an issue involves uncertainty regarding whether a reference in the singular also applies to the plural (see 13.748).

7.32 The distinction between undue generality (see 7.20) and failure to address an issue is one of degree—between being insufficiently specific in addressing an issue and not addressing it at all.

VAGUENESS

7.33 Another source of uncertainty is vagueness, which arises whenever a concept provides for the possibility of borderline cases. For example, *tall* is vague—one cannot say exactly what height someone needs to be in order to be considered tall. As a result, any two people might agree that Tom is short and Dick is tall but disagree whether Harry—who is taller than Tom but shorter than Dick—is tall.

7.34 Vagueness is unique among the sources of uncertainty, in that it's not inherently pernicious. Drafters routinely make use of vagueness—vague words and phrases that are commonplace in contracts include *reasonable efforts* (see chapter 8), *material* and *material adverse change* (see chapter 9), *promptly* and *immediately* (see 13.518–37), *reasonable* (see 13.549), *satisfactory* (see 13.593), *substantially* (see 13.621), and *undue*. Drafters invoke vagueness whenever lack of control (over the future, over someone else's conduct) renders precise standards unworkable. For example, if a provision

requiring reimbursement of attorneys' fees and expenses would likely cover a broad range of litigation, it probably wouldn't make sense to cap fees and expenses at a stated amount. A drafter might instead make use of vagueness by having the provision refer to reimbursement of *reasonable attorneys' fees and expenses*.

7.35 Under contract law, one uses the "reasonable person" construct to determine whether a provision incorporating vagueness has been satisfied. If a vague standard refers to the perspective of a specified party (as in *satisfactory to Acme*), it's likely that a court would adopt the perspective of a reasonable person in the position of that party rather than the actual perspective of that party (see 13.593). It's commonplace for drafters to attempt to circumvent the reasonable-person standard by grafting on to a vague provision *at its sole discretion* or some variation, as in *satisfactory to Acme at its sole discretion*. But a court might hold that that is inconsistent with the implied duty of good faith (see 3.171–96).

7.36 The uncertainty inherent in vagueness can be aggravated by other issues. For one thing, some words and phrases can be both vague and ambiguous, notably *best efforts* (see chapter 8) and *material* (see 9.3–12).

7.37 There's also the matter of precision. Some vague terms are so imprecise as to be effectively unusable, for example *moral turpitude* (see 13.406) and *substantial* (see 13.621). Another example: How

widely disseminated does information have to be for it to be considered "publicly available"?

A38 At the other extreme, some drafters put their faith in subtle gradations that the terminology cannot support. One example is the ostensible distinction between *recklessness* and *wanton misconduct* (see 13.451). Another is the ostensible distinction between *reasonable endeavours* (the UK equivalent of *reasonable efforts*) and *all reasonable endeavours* offered by an English court (see 8.32).

B39 In the appropriate context, it's possible to subdivide coherently a spectrum of vagueness. See the definitions that this manual offers for *Significant* and *Material* (see 9.13–24).

CHAPTER 8

"REASONABLE EFFORTS" AND ITS VARIANTS

THE FUNCTION OF "EFFORTS" PROVISIONS

8.1 When accomplishing a specific goal isn't entirely within Acme's control, Acme should be reluctant to enter into a contract that makes it Acme's obligation to accomplish that goal—doing so would pose undue risk of future liability for nonperformance. In such situations, the parties might instead agree that Acme must use *reasonable efforts*, or some other *efforts* standard, to accomplish that goal.

8.2 Contracts impose an *efforts* standard in connection with many different obligations, such as an obligation to cause a registration statement to become effective by a certain time, an obligation to obtain consents required for closing, or an obligation to promote sales of a product.

8.3 Different from an explicit *efforts* provision is an *efforts* standard that a court imposes even though the contract language at issue appears to impose an absolute requirement. An explicit *efforts*

provision can also be distinguished from an implied *efforts* provision that might be read into a contract by a court or by statute in the absence of an explicit undertaking. This chapter is concerned only with explicit *efforts* provisions.

THE SPECTRUM OF "EFFORTS" STANDARDS

8.4 Drafters use a bewildering variety of *efforts* phrases. An informal survey of contracts filed as "material contracts" on the U.S. Securities and Exchange Commission's EDGAR system suggests that the most prevalent efforts phrases are *best efforts*, *reasonable efforts*, *commercially reasonable efforts*, and *reasonable best efforts*. Also used are *good-faith efforts*, *diligent efforts*, *commercially reasonable best efforts*, and *every effort*. The mix-and-match quality of *efforts* terms can approach the bizarre, as in *best good-faith reasonable efforts*.

8.5 One also encounters offbeat alternatives to *efforts* provisions, as in the following examples (emphasis added):

> Distributor shall *aggressively* distribute and encourage the utilization of merchandising aids and promotional materials . . . .

> Both Buyer and Seller shall *strive* to achieve a 100% service level.

> The Employee shall use the *utmost* care to protect the secrecy and confidentiality of the Confidential Information.

8.6 Nothing is accomplished by using such alternatives, except perhaps greater uncertainty.

WHAT THE DIFFERENT "EFFORTS" STANDARDS MEAN

8.7 The conventional wisdom among lawyers is that *best efforts* is the most onerous of the *efforts* standards—that the promisor is required to do everything in its power to accomplish the stated goal, even if it bankrupts itself in the process—whereas other *efforts* standards are less onerous.

The Semantics of "Best Efforts" and "Reasonable Efforts"

8.8 The rationale underlying this distinction is that in everyday language, *best* represents a higher standard than *reasonable*. But as a matter of semantics, that is—at least in the context of the phrase *best efforts*—a dubious proposition.

8.9 In the sentence *Despite my best efforts, I wasn't able to purchase any World Cup tickets*, the word *best* doesn't mean that the speaker did everything possible to purchase World Cup tickets, no matter how onerous. Instead, if you were to omit the word *best* the meaning would remain the same—in other words, that the speaker did what was appropriate, taking into account not only the extent of his enthusiasm for the World Cup but also his finances. In this context, the word *best* is a rhetorical flourish that conveys to the listener the speaker's

sincerity but not the level of efforts expended. *Best* serves a similar rhetorical function in phrases such as *It's in your best interests* and *to the best of my knowledge*. (Regarding the latter phrase, see 13.368.)

8.10 The same applies to use of the word *best* in the statement *I'll do my best to purchase World Cup tickets*. The speaker isn't required to do everything possible to purchase World Cup tickets, just what makes sense under the circumstances. For contract-drafting purposes, the equivalent of *I'll do my best* is *Acme shall use best efforts*.

8.11 Because they seek to regulate conduct, contracts are scrutinized for meaning much more closely than less formal kinds of writing. In a dispute, an aggrieved party might seek to squeeze a desired but not necessarily evident meaning out of a particular phrase or, if necessary, its constituent components. It shouldn't come as a surprise that litigants have fastened on the dictionary meaning of *best*—"surpassing all others"—so as to argue, regardless of idiomatic use of the phrase *best efforts*, that an obligation to use best efforts in fact requires that a party take extraordinary measures. However problematic that meaning, it has proved plausible enough to create confusion over the meaning of *best efforts*.

8.12 One result of this confusion is use of the phrase *reasonable efforts* in contracts. *Best efforts* is used in colloquial English, but *reasonable efforts* is not—its use is essentially limited to contracts.

Reasonable efforts refers to the efforts that a reasonable person would use in the circumstances. As a result, *reasonable efforts* isn't subject to the additional meaning that has been grafted on to *best efforts*—one couldn't reasonably suggest that a party under an obligation to use reasonable efforts must take extraordinary measures.

813 whereas some lawyers regard *reasonable efforts* as a misinterpretation-proof replacement for *best efforts*, others regard both terms as two points on a spectrum of efforts that a party might be required to use, ranging from the relatively modest to the extraordinary, the latter being represented by *best efforts*. This interpretation is facilitated by colloquial use of *reasonable* to mean "not extreme," as in *She received a reasonable grade on her French test*.

814 this ostensible contrast between *best efforts* and *reasonable efforts* demonstrates that the notion that *best efforts* requires extraordinary measures has shortcomings in addition to its being inconsistent with the idiomatic meaning of *best efforts*. For one thing, if *best efforts* were to represent a more exacting standard than *reasonable efforts*, then anyone under an obligation to use *best efforts* would be at risk of having to act more than reasonably—in other words, unreasonably—to comply with that obligation. As a matter of contract law, that's an untenable proposition. Furthermore, one would have no basis for determining at what point a *best efforts* obligation had been complied

with—just how unreasonably would one have to act to meet this standard? So the "extraordinary measures" meaning of *best efforts* represents an unworkable standard.

The Semantics of Other "Efforts" Standards

3.15 Since *reasonable efforts* and *best efforts* were established in the minds of many drafters as representing points on a spectrum, drafters were at liberty to come up with variations on that theme. They've certainly taken advantage of that opportunity.

3.16 Of the other *efforts* standards, perhaps the most prevalent is *commercially reasonable efforts*. But the word *commercially* is redundant: determining whether a party's efforts constituted reasonable efforts would, in the context of a business contract, necessarily take into account that context.

3.17 As for *diligent efforts*, it conveys essentially the same meaning as *reasonable efforts*, only less clearly. *Black's Law Dictionary* defines diligence as the attention and care required from a person in a given situation.

3.18 The reference to good faith in *good-faith efforts* is redundant in those jurisdictions that recognize the implied duty of good faith (see 3.169). Furthermore, a good-faith standard is arguably less onerous than a reasonableness standard (see 13.559).

8.19 Other *efforts* standards—such as *reasonable best efforts* and *commercially reasonable best efforts*—are concoctions that add nothing to *reasonable efforts* other than confusion.

The Semantics of "All Reasonable Efforts"

8.20 You might be tempted to distinguish between *reasonable efforts* and *all reasonable efforts*, with the latter representing a more onerous standard. But in this context, *all* represents a simple rhetorical flourish that has no effect on meaning—it's used to the same effect in phrases such as *all due respect* and *all deliberate speed*.

U.S. Caselaw

8.21 Given that the "extraordinary measures" meaning of *best efforts* represents an unworkable standard, it's not surprising that in the United States, courts have avoided falling prey to the same misconception as practitioners.

8.22 U.S. courts haven't required that a party under a duty to use best efforts to accomplish a specific goal make every conceivable effort to do so, regardless of the detriment to it. See, e.g., *Coady Corp. v. Toyota Motor Distributors, Inc.*, 361 F.3d 50, 59 (1st Cir. 2004) ("'Best efforts' . . . cannot mean everything possible under the sun . . . ."); *Triple-A Baseball Club Associates v. Northeastern Baseball, Inc.*, 832 F.2d 214, 228 (1st Cir. 1987) ("We have found no cases, and none have been cited, holding that 'best efforts' means every conceivable effort."); *Bloor v. Falstaff Brewing*

Corp., 601 F.2d 609, 614 (2d Cir. 1979) ("The requirement that a party use its best efforts necessarily does not prevent the party from giving reasonable consideration to its own interests.").

Different courts have used different terminology in attempting to articulate what *best efforts* does mean. Some have held that the appropriate standard is one of good faith, a standard grounded in honesty and fairness. See *Triple-A Baseball Club Associates*, 832 F.2d at 225 ("We have been unable to find any case in which a court found . . . that a party acted in good faith but did not use its best efforts."); *Bloor*, 601 F.2d at 614 (*best efforts* imposes an obligation to act with good faith in light of one's own capabilities); *Western Geophysical Co. of America v. Bolt Associates, Inc*., 584 F.2d 1164, 1171 (2d Cir. 1978) (stating that an obligation to use best efforts can be met by "active exploitation in good faith").

More recent cases have held that the standard is higher than that of good faith. See *Martin v. Monumental Life Insurance Co.*, 240 F.3d 223, 234 (3rd Cir. 2001) ("Precedent treats 'best efforts' as a form of good faith and sound business judgment."); *Satellite Broadcasting Cable, Inc. v. Telefonica De Espana, S.A*., 807 F. Supp. 210, 217 (D.P.R. 1992) (holding that the net effect of the *best efforts* provision at issue was "to expand extra-contractual damages beyond a mere good faith requirement"); *Kroboth v. Brent*, 215 A.D.2d 813, 814 (N.Y. App. Div. 1995) ("'[B]est efforts'

requires more than 'good faith,' which is an implied covenant in all contracts . . . .").

Other more recent cases have held that the appropriate standard is one of diligence. See *National Data Payment Systems, Inc. v. Meridian Bank*, 212 F.3d 849, 854 (3d Cir. 2000); *T.S.I. Holdings, Inc. v. Jenkins*, 924 P.2d 1239, 1250 (Kan. 1996).

Still other cases have invoked reasonableness. See, e.g., *Corporate Lodging Consultants, Inc. v. Bombardier Aerospace Corp.*, No. 03-1467-WEB, 2005 WL 1153606, at *6 (D. Kan. May 11, 2005) ("Best efforts does not mean perfection and expectations are only justifiable if they are reasonable."); *Coady Corp.*, 361 F.3d at 59 ("'Best efforts' is implicitly qualified by a reasonableness test . . . ."); *Kroboth*, 215 A.D.2d at 814 ("'Best efforts' requires that plaintiffs pursue all reasonable methods . . . .").

And some courts have acknowledged that *best efforts* and *reasonable efforts* mean the same thing: See, e.g., *Stewart v. O'Neill*, 225 F. Supp. 2d 6, 14 (D.C. Cir. 2002) (stating that "the agency was obligated to use its best efforts—that is, all reasonable efforts—to comply with all terms of the settlement agreement"); *Scott-Macon Securities, Inc. v. Zoltek Cos.*, No. 04CIV.2124MBM, 2005 WL 1138476, at *14 (S.D.N.Y. May 12, 2005) ("New York courts use the term 'reasonable efforts' interchangeably with 'best efforts.'"); see also *Trecom Business Systems, Inc. v. Prasad*, 980 F.

Supp. 770, 774 n.1 (D.N.J. 1997) (in a case involving an implied rather than express duty, referring to the distinction between *best efforts* and *reasonable efforts* as "merely an issue of semantics").

8.28 It appears that only two courts have suggested that one can distinguish between *best efforts* and *reasonable efforts*. See *In re Chateaugay Corp.*, 198 B.R. 848, 854 (S.D.N.Y. 1996), aff'd 108 F.3d 1369 (2d Cir. 1997); *Krinsky v. Long Beach Wings,* LLC, No. B148698, 2002 WL 31124659, at *8 (Cal. Ct. App. Sept. 26, 2002). But in neither case does the court provide a coherent rationale for its position.

8.29 U.S. courts have overwhelmingly rejected—either explicitly or by adopting an alternative interpretation—the notion that *best efforts* represents a more onerous standard than *reasonable efforts*. Yet among practitioners that notion still represents the conventional wisdom.

8.30 Don't attribute any particular significance to the fact that courts use different buzzwords—"diligence," "good faith," "reasonableness"—in describing what *best efforts* does mean. That's a predictable result of courts' seeking to explain a vague phrase by using other vague words and phrases.

Other Caselaw

8.31 The ostensible distinction between *best efforts* and *reasonable efforts*—or the equivalent

best endeavours and *reasonable endeavours*, used in England and Australia—is a nuisance in other common-law jurisdictions too, with practitioners and judges exhibiting varying degrees of confusion.

8.32 In recent decades, English courts have had less success than U.S. courts in resisting the urge to drum up a distinction between the two phrases. One English court suggested, bizarrely (see 8.20), that "the phrase 'all reasonable endeavours' is probably a middle position somewhere between the other two, implying something more than reasonable endeavours but less than best endeavours." *UBH (Mechanical Services) Ltd. v. Standard Life Assurance Co.*, T.L.R., Nov. 13, 1986 (Q.B.). For a more recent English case reflecting a similar approach, see *Hiscox Syndicates v. The Pinnacle Limited* [2008] EWHC 145 (Ch).

8.33 And in *Rhodia International Holdings Ltd. v. Huntsman International LLC* [2007] EWHC 292 (Comm), the court took it upon itself to state, in dictum, that "[a]s a matter of language and business common sense, untrammeled by authority, one would surely conclude" that *best endeavours* and *reasonable endeavours* do not mean the same thing. It went on to offer what was—inevitably—an unworkable distinction. Coming up with a distinction between *best endeavours* and *reasonable endeavours* is facilitated if, as in this case, one doesn't have to apply it to facts.

8.34 On the other hand, in *Jet2.com Ltd v. Blackpool Airport Ltd.* [2012] EWCA Civ 417,

which involved a dispute over what an airport operator was required to do to comply with a *best endeavours* obligation, the English Court of Appeal displayed a more logical approach. In its opinion, it didn't discuss gradations of *endeavours* provisions, even though the contract used both *best endeavours* and *all reasonable endeavours*. The court said that the "natural meaning of ['all reasonable endeavours'] is that [the appellant] would do *its best* to ensure that charges made for ground services would support Jet2's low-cost pricing model." (Emphasis added.) That suggests a willingness to equate *best* with *reasonable* in this context. The court also noted that the litigants had agreed that the two *endeavours* standards "meant the same thing."

8.35 Perhaps the *Jet2.com* case is a sign that there's hope for a return to a more rational approach to *endeavours* provisions in England. Meanwhile, judging by the analyses offered by law firms, many English practitioners appear to endorse the notion that different *endeavours* provisions express varying degrees of onerousness.

8.36 The leading Canadian case on *best efforts* is an opinion of the British Columbia Supreme Court, *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, (1994), 89 B.C.L.R. (2d) 356 (S.C.). Here are the first two points of its seven-point digest of the relevant caselaw:

> 1. "Best efforts" imposes a higher obligation than a "reasonable effort".
> 2. "Best efforts" means taking, in good faith, all reasonable steps to achieve

> the objective, carrying the process to its logical conclusion and leaving no stone unturned.

8.37 a *best efforts* obligation represents a more onerous standard than does *reasonable efforts* . . . but to comply with that obligation, all that's required is that you act reasonably! The court's first two points are incompatible, so the ostensible distinction collapses. But that hasn't stopped courts from treating it as holy writ. See, e.g., *Diamond Robinson Building Ltd. v. Conn*, 2010 BCSC 76. And Canadian law firms continue issuing earnest misinformation on the subject.

8.38 As regards Australia, in *Hospital Products Ltd. v. United States Surgical Corp*. (1984), 156 CLR 41, at 64, the Higlh Court of Australia stated sensibly that "an obligation to use 'best endeavours' does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual object, but no more." But the urge to create an unwarranted distinction is a strong one: in *Waters Lane v. Sweeney* [2007] NSWCA 200, the New South Wales Court of Appeal noted, but did not follow, a distinction offered by the trial court.

The Uniform Commercial Code

8.39 The drafters of article 2 of the Uniform Commercial Code evidently saw no distinction between *best efforts* and *reasonable efforts*. Section

2-306(2) states as follows with respect to implied obligations:

A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

8.40 Official Comment 5 to section 2-306(2) says that subsection (2) makes explicit the commercial rule under which parties "are held to have impliedly, even when not expressly, bound themselves to use reasonable diligence as well as good faith in their performance of the contract." Whatever might have been intended by equating *best efforts* with reasonableness, diligence, and good faith in this manner, doing so certainly precludes, for purposes of article 2, using *best efforts* as a more onerous standard than *reasonable efforts*.

ENFORCEABILITY OF "EFFORTS" PROVISIONS

8.41 Courts in most U.S. jurisdictions have held that *efforts* provisions are enforceable. The principal exception is Illinois courts, which have held that a promise to use best efforts is too vague to be binding if the parties fail to articulate what performance the phrase requires. See *Kraftco Corp. v. Kolbus*, 274 N.E.2d 153, 156 (Ill. App. Ct. 1971).

8.42 Also some U.S. courts have held unenforceable an unlikely subset of *efforts*

provisions, namely an agreement to use "best efforts" to agree. See, e.g., *Pinnacle Books, Inc. v. Harlequin Enterprises Ltd*., 519 F. Supp. 118, 121–22 (S.D.N.Y. 1981). And at least one English case has held likewise with respect to an obligation to use "reasonable endeavours" to agree. See *Phillips Petroleum Co. UK Ltd. v. Enron Europe Ltd*. [1997] CLC 329. By contrast, in *Denil v. DeBoer, Inc.*, 650 F.3d 635 (7th Cir. 2011), the U.S. Court of Appeals for the Seventh Circuit held that an obligation to use "best efforts" to reach agreement is equivalent to an obligation to negotiate in good faith. So if you want to include in a contract a provision making some arrangement contingent on future agreement, using a good-faith standard rather than an *efforts* standard would reduce the risk of a court's holding that the provision is unenforceable.

8.43 Sometimes you can't avoid the uncertainty that goes with making contract relations contingent on future agreement. But if you incorporate the notion of future agreement as a way of putting off negotiations—as was the case in the dispute at issue in *Denil*—you're running the risk of dispute.

DETERMINING WHETHER A PARTY HAS MADE REASONABLE EFFORTS

8.44 Because *reasonable efforts* is vague, determining whether a party has complied with a *reasonable efforts* obligation depends, as with all *efforts* standards, on the circumstances of the case, with all the uncertainty that entails. See *Martin*, 240

F.3d at 233 (“‘Best efforts’ depends on the factual circumstances surrounding an agreement.”); *Triple-A Baseball Club Associates v. Northeastern Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir. 1987) (stating that *best efforts* “cannot be defined in terms of a fixed formula; it varies with the facts and the field of law involved”).

8.45 That being the case, anyone inclined to include a *reasonable efforts* standard in a contract would benefit from understanding how courts have determined whether a party has in fact made reasonable efforts.

Standard for Measuring Performance

8.46 *Kevin M. Ehringer Enterprises, Inc. v. McData Services Corp.*, 646 F.3d 321 (5th Cir. 2011), the U.S. Court of Appeals for the Fifth Circuit, applying Texas law, held that McData’s promise to use “best efforts” to promote, market, and sell products during the three-year term wasn’t an enforceable promise and so couldn’t form the basis of a fraudulent-inducement claim. According to the court, that’s because “a best efforts contract must set some kind of goal or guideline against which best efforts may be measured.”

8.47 Another Fifth Circuit case applying Texas Law, *Herrmann Holdings Ltd. v. Lucent Technologies Inc.*, 302 F.3d 552 (5th Cir. 2002), involved “best efforts” provisions that required the defendant to file a registration statement and cause it to become effective “as promptly as practicable” and

"in the most expeditious manner practicable." The court held that the latter two phrases served to establish an objective goal, thereby rendering the "best efforts" provision enforceable.

8.48 These two cases highlight the fact that imposing on Acme an obligation to use reasonable efforts to sell widgets doesn't make sense unless you indicate how many widgets it must sell, and how quickly. And that imposing on Acme a reasonable-efforts obligation to file a registration statement doesn't make sense unless you include some indication of how soon it has to file it. For purposes of an obligation to use reasonable efforts, always incorporate a standard for measuring performance. A vague standard—for example, one using *promptly*—would be sufficient.

Establishing a Benchmark

8.49 Determining whether a party has complied with an obligation to use reasonable efforts is facilitated if the efforts made can be compared against a benchmark. There are a number of possible benchmarks:

- *Past performance.* See *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979), which concerned a provision requiring the purchaser of assets relating to Ballantine beer to "use its best efforts to promote and maintain a high volume of sales." In assessing compliance with that provision, the court considered, among other things, sales figures over several years.

- *Promises made during contract negotiations for guidance on what efforts had been expected.* See *Stone v. Caroselli*, 653 P.2d 754, 757 (Colo. Ct. App. 1982) (stating that testimony by manufacturers as to distributors' promise during negotiations to "hit the road" to promote the product was admissible to explain the distributors' implied duty to use best efforts). But see *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1373 (7th Cir. 1990) ("The contract contains an integration clause, and the district judge was correct that the parol evidence rule forbade inquiry into precontractual discussions or agreements concerning the meaning of best efforts.").
- *Industry practice.* See *Zilg v. Prentice-Hall Inc.*, 717 F.2d 671, 681 (2d Cir. 1983) (noting that plaintiff's expert testified that "[defendant's] efforts were 'perfectly adequate,' although they were 'routine' and [defendant] 'did not follow through as they might'"); *First Union National Bank v. Steele Software Systems Corp.*, 838 A.2d 404, 448 (Md. Ct. Spec. App. 2003) (stating that in determining whether an obligation to use best efforts had been satisfied, the jury was entitled to consider such things as "the standard in the industry regarding similar contracts between banks and their settlement service vendors").
- *Efforts used by the promisor in connection with other contracts imposing an* efforts *standard.* See *Olympia Hotels Corp.*, 908 F.2d at 1373 (holding that if the promisor has similar contracts with other promisees, "'best efforts' means the efforts the promisor has employed in those parallel contracts where the

adequacy of his efforts have not been questioned").

- *How the promisor would have acted if the promisor and promisee had been united in the same entity*. This approach was used in a case involving a promise by the buyers of a business to use best efforts to collect all accounts receivable on the books of the business on the closing date. The court noted that the parties had accepted that the buyers had had the duty to "use such efforts as it would have been prudent to use in their own behalf if they had owned the receivables, or such efforts as it would have been prudent for the [sellers] to use if they had retained possession of them." *Petroleum Marketing Corp. v. Metropolitan Petroleum Corp.*, 151 A.2d 616, 619 (Pa. 1959).

8.50 In the absence of any such benchmark, a requirement that a promisor use reasonable efforts to accomplish a contract goal would likely be balanced against the broader constraints faced by the promisor in conducting the business that is the subject of the contract. See *Martin v. Monumental Life Insurance Co.*, 240 F.3d 223, 235 (3rd Cir. 2001) (holding that in agreeing to use best efforts, defendant did not compromise its right to exercise sound business judgment). Without this balancing, the promisor could be forced to expend sufficient resources as to render the contract uneconomic.

Narrowly Directed Efforts

8.51 A situation that poses a risk of a court's holding that a promisor was required to make what might seem like disproportionate efforts is when an

efforts provision applies only to a discrete aspect of a business relationship, making it perhaps less obvious that one is to balance the required efforts against the benefits to the promisor under that relationship, or how one is to do so. For example, one court suggested, in dicta, that a party that undertook to use best efforts to take all actions necessary on its part so as to permit consummation of a merger might be required to divest a subsidiary if that was necessary to obtain regulatory approval. See *Carteret Bancorp v. Home Group, Inc.*, No. 9380, 1988 Del Ch. LEXIS 2, at *20–21 (Del. Ch. Jan. 13, 1988).

USE ONLY "REASONABLE EFFORTS"

8.12 Although as a matter of semantics and U.S. caselaw *reasonable efforts* and *best efforts* are best thought of as meaning the same thing, practitioners and judges (depending on the jurisdiction) will doubtless continue to seek to distinguish the two by claiming that a party under an obligation to use *best efforts* must be willing to take extraordinary measures (see 8.8–14). Consequently, use of *best efforts* will always entail a significant risk of confusion leading to dispute or loss of an anticipated benefit under a contract. To avoid any such confusion, don't use *best efforts*. Use instead *reasonable efforts*, which isn't prone to such confusion.

8.13 To impose on a party a standard more onerous than a *reasonable efforts* standard, make it

an absolute obligation of that party to perform, in addition to an obligation to use reasonable efforts, narrowly tailored tasks related to the desired goal. For example, you could supplement an obligation to use reasonable efforts by requiring that by a specified date Acme file an application for a permit, or hold a meeting of shareholders. Such obligations serve to reduce the scope of the vagueness inherent in a *reasonable efforts* obligation.

8.54 If clients balk at using *reasonable efforts*, tell them that the caselaw doesn't support the proposition that *best efforts* represents a more onerous standard (in the United States) or is confusing (elsewhere).

8.55 You might nevertheless be tempted to use *best efforts* in a given contract because the other side isn't aware of the caselaw on *best efforts*. But seeking to hoodwink them in this manner isn't conducive to a healthy business relationship.

DEFINING WHAT "REASONABLE EFFORTS" MEANS

8.56 Even though the phrase *reasonable efforts* doesn't pose the same risk of confusion as *best efforts*, you might want to use it as a defined term. Doing so could assist a court and might help the parties better understand the implications of using *reasonable efforts*. And in the definition the parties could fine-tune their understanding of what *reasonable efforts* means.

The Core Definition

8.57 Any definition of *reasonable efforts* should specify what the core meaning is—it will necessarily be vague—and specify anything that's to be excluded from the definition. The recommended core definition is as follows:

"**Reasonable Efforts**" means, with respect to a given obligation, the efforts that a reasonable person in [the promisor's] [Acme's] position would use to comply with that obligation as promptly as possible.

8.58 This core definition wouldn't be suitable in all contexts. If, for example, a party was required to use reasonable efforts to prevent something from happening, it wouldn't make sense to refer to prompt compliance with that obligation.

8.59 If more than one party is subject to a *reasonable efforts* provision, refer in the definition to *the one or more promisors*. And if only one party to a contract is subject to all the *reasonable efforts* provisions, you can use that party's name instead of *promisor.*

8.60 Sometimes the parties will want to specify that what *reasonable efforts* means is to be determined by reference to the promisor's past practice or the practice in a particular industry. This concept can be added to the core definition:

"**Reasonable Efforts**" means, with respect to a given obligation, the efforts [, consistent with its past practice,] [, consistent with the practice of

comparable pharmaceutical companies with respect to pharmaceutical products of comparable market potential,] that a reasonable person . . . .

Carve-Outs

8.61 Because the principal concern of a party subject to a *reasonable efforts* standard would be to avoid having to take actions that are out of proportion to the benefits to it under the contract, it's likely that negotiations regarding the definition of *reasonable efforts* would mostly concern carve-outs, which specify what's excluded from the definition.

8.62 One issue is the language used to introduce carve-outs. Often a definition will place the carve-outs in a proviso: *provided, however, that an obligation to use Reasonable Efforts under this agreement does not require the promisor to* . . . . But given the shortcomings of the traditional proviso (see 13.542), a clearer and more economical way to introduce carve-outs in definitions is by using *but does not include* (see 6.25).

8.63 Because carve-outs are intended to provide certainty to offset the vagueness of the core definition, they should be highly specific. For example, one could exclude from the definition of *reasonable efforts* any one or more of the following (revising the wording to include, as appropriate, any available defined terms):

- incurring any expenses [in excess of $X individually and $Y in the aggregate] other than as provided in this agreement

- incurring any liabilities
- changing the promisor's business strategy
- disposing of any significant assets of the promisor
- taking any action that would violate any law or order to which the promisor is subject
- taking any action that would imperil the promisor's existence or solvency
- initiating any litigation or arbitration

8.64 Some commonly used carve-outs would likely fall outside the scope of *reasonable efforts* anyway, but a party might nevertheless wish to make doubly sure of avoiding any dispute over what kind of efforts are required. Here are two examples:

- taking any actions that would, individually or in the aggregate, cause the promisor to incur costs, or suffer any other detriment, out of reasonable proportion to the benefits to the promisor under this agreement
- taking any actions that would, individually or in the aggregate, result in a material adverse change in the promisor

8.65 Sometimes a definition of *reasonable efforts* will specify actions that the promisor must take to meet its obligations under the *reasonable efforts* standard. For example, when in a registration rights agreement an issuer is required to use reasonable efforts to cause a registration statement to become effective as soon as practicable after filing, the contract typically uses as the definition of reasonable efforts something along the following lines:

"**Reasonable Efforts**" means, among other things, that the Company shall submit to the SEC, within two business days after the Company learns that no review of a particular Registration Statement will be made by the staff of the SEC or that the staff has no further comments on the Registration Statement, as the case may be, a request for acceleration of effectiveness of the Registration Statement to a time and date not later than 48 hours after submission of that request.

8.66 Don't use such definitions: A *reasonable efforts* standard serves to capture that which the parties are unable to specify with precision when they enter into the contract. If you're able to express in an absolute obligation something that a party has to accomplish, state it as a freestanding obligation rather than putting it the definition of *reasonable efforts*. And more generally, don't use in autonomous definitions language of obligation and other language suited to substantive provisions (see 6.28).

THE WORDING OF "REASONABLE EFFORTS" PROVISIONS

8.67 Ensuring that *reasonable efforts* provisions are clear and effective requires that you pay attention not only to how the term *reasonable efforts* is defined—if you do define it—but also to how you word any provisions that use the phrase *reasonable efforts*.

8.68 Have a party undertake to *use reasonable efforts*, as opposed to *use its reasonable efforts* or *use all reasonable efforts.*

8.69 Because it's the simplest and clearest option, have a party *use* reasonable efforts as opposed to making, exerting, or exercising reasonable efforts. If contracts filed with the U.S. Securities and Exchange Commission are at all representative, *use* is also the most popular option.

8.70 In *efforts* provisions, *effort* is generally used in the plural rather than the singular, although some contracts require a party to *use every reasonable effort* or *make a reasonable effort*. Use the plural, if only for consistency.

8.71 It's commonplace for a contract to require a party to use efforts to accomplish something "to the extent possible" (or words to that effect). That notion is redundant, as it's implicit in an *efforts* provision that the party under the obligation might be unable to perform it, even after making the required effort. Two examples:

Acme shall use reasonable efforts to cancel or mitigate~~, to the extent possible,~~ each obligation that would cause Acme to incur expenses . . . .

The Borrower shall use reasonable efforts to provide the Agent with *information that is as accurate as possible* [read *accurate information*] for all weekly Borrowing Base Certificates.

8.72 Using *best efforts* instead of *reasonable efforts* is bad enough—don't make matters worse by using two or more different *efforts* standards in one contract. Doing so only invites a court to ascribe a different meaning to each (see 1.63).

8.73 Don't refer to good faith or diligence in a *reasonable efforts* provision, as in *Each party shall use reasonable efforts, undertaken diligently and in good faith, to obtain all Consents before Closing*. Mixing different standards would only muddy the waters.

CHAPTER 9

"MATERIAL" AND "MATERIAL ADVERSE CHANGE"

"MATERIAL"

9.1 An important drafting tool is the adjective *material*, as in *Widgetco is not party to any material litigation*. Drafters use it, and the adverb *materially* (as in *at a price materially below Fair Market Value*), to narrow an otherwise overly broad provision so that it covers only what really matters. Whether something is material depends on the circumstances—*material* and *materially* are vague words (see 7.33).

9.2 The word *material* features in the phrase *material adverse change*, or "MAC." (The phrase *material adverse effect*, or "MAE," is used to convey essentially the same meaning; see 9.63–71.) MAC provisions are always a focus of attention, particularly when uncertain economic conditions prompt deal parties, and the business and legal communities as a whole, to consider anew on what basis a MAC provision would allow a party to get out of a deal.

A Source of Ambiguity

Black's Law Dictionary gives as one meaning of *material* "of such a nature that knowledge of the item would affect a person's decision-making." (In this chapter, this meaning is referred to as the "affects a decision" meaning.) This meaning has been embraced in cases addressing securities laws violations, suppression of evidence in criminal matters, and a variety of other fields, as well as in Delaware Court of Chancery opinions on materiality in a merger-and-acquisitions (M&A) context, including *IBP, Inc. v. Tyson Foods, Inc.*, 789 A.2d 14 (Del. Ch. 2001). In an M&A context, and from the buyer's perspective, this meaning of *material* refers to information that would have caused the buyer not to enter into the agreement or would cause the buyer not to want to close the transaction. The standard is a high one—think "deal-breaker."

But according to *Black's Law Dictionary*, another meaning of *material* is "significant"—in other words "important enough to merit attention." This meaning encompasses a broader range of significance than the "affects a decision" meaning—in this sense of the word, for something to be material to a contract party, it would simply have to be of more than trivial significance.

In a particular provision, such as the representation *Acme's financial records contain no material inaccuracies*, either meaning could conceivably be intended. In other words, *material* is

not only vague, it's ambiguous, although that isn't the case with *material* when used in the phrase *material adverse change* (see 9.12, 9.82). (Although this manual suggests using the phrase *statement of fact* instead of *representation* (see 3.299), this chapter uses *representation* and the verb *represents* because use of that terminology is so ingrained in M&A practice.)

9.16 This ambiguity could result in confusion. For example, a buyer and its counsel might assume that any nontrivial nondisclosure with respect to a given representation containing a qualification using *material* would be sufficient to render the representation inaccurate. By contrast, a court might hold that for purposes of that representation, *material* conveys the "affects a decision" meaning. That could result in the buyer's not being entitled to indemnification for any nondisclosure unless it were to meet the high standard associated with that meaning.

How "Material" Is Used

9.17 Given that cases addressing materiality invariably invoke the "affects a decision" meaning, one would be entitled to wonder whether the ambiguity inherent in *material* is theoretical and of no practical significance. But lawyers use the word *material* so liberally in drafts and in negotiation as to make it unlikely that each time they do so they have in mind a deal-breaker level of significance. And indeed, two pieces of evidence suggest that regardless of the caselaw, in many contexts drafters

do in fact have in mind the "important enough to merit attention" meaning when they use the word *material*.

First, attributing the "affects a decision" meaning to the word *material* would often strip a provision of much of its utility. Consider the following representation: *There is no material litigation pending against the Company.* If in this representation *material* were given the "affects a decision" meaning, it would be inaccurate only if litigation were in fact pending against the Company and it were sufficiently significant that it would affect the buyer's decision whether to go ahead with the transaction. But one suspects that that's not what the buyer had in mind, that instead it would want to be compensated for any losses it incurs due to any nontrivial pending litigation that it hadn't been informed of. For the representation to convey that meaning, *material* would have to mean "important enough to merit attention."

And consider the following example: A credit agreement requires the lender to deliver certain forms unless doing so *would result in the imposition on the Lender of any additional material legal or regulatory burdens, any additional material out-of-pocket costs not indemnified hereunder, or be otherwise materially disadvantageous to the Lender*. It's unlikely that in this case the lender had in mind that it would be reimbursed only if the burdens, costs, and disadvantages imposed on the lender were

sufficiently significant that it wouldn't have made the loan if it had known about them.

9.80 The second piece of evidence suggesting that drafters do in fact have in mind the "important enough to merit attention" meaning of *material* is that in some contexts one cannot, as a matter of semantics, say that *material* conveys the "affects a decision" meaning.

9.81 Consider the following representation: *The Seller is not in breach of any material contract to which it is party.* This representation relates to breach of any contracts to which the seller is party rather than to the contracts themselves. Consequently, it wouldn't make sense to modify the phrase *contract to which it is party* (as opposed to the word *breach*) with the word *material* if it were meant to convey the "affects a decision" meaning. In this context, *material* could only mean "important enough to merit attention."

9.82 Courts and practitioners appear to accept that in the phrase *material adverse change*, the word *material* conveys the "affects a decision" meaning—any party invoking a MAC provision would need to make a strong showing (see 9.82). But in any other context, either meaning of *material* could conceivably be the one intended. Although the context might suggest that one or the other meaning is intended, from a semantics perspective one cannot know for sure, as agreements invariably fail to specify which meaning is intended. For example, in the phrase *material inaccuracy* it's not clear how

significant an inaccuracy has to be in order for it to be material.

Defining "Material"

9.13 The surest way to eliminate this ambiguity would be to use two different terms for the two meanings. This manual proposes that you use *material* to convey the "affects a decision" meaning and use *significant* to convey a broader range of significance.

9.14 But if you wish to use *material* to convey the "affects a decision" meaning, you should make that meaning explicit, so as to purge *material* of its ambiguity. You would also need to make clear whose perspective applies for purposes of determining materiality. In *IBP, Inc. v. Tyson Foods, Inc.*, the court considered materiality from the perspective of the "reasonable acquiror"; for this approach to apply in any context, one would need to refer to the perspective of a reasonable person in the position of the party in question. (A more conventional alternative would be simply to say, for example, *from the Buyer's perspective*, but it's preferable to make it clear that the standard isn't a subjective one—you wouldn't adopt the perspective of an unreasonable buyer.)

9.15 To incorporate these concepts into the meaning of *material*, it would be simplest to use *material* as a defined term, even though that's not the current practice. You might find it useful to also define *materially*. For one thing, as a matter of logic

it's the most appropriate choice for use in the bringdown condition (see 9.45) rather than the phrase *material adverse change* (see 9.50).

9.16 Exactly how you would define *material* would depend on the context and on which parties are covered by the definition. The following definition of *material* would apply to the buyer in an M&A transaction:

Definition of "Material" and "Materially" (Applies to the Buyer)

"**Material**" and "**Materially**" refer to a level of significance that would have affected any decision of a reasonable person in the Buyer's position regarding whether to enter into this agreement or would affect any decision of a reasonable person in the Buyer's position regarding whether to consummate the transaction contemplated by this agreement.

9.17 By referring to entry into the agreement and consummation of the transaction, the definition addresses circumstances relating to the periods before and after signing.

9.18 It's commonplace for both the seller and the buyer to be subject to provisions containing a materiality standard. For example, if in a contract the bringdown condition to the buyer's obligations is subject to a materiality standard, often the bringdown condition to the seller's obligations will likewise incorporate a materiality standard (see 9.47). In such contexts, the definition of *Materially*

(and *Material* too) would need to apply to all parties:

Definition of "Material" and "Materially" (Applies to More than One Party)

"**Material**" and "**Materially**" refer, with respect to a given Person, to a level of significance that would have affected any decision of a reasonable person in that Person's position regarding whether to enter into this agreement or would affect any decision of a reasonable person in that Person's position regarding whether to consummate the transaction contemplated by this agreement.

Defining "Significant"

9.19 for using *significant* to convey the "important enough to merit attention" meaning of *material*, there is precedent for according *significant* this broader meaning: In connection with guidance on evaluating internal controls, the U.S. Securities and Exchange Commission has defined the term "significant deficiency" to mean a deficiency "that is less severe than a material weakness, yet important enough to merit attention by those responsible for oversight of the registrant's financial reporting." See SEC Release No. 33-8829.

9.20 given that *significant* is a vague word, it would be best to make it explicit that the broader meaning is intended, and the best way to do that would be to use *significant* as a defined term, as in *Acme's financial records contain no Significant inaccuracies*.

9.21 You could define *Significant* as follows:

"**Significant**" means important enough, from the perspective of a reasonable person in the Buyer's position, to merit attention, and it includes a lesser level of significance than does the defined term "Material."

9.22 Through contrast with the definition of *Material*, this definition specifies that in a relative sense the broader meaning is intended. And it does so in an absolute sense, too, by offering "important enough to merit attention" as the lexical definition of *significant*.

9.23 You might want to define *insignificant* too, for use in provisions such as *Any inaccuracies in Acme's financial records are Insignificant*. You could define *Insignificant* as follows:

"**Insignificant**" means not important enough, from the perspective of a reasonable person in the Buyer's position, to merit attention.

9.24 As with the "affects a decision" meaning, the broader meaning of *material* raises the question of whose perspective applies for purposes of determining whether something is important enough to merit attention. That issue is addressed in the proposed definitions.

Using Qualifications Relating to Significance

9.25 A buyer that wishes to close a transaction without delay might be particularly amenable to

having a given representation be subject to a qualification using *Material* or *Significant* if the alternative would be having the seller devote an inordinate amount of time to compiling a schedule of exceptions. Beyond that, whether to make a representation or a condition subject to such a qualification is essentially a function of the respective bargaining power of the parties.

9.26 That said, certain representations are rarely subject to qualifications relating to significance, either because they are too straightforward to be anything other than unqualified or because the matters being represented are sufficiently fundamental that the buyer is unwilling to accept any inaccuracies. Such representations include representations as to organization, capitalization, and authority to enter into the transaction.

9.27 Of the two standards, qualifications using *Significant* seem the less useful. Determining whether an issue merits the buyer's attention is prone to arbitrariness, given the low threshold involved. A party could reasonably claim that if it's willing to go to court to recover damages that it claims arose from inaccuracy of a representation subject to a qualification using *Significant*, then by definition the inaccuracy was nontrivial.

9.28 So you might want to avail yourself of bright-line alternatives to a qualification using *Significant.* Instead of having a party make a representation as to absence of *breach of any Significant agreement to which the Seller is party*,

you could refer to absence of *breach of any agreement to which Acme is party that is listed on schedule 2.4.* And rather than having a party make a representation as to absence of *any pending Significant litigation*, you might want to refer to absence of litigation in excess of a stated dollar amount or seeking injunctive relief. (Using quantitative guidelines in this manner to replace materiality is different from using quantitative guidelines in defining MAC; see 9.86.)

9.20 And in some contexts you might decide to dispense with a qualification using *Significant* and do without any substitute. For example, rather than imposing on Acme a duty to notify Widgetco of changes that merit attention in an agreement that Acme has entered into with a nonparty, it would be simpler to impose a flat obligation if it's unlikely that the agreement would be amended sufficiently extensively, and sufficiently often, to render that obligation burdensome. So in this instance, a significance qualification would accomplish nothing other than to add an unnecessary element of uncertainty.

9.21 And more generally, in a transaction that provides for a delayed closing and indemnification, the seller might be willing to omit from its representations some or all qualifications relating to significance—whether using *Material*, *Significant*, or more precise alternatives—if you incorporate a materiality qualification in the seller's bringdown condition (see 9.38), using *Materially* (see 9.16),

and specify in the indemnification provisions that indemnification doesn't apply until indemnifiable losses have reached a specified amount—in other words, if you establish a "basket," whether of the "threshold" or "deductible" variety. Doing so should eliminate any concern on the part of the seller that giving an unqualified representation could result in the transaction not closing due to a relatively minor inaccuracy, or result in that party's incurring indemnification liability for a relatively minor inaccuracy.

9.31 A seller might want to retain qualifications relating to significance in any representations that it expects would otherwise likely be inaccurate when made at closing, but it should be able instead to address that concern by negotiating an appropriate basket.

Basic Protection

9.32 If you're reluctant to adopt the definitions recommended in this chapter—they're not currently in mainstream use—here's a more basic way to avoid disputes due to the ambiguity inherent in *material*: Use *material* only to convey the "affects a decision" meaning—that's the meaning that a court would likely attribute to it. Use bright-line alternatives to express a lesser level of significance. And where circumstances permit, dispense with qualifications relating to importance.

"MATERIAL ADVERSE CHANGE"

9.33 MAC provisions raise many subtle drafting issues. These issues fall into two categories: those relating to using MAC provisions and—since MAC is generally used as a defined term—those relating to how MAC is defined. (If all that you are looking for is a basic definition of MAC, see 9.74.)

Using MAC

WHERE MAC PROVISIONS ARE USED

9.34 MAC provisions are used in different parts of a contract. They occur most commonly in representations, where they can be used in two different ways.

9.35 First, a party can make a representation regarding nonoccurrence of a MAC since a specified date—*Since December 31, 2012, no MAC has occurred*. (This chapter uses the term "absolute MAC provision" to mean any provision that in this manner addresses directly nonoccurrence of a MAC. Regarding an expanded form of absolute MAC provision, see 9.62.)

9.36 A buyer might want to rephrase an absolute MAC representation as follows to ensure that it also encompasses adverse changes that are only material when considered in the aggregate—*Since December 31, 2012, no events or circumstances have occurred that constitute, individually or in the aggregate, a MAC*. But in this context a court should be willing to aggregate adverse changes even without explicit contract language to that effect. The absolute MAE and the definition of MAE at issue in the *IBP* case

didn't explicitly provide for aggregation of adverse changes, yet the court didn't dispute the defendant's assertion that a combination of factors can amount to a MAE. See *IBP*, 789 A.2d at 65 (noting that "taken together, Tyson claims that it is virtually indisputable that the combination of these factors amounts to a Material Adverse Effect").

9.37 Second, a MAC provision can serve to modify a representation as to some aspect of a party's operations so as to indicate the absence of anything leading to a MAC. The modification is in the negative when the noun or noun phrase being modified—in the following example, *inaccuracies*—is in the negative: *Acme's financial records contain no inaccuracies except for inaccuracies that would not reasonably be expected to result in a MAC.* The modification is in the affirmative when the negative is expressed elsewhere in the representation: *Acme is not* [or *No Seller is*] *party to any litigation that would reasonably be expected to result in a MAC.* (This chapter refers to as a "modifying" MAC provision any MAC provision that modifies a representation in this manner.) Adding *individually or in the aggregate* would serve to aggregate, for purposes of determining materiality, instances of the thing in question, but using a mass noun (*litigation*) or a plural count noun (*inaccuracies*) should be sufficient to accomplish that.

9.38 MACs also occur in closing conditions. Any representation containing a MAC provision

could, with a suitable introduction, serve as a condition: *The Buyer's obligation to consummate at the Closing the transactions contemplated by this agreement is subject to satisfaction, or waiver by the Buyer, of the following conditions at or before the Closing: . . . that since December 31, 2012, a MAC has not occurred; that Acme is not party to any litigation that would reasonably be expected to result in a MAC . . . .* It would, however, be redundant to repeat in the closing conditions any representations made in that contract, since it's standard practice to require as a closing condition that the representations be accurate on the closing date as well as on the signing date. This "bringdown" of the representations would allow the party relying on the representations to avoid its obligations under the contract if a representation is inaccurate at closing. (The bringdown condition is discussed further in 9.44–54.)

9.39 MAC provision could of course be incorporated as a condition rather than as a representation, but it would afford better protection if drafted as a representation: although an unsatisfied condition would allow a party to walk, an inaccurate representation could also result in that party's having a cause of action for damages or a claim for indemnification.

9.40 C provisions are also found in parts of a contract other than the representations and conditions. For example, a contract might impose on Acme an obligation to promptly notify Widgetco of

any MAC. And a contract governing an ongoing relationship between the parties, such as a license agreement, might give a party the right to terminate upon occurrence of a MAC affecting the other party. Similarly, a credit agreement might provide that occurrence of a MAC affecting the borrower constitutes an event of default.

MAC VERSUS SIMPLE MATERIALITY

9.41 An alternative to a modifying MAC provision is simply to use the word *material* on its own. For example, the modifying MAC representation in 9.37 could be rephrased as *Acme's financial records contain no material inaccuracies*. If Widgetco is concerned that an inaccuracy in an Acme representation could adversely affect Acme's fortunes, then in the interest of precision it would be best to use MAC to qualify that representation, even though a court might hold that *material* by itself in effect conveys the same meaning. But if Widgetco is instead concerned about a potential inaccuracy directly affecting Widgetco—if, for example, the representation is in an asset purchase agreement and concerns an Acme asset that is of little significance to Acme but is central to Widgetco's plans—it would seem best to stick with *material*.

9.42 But not all provisions using *material* can be turned into MAC provisions. A representation as to absence of any *breach of any material contract to which Acme is party* cannot as a matter of semantics be restructured to use a MAC provision instead (see 9.11).

9.43 In some contexts—for example, in a representation stating that a party *has not made any material change in any method of accounting or accounting practice*—it's likely that the drafter is seeking to convey a level of significance below that associated with MAC provisions (see 9.82). In that case, it would be best to restructure the provision to use *Significant* (see 9.19) as opposed to a MAC provision or to eliminate any significance qualification (see 9.28).

THE BRINGDOWN CONDITION

9.44 A bringdown condition (including the introductory language) could be phrased as follows:

> The Buyer's obligation to consummate the transaction contemplated by this agreement is subject to satisfaction of the following conditions: . . . that the representations made by the Seller in article 2 were accurate on the date of this agreement and are accurate at Closing;

9.45 It's usually the seller succeeds in having the buyer's bringdown condition be subject to a materiality qualification. Often that's accomplished by having the condition require that the representations be *accurate in all material respects*, but *materially accurate* is a more concise way of expressing the same concept:

> that individually and in the aggregate, the representations made by the Seller in article 2 were Materially accurate on the date of this agreement and are Materially accurate at Closing;

9.46 It would be prudent to use *materially* as a defined term (see 9.15).

9.47 If, as is often the case, the bringdown condition to the buyer's obligations and the bringdown condition to the seller's obligations both incorporate a materiality standard, *Materially* would have to be defined so as to apply to all parties (see 9.18). That in turn would require that each bringdown condition make it clear from whose perspective materiality is determined:

that from the Buyer's perspective, individually and in the aggregate the representations made by the Seller in article 2 were Materially accurate on the date of this agreement and are Materially accurate at Closing;

9.48 If a bringdown condition incorporates a materiality qualification, it would be to the buyer's benefit to have it include the phrase *individually and in the aggregate*, so that materiality is determined by considering not only the extent to which each representation is inaccurate but also the cumulative effect of all inaccuracies. Arguably that could be accomplished by saying just *in the aggregate*, but using the longer phrase makes it clearer what is intended.

9.49 If you omit *individually and in the aggregate*, the bringdown condition should refer to *each representation made by the Seller*—that would serve to make it clear that the cumulative effect of all inaccuracies has no bearing on materiality.

9.50 A materiality qualification incorporated in a bringdown condition is often phrased using MAC. But it's illogical to think in terms of a representation inaccuracy resulting in a MAC, given that the only consequence of an inaccurate seller representation would be that the buyer is entitled not to close or has a claim for indemnification. It's the facts underlying a representation inaccuracy, rather than the inaccuracy itself, that could result in a MAC.

9.51 The materiality qualification in a bringdown condition can be subject to carve-outs if the buyer is reluctant to have the materiality qualification apply across the board. A representation that is often included in such carve-outs is the seller's representation regarding its capitalization. This sort of carve-out would only make sense if the representation itself did not include a materiality qualification. More generally, it's not clear that such carve-outs accomplish much, as the notion of the buyer's refusing to close because of an immaterial inaccuracy seems unpromising, whatever the representation.

DOUBLE MATERIALITY

9.52 Another issue related to materiality is "double materiality." It ostensibly arises when a materiality qualification is included in the bringdown condition to one party's obligation to close as well as in one or more representations of the other party. The concern is apparently as follows: If the bringdown condition to the buyer's obligation to close incorporates a materiality qualification, then to

determine whether that condition has been satisfied you apply a discount to the accuracy required for a given seller representation to be accurate. If a seller representation itself includes a materiality qualification, the same discount is also applied to the representation, with the result that the level of accuracy required to satisfy the bringdown condition is further reduced. Consequently, the buyer could be required to close even if a seller representation was on the date of the agreement, or is at closing, materially inaccurate.

9.53 It's common practice for drafters to seek to neutralize double materiality. To do so, either they incorporate in the bringdown condition a materiality qualification only with respect to those representations that do not themselves contain a materiality qualification, or for purposes of the bringdown condition they strip out materiality qualifications from those representations that have them and apply instead a materiality qualification across the board.

9.54 But such contortions are unnecessary. If *material* conveys the "affects a decision" meaning (see 9.3)—and using the proposed definition of *Material* and *Materially* would make it clear that that's the case (see 9.16)—then materiality qualifications are not in fact equivalent to an across-the-board discount on accuracy, and materiality on materiality isn't equivalent to a discount on a discount. Instead, for purposes of determining both accuracy of a representation

subject to a materiality qualification and satisfaction of a bringdown condition subject to a materiality qualification, one would consider the same external standard—whether the representation inaccuracy in question would have affected the buyer's decision to enter into the contract or would affect the buyer's decision to consummate the transaction. Because the same standard applies in both contexts, for purposes of determining satisfaction of the bringdown condition it's irrelevant whether the representation too contains a materiality qualification.

9.55 The notion of double materiality is based on a misunderstanding of how materiality operates. It should come as no surprise that caselaw makes no mention of double materiality—it's a figment of practitioner imagination.

9.56 Because courts don't recognize double materiality, attempting to neutralize it would seem to put a party in no worse a position than would have been the case had the issue been ignored. But the verbiage needed to address double materiality adds useless clutter. And to the extent that parties spend time negotiating double-materiality language, that's time wasted. Furthermore, assuming that double materiality is a valid concept requires a skewed view of materiality. On balance, disregarding double materiality would seem the more efficient option.

9.57 Including the following provision—it's novel—could help remove double materiality as a negotiation issue:

Double Materiality. The parties acknowledge that regardless of whether any court recognizes it for purposes of other contracts, the contract-interpretation concept referred to as "double materiality" does not apply to this agreement, so the level of representation inaccuracy permitted by the materiality qualification to which section __ [the bringdown condition] is subject will not be affected by a materiality qualification to which any representation is subject.

USE OF VERBS IN MAC PROVISIONS

9.58 A modifying MAC provision (see 9.37) addresses the possibility of future MACs, so it might seem natural to use *will* in expressing it: *Acme's financial records contain no inaccuracies except for inaccuracies that will not result in a MAC.* Using *will* in this representation would mean that the representation would be inaccurate only if a MAC were to materialize before closing or if it were to become apparent before closing that a MAC is certain to occur in the future.

9.59 A party to whom such a representation is made would generally want it phrased in such a way that if the party identifies a problem with the potential to lead to a MAC, it would be able to avoid its obligations under the contract or recover damages caused by the inaccurate representation. This could be achieved by using *could*, as in *could* [or *could not*] *result in a MAC.* This formulation is very favorable to the nonrepresenting party. Assume that Acme makes the following representation: *Acme's*

financial records contain no inaccuracies except for inaccuracies that could not result in a MAC. To say that an inaccuracy could not result in a MAC is to say that no matter how the future might develop, no possible alternative course of events could lead to a MAC occurring. If, after signing, it were discovered that Acme's financial records contain an inaccuracy that might result in a MAC, that discovery would in theory serve to render the representation inaccurate, no matter how remote the possibility of a MAC's actually occurring.

9.60 Your best bet would be to use instead the formulation *would* [or *would not*] *reasonably be expected to result in a MAC*, meaning that a reasonable person would (or would not, as applicable) expect the subject of the representation to result in a MAC. In this context, *expect* means "regard as likely to happen," but it's not clear exactly what *likely* means, so don't expect to establish with mathematical certainly what level of likelihood that conveys (see 13.378).

9.61 Other alternatives are available, such as *could* [or *could not*] *reasonably be expected* or *would* [or *would not*] *result in a MAC*, but they don't offer any advantages.

9.62 For an absolute MAC representation (see 9.35), the present perfect—*no MAC has occurred*—is the appropriate tense. That's because such representations address MACs that have already occurred. But it would be advantageous to the party that has the benefit of an absolute MAC

provision if it were extended to cover, in the manner of a modifying MAC provision, the possibility of future MACs. This can be easily achieved by grafting a modifying MAC provision on to any absolute MAC provision: *Since December 31, 2012, there has not occurred any MAC or any events or circumstances that would reasonably be expected to result in a MAC.* This sort of modifying MAC provision serves to backstop any modifying MAC provisions contained in representations addressing specific aspects of the representing party's operations. Using the plural nouns *events* and *circumstances* should make it unnecessary to add *individually or in the aggregate*; see 9.37.

WHETHER TO USE MAC OR MAE AS THE DEFINED TERM

9.63 The defined term MAE is used as an alternative to the defined term MAC. In absolute provisions one can say that since a specified date *no MAE has occurred*, but MAC works better—it sounds a little odd to refer to an *effect*, as opposed to a *change*, as not having occurred since a specified date.

9.64 Some drafters attempt to cure this awkwardness by inserting transitional language—for example, *there has been no change, event, or condition that has resulted in an MAE*. This sort of fix is more than just wordy—it also suggests that it's not enough to show that an MAE has occurred. Instead, you have to show that something has given rise to an MAE. Such a cause-and-effect scenario

not only doesn't make sense, it potentially reduces the buyer's protection.

9.65 For example, in the purchase agreement at issue in *Great Lakes Chemical Corp. v. Pharmacia Corp.*, 788 A.2d 544, 557 (Del. Ch. 2001), the seller, Pharmacia, represented that since the baseline date "there has been no change in the business of the Company which would have a Material Adverse Effect." It would have been simpler to have the representation say instead that *no MAC has occurred*. Perhaps the drafter, having opted to use MAE, thought it odd to have the representation say *there has been no MAE* and so shoehorned in the additional language. The additional language had the potential to be detrimental to the buyer, in that it could be interpreted as meaning that what falls within the scope of the absolute MAE provision is not any MAE, but only a subset of all MAEs, namely those caused by a change in the Company's business. This raised the possibility of the seller's claiming that the absolute MAE provision covers only internal changes at the seller, rather than external market changes and problems at other companies. This is exactly what the seller claimed in a motion for summary judgment made by the seller in response to a breach-of-contract claim brought by the buyer. The court denied the seller's motion but noted that the seller might ultimately prevail on this theory at trial. The seller might have made the same argument even if the absolute provision had been drafted as recommended in 9.35, but it would probably have had a harder time doing so.

9.66 A agreement might use both MAC and MAE. There are two reasons for this practice (a third is described in 9.79).

9.67 First, a drafter might want to be able to use the terms interchangeably. One way to accomplish this would be to provide a full definition for one of the terms then piggyback off that definition for purposes of the other definition by specifying that MAC *means a change that has* a MAE. Another way would be to create a twofer definition: *"Material Adverse Change" and "Material Adverse Effect" mean any material adverse change or material adverse effect in* . . . . There is some value to each of these approaches, since drafters cannot always be relied on to keep track of which defined term they happen to be using. (For example, sometimes the text of a section entitled "No Material Adverse Effect" will refer to MAC.) But rather than providing a safety net for imprecision, it's better to be precise.

9.68 Second, a drafter might want to use in modifying provisions a broader definition of MAC than is used in an absolute representation in the same contract; because one defined term cannot have two definitions, the drafter uses MAC as the defined term for one definition and MAE for the other. For example, credit agreements often use MAC for the absolute representation and MAE for modifying provisions, with MAE being defined more broadly than MAC in that it incorporates any material adverse effect on the rights of the agent or

any lender under any of the loan documents or on the borrower's ability to perform its obligations under the loan documents (see 9.94). Presumably, the reason for this is that since in the absolute representation the focus is more on past adverse changes, the impact on rights and obligations under the loan documents is less relevant.

9.69 using both MAC and MAE as defined terms in this manner is potentially confusing and generally should be unnecessary, since the broader definition should work equally well in all contexts.

9.70 Given that usually you should be able to make do with one defined term, you have a choice between MAC and MAE. Because MAC is better suited to absolute representations (see 9.63) and should work as well as MAE in all other contexts, MAC is the better term to use.

9.71 encounters in the literature on MAC provisions the suggestion that there is some substantive basis for distinguishing between MAC and MAE. That's not the case.

THE BASELINE DATE

9.72 absolute MAC representation must specify the baseline date, which is the date from which the representation runs. Common baseline dates include the date the agreement was signed and the date of the most recent audited, or most recent unaudited, financial statements. Given a choice between using as a baseline date the date of audited or the date of unaudited financial statements, a buyer

will generally prefer to use the date of audited financial statements, because they provide a more reliable picture of the target. One can also use other dates as the baseline date. For example, in the case of an unaudited startup company, the date of formation would be an appropriate baseline date. And a lender might want the borrower's absolute MAC representation to use the date when the lender issued the financing commitment.

Defining MAC

9.73 Drafters generally provide a definition for MAC and use it as a defined term. Doing so allows you to specify precisely what's meant by MAC but without burdening readers by requiring them to wade through the entire definition every time the contract refers to MAC. And it allows you to ensure that the concept is expressed consistently throughout the contract (see 6.2). You could use the initialism "MAC" as the defined term, but it's preferable that you spell it out—the fewer acronyms and initialisms in a contract the better, because they make a contract harder to read (see 2.114). This chapter uses the initialism so as not to use the entire phrase an inordinate number of times.

9.74 Here's the basic definition recommended by this manual:

"**Material Adverse Change**" means any Material adverse change in the business, results of operations, assets, liabilities, or financial condition of the Seller.

9.75 uses the defined term *Material* (see 9.16). The remainder of this chapter will explain the basis for this definition.

CHANGE VERSUS EXPECTATION OF CHANGE

9.76 When defining MAC, a drafter has to decide whether a MAC should be defined as a material adverse change in something, as any event or circumstance that would reasonably be expected to result in a material adverse change in something, or as both.

9.77 The first approach is the better one. If the definition incorporates the *would reasonably be expected* formula, the drafter should omit it from the MAC provisions themselves, since it would be redundant and potentially confusing to have it present at both levels. (Regarding its use in absolute and modifying MAC provisions, (see 9.37, 9.60, and 9.62.) But a MAC provision from which this formula has been omitted (*Acme's financial records contain no inaccuracies except for inaccuracies that do not constitute a MAC*) presents its own problems: relegating to the definition the concept of likelihood conveyed by the *would reasonably be expected* formula would suggest to readers who have not studied the definition that the MAC provisions are concerned solely with current, rather than future, adverse changes. This probably explains why many of those drafters who use the *would reasonably be expected* formula in the definition of MAC also use it, however incongruously, in the MAC provisions themselves.

9.78 Similar redundancy occurs when a drafter uses the *would reasonably be expected* formula, including a reference to *events*, or *events* and *circumstances*, in the definition of MAC and also refers to *events*, or *events* and *circumstances*, in a MAC provision.

9.79 Often when a drafter incorporates the *would reasonably be expected* formula in the MAC definition, the drafter created the defined term expressly for use in absolute provisions, with the defined term MAE (defined without the *would reasonably be expected* formula) being used in modifying provisions. (The relationship between these two defined terms is discussed in 9.63–71.) Presumably drafters do this because it's not immediately obvious to them how to fit the *would reasonably be expected* formula into absolute provisions. But it's easily done (see 9.62).

NO TAUTOLOGY IN USING "MATERIAL ADVERSE CHANGE" IN THE DEFINITION OF MAC

9.80 It has been suggested that using the phrase *material adverse change* in the definition of MAC entails circularity or tautology. But that's not so—in contracts it's commonplace for a definition to include the term being defined (see 6.4).

USING NOUNS IN ADDITION TO "CHANGE" IN THE DEFINITION OF MAC

9.81 Instead of referring to material adverse change, often the definition of MAC will state that MAC means *any change, effect, development, or*

circumstance that is materially adverse to . . . , or some variation. The extra language is superfluous and is evidence of lawyers' appetite for redundancy (see 1.41). It's clearer and more concise simply to state that MAC means *any material adverse change in . . . .*

WHAT DOES "MATERIAL ADVERSE CHANGE" MEAN?

9.82 The *adverse change* part of *material adverse change* means, evidently enough, a change for the worse. As regards *material*, courts and practitioners appear to accept that when used in MAC, material conveys the "affects a decision" meaning. Any court would likely echo the *IBP* court in requiring that a party "make a strong showing" when invoking a MAC provision. See *IBP* at 68.

9.83 Using *material* as a defined term, as in the recommended definition at 9.74, would allow you to avoid any confusion on that score. And it might be economical to do so, as an agreement that uses MAC could well make use of *material* in other provisions.

9.84 If you elect to use a definition of *Material* that applies to more than one party (see 9.18), then not only in the bringdown condition (see 9.47) but also the definition of MAC you would need to specify from whose perspective materiality is determined:

"**Material Adverse Change**" means, from the perspective of the Buyer, any Material adverse

change in the business, results of operations, assets, liabilities, or financial condition of the Seller.

9.85 If you elect not to use in the definition of MAC the defined term *Material*, you would need to make it clear in the definition of MAC whose perspective applies for purposes of determining materiality:

"**Material Adverse Change**" means any material adverse change in the business, results of operations, assets, liabilities, or financial condition of the Seller, as determined from the perspective of a reasonable person in the Buyer's position.

QUANTITATIVE GUIDELINES

9.86 With a view to relieving courts of any responsibility for determining whether a given adverse change is material, parties sometimes include in a contract quantitative guidelines as to what constitutes a MAC. Sometimes a quantitative guideline provides the exclusive basis for determining whether an adverse change is a MAC, as when a purchase agreement defines MAC as *a material adverse change in the business, results of operations, assets, liabilities, or financial condition of Acme in an amount equal to $6.5 million or more*. Alternatively, quantitative guidelines can serve to supplement a conventional definition of MAC.

9.87 But such an approach presents four problems:

9.88 First, adverse changes could conceivably be measured by means of a number of different quantitative indicia. Setting a threshold for all possible indicia would seem impractical, and addressing only a limited number could well be arbitrary.

9.89 Second, establishing one or more numerical thresholds for materiality can significantly complicate the negotiation process.

9.90 Third, if the quantitative indicia are illustrative rather than exclusive, adding them to the definition of MAC would increase the risk that a court wouldn't consider to be a MAC a change that doesn't resemble the examples.

9.91 And fourth, MAC provisions are intended to capture the unknown. If a party is able to articulate a concern sufficiently to be able to quantify it, it follows that the concern would be better addressed somewhere other than in the definition of MAC.

9.92 Given these concerns, it's not surprising that quantitative guidelines are little used. But an aggressive buyer, or one with ample bargaining power, might nonetheless want to try to have one or more favorable quantitative guidelines included in the definition of MAC so as to make it easier for the buyer to successfully invoke a MAC provision.

A MATERIAL ADVERSE CHANGE IN WHAT?

Defining MAC requires that you determine what needs to experience a material adverse change in order for a MAC to occur; in the following discussion, this is referred to as the "field of change."

When representing a buyer acquiring a company, an appropriate field of change would consist of *the business, results of operations, assets, liabilities, or financial condition* of the target, but the exact formulation depends on the type of transaction involved. For example, if the acquisition is in the form of an asset purchase, one might want to formulate the definition so that it covers a MAC in the assets being acquired. Sometimes the field of change can be unusually broad. For example, credit agreements often define MAE to include—instead of, in addition to, or as an alternative to, a more traditional field of change—any material adverse effect on the rights of the agent or any lender under any of the loan documents or the ability of the borrower to perform its obligations under the loan documents. And in merger agreements it's commonplace to include within the field of change any event that results in a material adverse change in the ability of one or more parties to complete the merger.

The word *liabilities* can mean financial obligations required to be disclosed on a balance sheet. It can also mean, more broadly, any legal responsibility to another—*liabilities* in this sense would include contract obligations or an obligation

to remediate environmental contamination. For purposes of the recommended field of change, the broader sense is intended. It would be cumbersome to attempt to eliminate this ambiguity by means of a more explicit field of change, but if a contract uses the defined term *Liabilities* elsewhere (for example, in indemnification provisions) to convey the broader meaning, that defined term could be used in the field of change.

9.96 If when a deal is signed the target is planning to enter into a new line of business, the buyer's counsel might want to have the field of change refer to *the business (as it is currently being conducted or as Target currently proposes to conduct it)*. (Changes that adversely affect the target's plans to enter into a new line of business might well fall within the scope of *prospects*, but as discussed in 9.109 a buyer would be better off excluding *prospects* from the field of change. Since such changes would likely not be covered if, as recommended in 9.109, one were to incorporate *prospects* by the "back door," it would be appropriate to address such changes separately (see 9.112).) If the target's plans to enter into a new line of business are sufficiently developed, a more precise alternative to appending a parenthetical to *the business* and relying on an absolute MAC representation or condition would be to have representations or conditions that address circumstances relating to the proposed expansion.

You can find surplusage in the field of change. For example, excluded from the field of change recommended above are *properties*, *operations*, and *capitalization*. Little is to be gained by including both *assets* and *properties,* and *operations* (as opposed to *results of operations*) should fall within the scope of *business*—otherwise, one would be entitled to wonder what, if anything, *business* means. Regarding *capitalization*, it is an ambiguous word that could refer either to the number and type of shares outstanding or to the "market capitalization," or value, of those shares. If the former meaning is intended, it isn't clear what an adverse change would consist of; if the latter meaning is intended, the parties would be advised to address explicitly, in exchange-ratio provisions or elsewhere, the impact on their deal of changes in stock price. In any event, only rarely does *capitalization* feature in the field of change. Don't assume that changes in stock price would come within the scope of a standard field of change that excludes *capitalization*—it's far from clear that it would.

Many definitions include *condition (financial or otherwise)*, but you can use instead just *financial condition*, because whatever might fall within the scope of *otherwise* would be covered by the other elements in the recommended field of change.

One could argue that the standard elements of the field of change other than *business* are also

surplusage, in that any adverse change to the results of operations, assets, liabilities, or financial condition of Acme (to use the elements of the recommended field) would fall within the scope of Acme's business. But in *Pine State Creamery Co. v. Land-O-Sun Dairies, Inc.*, No. 5:96-CV-170-BO, 1997 U.S. Dist. LEXIS 22035, at *9 (E.D.N.C. Dec. 22, 1997), the district court held that the operating profits and losses of Pine State did not fall within the scope of a condition requiring that "there shall not have occurred any material adverse change in the Business." "Business" was defined to mean a dairy processing plant and wholesale dairy distribution system. Although the U.S. Court of Appeals for the Fourth Circuit overturned that decision, stating that "Pine State's financial activities are fairly included within the term 'Business,'" *Pine State Creamery Co. v. Land-O-Sun Dairies, Inc.*, No. 98-2441, 1999 U.S. App. LEXIS 31529, at *10 n.1 (4th Cir. Dec. 2, 1999), other courts might be inclined to narrowly interpret a field of change consisting solely of *the business*. Accordingly, it would be prudent to sacrifice some economy in the field of change.

2.100 Even if you use a broad field of change, a court could hold that a development doesn't constitute a MAC because it doesn't constitute change falling within the field of change. There's mixed caselaw on the question of whether industry-wide or general factors over which a party had only partial control (such as market share) or no control (such as the availability or price of one or

more commodities) constitute a MAC. In cases such as *Borders v. KRLB, Inc.*, 727 S.W.2d 357, 358 (Tex. App. 1987), and *Pittsburgh Coke & Chemical Co. v. Bollo*, 421 F. Supp. 908, 930 (E.D.N.Y. 1976), the court held that such change didn't constitute a MAC. On the other hand, in *IBP* the court declined to "preclude industry-wide or general factors from constituting a Material Adverse Effect" on the grounds that if the target, IBP, had wanted to exclude the factors, "IBP should have bargained for it." *IBP* at 66.

9.101 If a party wants to ensure that it would be able to walk away from a deal if a MAC is caused by one or more specific industry-wide or general developments, it had best incorporate that concept in the contract.

9.102 One way to make clear that certain changes constitute material adverse changes falling within the field of change would be to list them at the end of the MAC definition, preceded by *including*. But for reasons explained in 9.128, it would be best to address those concerns in a representation, condition (either directly or by bringdown of the representations), or other provision.

"PROSPECTS"

9.103 A recurring topic in negotiations is whether to include *prospects* in the field of change. The buyer wants it included—the future of the business, it says, is a legitimate concern, because the buyer is acquiring the business to operate it in the future. The

seller wants it excluded—it's willing, it says, to stand behind how the business is currently being operated, but risks relating to future operations are the buyer's concern. More often than not the seller wins this battle.

9.104 Although *prospects* is a hot-button topic, little thought is given to what *prospects* means and what the implications are of including it in, or excluding it from, the field of change.

9.105 In general usage, *prospects* means "chances or opportunities for success." The term is not often defined in contracts, but when it is, a definition that is often used is the following one: *"Prospects" means, at any time, results of future operations that are reasonably foreseeable based on facts and circumstances in existence at that time.*

9.106 Here's an example of the effect of including *prospects* in the field of change: If one of Acme's competitors secures an alternative source of raw materials that would allow it to produce goods more cheaply, that development could be said to have an adverse effect on Acme's prospects if it appears that as a result Acme would likely be forced to reduce its profit margins. And an adverse effect on prospects could be predicated not only on the occurrence, preclosing, of an event that is likely to have an adverse effect on Acme's business, but also on the preclosing likelihood of such an event occurring sometime in the future. Such a circumstance was at issue in *Pacheco* and *Goodman*, discussed immediately below.

9.107 The question arises how *prospects* relates to the other standard elements of the field of change. One could argue that a material adverse change in a company's prospects constitutes a material adverse change in the company's current business condition and that therefore a change in the company's prospects would allow one to say that a MAC has occurred even if *prospects* is absent from the field of change. But in the two cases bearing on the meaning of *prospects*, the courts rejected this argument. See *Pacheco v. Cambridge Technology Partners (Massachusetts), Inc.*, 85 F. Supp. 2d 69 (D. Mass. 2000), and *Goodman Manufacturing Co. v. Raytheon Co.*, No. 98 Civ. 2774(LAP), 1999 WL 681382 (S.D.N.Y. Aug. 31, 1999).

9.108 Drafting you can effectively render *prospects* superfluous. As stated in 9.37, 9.60, and 9.62, if you represent a party that has the benefit of MAC provisions in a contract, then your best course would be to use in any modifying MAC provisions the formula *would* [or *would not*] *reasonably be expected to result in a MAC* and to tack on to any absolute MAC provision the phrase *or any event or circumstance that would reasonably be expected to result in a MAC*. Determining how likely it is that an event or circumstance will result in a MAC in the future necessarily requires that one make a reasonable assessment, based on facts and circumstances in existence at the time, of how the business would operate in the future, both in the presence and in the absence of the event or circumstance in question. This analysis is in large

measure identical to the analysis that would be required to determine whether something constitutes a material adverse change in results of future operations that are reasonably foreseeable based on facts and circumstances in existence at that time—in other words, *prospects* as the term is commonly defined.

9.109 Given that the two approaches serve essentially the same purpose, omitting *prospects* from the field of change and instead using consistently the *would* [or *would not*] *reasonably be expected to result in a MAC* formula and expanding as suggested any absolute MAC provisions should afford the protection of *prospects* to the party that would benefit from the MAC provisions while sparing it—with luck—the skirmishing that parties commonly engage in over whether to include *prospects* in the field of change. This approach has been referred to as incorporating *prospects* by the "back door." There is, however, no caselaw on point.

9.110 Even in two contexts, a drafter might be reluctant to dispense with *prospects*.

9.111 First, *Pacheco* is precedent for the notion that if a company is likely to fail to meet its publicly announced financial projections, that constitutes a material adverse change in the company's prospects. Some might think it rash to lose the benefit of that precedent by relying on the back-door approach. But relying on a court to follow *Pacheco* presents risks of its own; if you represent a buyer that wants to be

certain that it can walk if it appears that the target will fail to meet its projections, your safest bet would be to make it a condition to closing that there exists no event or circumstance that would reasonably be expected to result in the target's failing to meet any publicly announced financial projections.

Second, what if before closing a buyer learns that the anticipated expansion of the target, Acme, into a new line of business has been stymied? If the definition of MAC includes *prospects*, a court might well consider that such an adverse development falls within the scope of the absolute MAC representation in the purchase agreement. If by contrast the contract sought to incorporate *prospects* by the back door, it's not clear that a court would find that a MAC had occurred: under the back-door approach, the absolute MAC representation would encompass future changes to Acme's current business but not necessarily future changes to a business that Acme had yet to engage in (in this case, the failure of a line of business to materialize). But don't rely on *prospects* to address in a MAC provision a target's knowledge of adverse developments concerning a proposed expansion. Instead, your best bet would be either to refer in the field of change to *the business (as it is currently being conducted and as Acme currently proposes to conduct it)* or, if the plans to enter into a new line of business are sufficiently developed, to include representations or conditions that address

circumstances relating to the proposed expansion (see 9.96).

9.113 In fact, as a general matter any party that has specific concerns that might fall within the scope of *prospects*, either directly or through the back door, would be advised to also address them in representations, conditions, or termination provisions.

WHOSE MATERIAL ADVERSE CHANGE?

9.114 If the definition of MAC is meant to encompass only adverse changes to a single company, make that clear by referring to, for example, *a material adverse change in . . . of the Seller*.

9.115 MAC definitions are often drafted to cover an entity and some or all of its subsidiaries, using *taken as a whole*. Sometimes a party's parent entity is included, and in merger agreements MAC is sometimes defined to include an adverse change to the surviving entity. A MAC definition can also cover a number of different parties on one side of a deal, such as all borrowers under a credit agreement together with their subsidiaries and, perhaps, any guarantors.

9.116 An agreement might contain some MAC provisions that can be invoked by Acme against Widgetco, and others that can be invoked by Widgetco against Acme. (Whether the target in an acquisition should seek the protection of MAC provisions would depend on the consideration to be

paid. If the buyer were paying cash, the target would normally forgo such protection. If the buyer were paying with its own stock, the question of whether the target would benefit from the protection of MAC provisions would depend on the nature of the exchange ratio and whether the agreement incorporates other mechanisms to address major changes in the buyer's business.)

9.117 When both sides of a deal have the benefit of MAC provisions, any MAC provision should state which party that MAC provision applies to. It would be simplest to refer to *a Seller MAC* rather than, say, *a MAC of* [or *in*] *the Seller*.

9.118 You could define MAC generically so that it applies to more than one party. Here's a generic definition that uses the defined term *Material*:

"**Material Adverse Change**" means, with respect to any Person, any Material adverse change in the business, results of operations, assets, liabilities, or financial condition of that Person.

9.119 And here's a generic definition that doesn't use the defined term *Material*:

"**Material Adverse Change**" means, with respect to any Person, any material adverse change in the business, results of operations, assets, liabilities, or financial condition of that Person, as determined by a reasonable person in the position of any party having the benefit of that provision.

9.120 It would be clearer to give each side its own comprehensive MAC-defined term, such as *Buyer MAC* and *Seller MAC*. This approach would allow you to create customized definitions of MAC that take into account the parties' differing roles in the transaction and any differences in negotiating leverage.

9.121 If both sides to a transaction have the benefit of MAC provisions and the generic definition or the customized definitions (as applicable) use the defined term *Material*, you would need to use the generic definition of *Material* (see 9.18).

9.122 Finally, if a definition of MAC applies to only one party, take care not to use that defined term in a MAC provision that applies to another party.

AGGREGATING INSTANCES OF CHANGE

9.123 As discussed in 9.36, 9.37, 9.48, and 9.62, for purposes of determining occurrence of a MAC, a MAC provision can raise for the drafter the issue of whether events or circumstances should be considered individually or should be considered individually and in the aggregate.

9.124 Occasionally one finds the issue of aggregation addressed in the definition of MAC. A simple way to accomplish this would be by modifying the recommended form of definition as follows:

"**Material Adverse Change**" means any adverse change in the business, results of operations, assets, liabilities, or financial condition of the Seller that is material, as determined from the perspective of a reasonable person in the Buyer's position, when considered individually or together with each other such adverse change.

9.125 This sort of definition is awkward. It aims to lump together all adverse changes, of whatever kind, for purposes of determining whether a MAC has occurred. It's clear enough how this definition would affect an absolute MAC provision, which looks at MACs that have already occurred, but it wouldn't seem to make sense for purposes of a modifying MAC representation. For example, if Acme represents that its financial records contain no inaccuracies except for inaccuracies that would not reasonably be expected to result in a MAC, and a dispute arises regarding an inaccuracy, the inquiry would be whether at signing or closing (as applicable) it would have been reasonable to expect that inaccuracy to result in a MAC. Since that inquiry would look to the possibility of future adverse change, it's unclear what other adverse changes could be aggregated with any adverse change that one could reasonably expect to be caused by that inaccuracy in the financial records.

9.126 The expanded absolute MAC provision recommended above (see 9.62) offers a better way to ensure broad-based aggregation of adverse changes.

9.127 Given that, as described in 9.100, some courts have held that a MAC provision was not triggered by an adverse change in a matter over which the seller had only partial control or no control, any buyer that wants to be able to get out of a deal on such grounds had best specify as much in the agreement. Furthermore, a buyer might have in mind some other circumstances that it wants to be sure would constitute MACs. One way to make clear that certain changes constitute material adverse changes coming within the field of change would be to list them out at the end of the MAC definition, preceded by *including*. But it would be best not to include in the definition of MAC examples of changes that would fall within the definition, because doing so would increase the risk that a court would not consider to be a MAC a change that does not resemble the examples (see 13.282). You would avoid this risk by instead incorporating nonoccurrence of any of those changes in representations, conditions to closing, or termination provisions, as appropriate.

9.128 It has become commonplace to exclude from the definition of MAC, by means of "carve-outs," specific adverse changes. And carve-outs can themselves be subject to carve-outs. Carve-outs don't relate to historical facts, but instead are worded generally so as to cover the stated circumstances, whatever the time frame.

There are many possible carve-outs; here are some common ones:

- any change affecting economic or financial conditions generally (global, national, or regional, as applicable)
- any change affecting the party's industry as a whole (it can be specified that this carve-out does not apply if those conditions disproportionately affect the party in question)
- any change caused by announcement of the transaction or any related transaction (this carve-out can be general or limited to changes related to specific aspects of the party's operations, such as loss of customer orders or employee attrition; note that this carve-out could increase the buyer's risk as to whether it could successfully invoke a MAC provision, because it might be unclear whether a particular adverse effect was caused by announcement of the transaction)
- any change in a party's stock price or trading volume (in most contexts a carve-out for changes in stock price would probably be unnecessary, since it isn't clear that a drop in stock price would fall within the scope of a field of change that doesn't include capitalization (see 9.97), but the cautious drafter might want to avoid any possibility of confusion on the subject by including this carve-out)
- any failure to meet analysts' or internal earnings estimates
- any action contemplated by the agreement or taken at the buyer's request
- any action required by law

9.129 You can introduce carve-outs by stating that MAC *means any material adverse change in . . . other than* [*or except for* or *but does not include*] *any of the following, either alone or in combination . . . .*

9.130 Any time you represent an acquisition target, you need to decide the extent of the carve-outs that you wish to seek. One factor in your decision would presumably be the parties' relative bargaining power. A second factor would be the nature of your client's business. Carve-outs are associated with technology deals because they address the distinctive characteristics of technology companies, such as unusually short product cycles, intense competition, and the importance of qualified personnel. These characteristics are not unique to technology companies. For example, in any industry in which personnel represent an important component of a company's assets, there is the risk that announcing the deal would result in target personnel leaving. A third factor would be the deal-making practices at the time.

9.131 A constrained position for seller's counsel to take would be to propose carving out adverse changes in the economy or in the industry in question as well as adverse changes attributable to the deal or announcement of the deal.

HOW MAC PROVISIONS RELATE TO OTHER PROVISIONS

9.132 Whether a plaintiff succeeds in convincing a court that a MAC has occurred under an agreement can be influenced by what is, or isn't, included in the other provisions of that agreement.

9.133 For one thing, caselaw shows that a court might use the narrow scope of a representation or condition as a basis for concluding that a MAC had not occurred. In *Gordon v. Dolin*, 434 N.E.2d 341, 348–49 (Ill. App. Ct. 1982), the buyer of a manufacturing plant claimed that the absolute MAC representation contained in the purchase agreement had been triggered by the decision of the seller's principal customer to shift part of its business to a new supplier. It was a condition to closing that before the closing date the seller not have received "actual notice" from any customer that the customer intended to stop purchasing any products from the seller or intended to reduce the quantity of products purchased; the seller had not in fact received actual notice. The court held that the buyer could not rely on the absolute MAC representation, as the narrower condition "modified and limited" the absolute MAC representation: "Where a contract contains both general and specific provisions relating to the same subject, the specific provision is controlling."

9.134 One could conclude from this case that the buyer's MAC claim would have succeeded had the contract not contained the condition regarding customer purchases. But a court might consider that if a contract doesn't address a given topic, then that topic could not have been material to the deal. In

Northern Heel Corp. v. Compo Industries, Inc., 851 F.2d 456, 465–66 (1st Cir. 1988), the court, affirming a lower court, found meritless defendant Compo's claim that a downturn in daily shoe production constituted inaccuracy of certain representations in the purchase agreement, including an absolute MAC representation. One reason for the court's decision was the absence of any representation on the subject of daily shoe production: "Had the parties deemed average daily production important ('material' to the deal), surely an appropriate reference would have been included. But, it was not."

9.135 The lesson to draw from this is that when drafting a contract, you should ideally include—and express as broadly as possible—provisions addressing any issue that might conceivably form the basis for a claim by your client or provide grounds to walk. With luck, your client would then need to rely on an absolute MAC provision only in connection with disputes relating to matters that were not foreseeable when the contract was signed.

CHAPTER 10

REFERENCES TO TIME

10.1 In a contract, a reference to time could serve one of four functions:

10.2 First, it could be used to give a date to something, as in *the financial statements dated December 31, 2012*.

10.3 Second, it could be used to specify a point in time, as in *Roe became an Acme employee on March 23, 2012*. Transitions occur at a point in time, even if they're expressed using a unit for measuring periods of time.

10.4 Third, it could be used to specify a period of time that begins or ends at a stated point in time and has a stated duration, as in *Roe was an Acme employee for two years starting March 23, 2010*, and *Acme may exercise the Option during a 90-day period starting July 1, 2014*. Paired points in time are equivalent to a period of time beginning or ending at a point in time, and the former can with varying degrees of awkwardness be restated as the latter, and vice versa. The preceding examples of periods of time can be restated as *Roe was an Acme employee from March 23, 2010, to March 23, 2012*

and *Acme may exercise the Option from July 1, 2014, to September 28, 2014*.

10.5 And fourth, it could be used to apportion a quantity per unit of time, as in *Acme shall pay Doe an annual salary of $250,000* and *Acme shall not exercise the Option more than twice a year*.

10.6 The first function is self-explanatory; this chapter considers in turn issues raised by the remaining three functions.

POINTS IN TIME

10.7 Drafters generally fix a point in time by reference to a date that is either a known date (such as *January 24, 2013*, or *the date of this agreement*) or the date of a contingent future event. You can also specify an anniversary of a date (see 13.8); the concept of an anniversary is equivalent to a forward-running period of years (see 10.44).

10.8 If a point in time comes at the beginning or end of a period of time, it can be unclear whether the day in question is to be excluded (in other words, is "exclusive") or is to be included (is "inclusive") for purposes of determining exactly when that point in time occurs.

The Prepositions

10.9 Each of the following examples uses one of the prepositions most often used to denote a beginning point in time; next to it is a thumbnail

assessment of the caselaw addressing whether that preposition is inclusive or exclusive.

Acme may exercise the Option *from* April 1, 2013.	Most courts have held that *from* is exclusive, but some have held that it's inclusive.
Acme may exercise the Option *after* April 1, 2013.	Most courts have held that *after* is exclusive, but some have held that it's inclusive.
Acme may exercise the Option *starting* April 1, 2013.	A court would likely hold that *starting* is inclusive.
The Option Period commences *on* April 1, 2013.	A court would likely hold that in this context *on* is inclusive.

10.10 Each of the following examples uses one of the prepositions most often used to denote an ending point in time:

Acme may exercise the Option *until* April 1, 2014.	Some courts have held that *until* is inclusive, others that it's exclusive.
Acme may exercise the Option *to* April 1, 2014.	Some courts have held that *to* is inclusive, others that it's exclusive.
The Option Period will end *on* April 1, 2014.	A court would likely hold that in this context *on* is inclusive.
Acme may exercise the Option *before* April 1, 2014.	A court would likely hold that *before* is exclusive.
Acme may exercise the Option *through* April 1, 2014.	A court would likely hold that *through* is inclusive.
If Acme exercises the Option *by*	Some courts have held that *by* is inclusive,

April 1, 2014, . . .	others that it's exclusive.

10.11 *Between* links beginning and ending points in time; a majority of courts have considered *between* to be exclusive at both ends. Pairing *from* and *to*, as in *from February 1, 2014, to April 30, 2014*, and *after* and *before*, as in *after February 1, 2014, and before April 30, 2014*, can serve the same purpose, but subject to whatever ambiguity afflicts the individual prepositions.

10.12 Although the caselaw relating to some prepositions provides a good indication of whether a court would treat it as exclusive or inclusive, the caselaw relating to others is less clear-cut. And a court could always hold that based on the circumstances, a preposition that most courts have considered to be exclusive is, in the case at hand, inclusive (or vice versa).

10.13 Even if the caselaw regarding the effect of a particular preposition is mostly consistent, that doesn't mean that the parties to a contract had that effect in mind. If anything, the potential for confusion caused by prepositions is perhaps greater than is suggested by the caselaw.

When in a Given Day a Point in Time Occurs

10.14 Even if it's certain on which day any stated point in time is to occur, there remains the question of when on that day it is to occur. In this context *day*

means the 24 hours from one midnight to the next, so a beginning point in time could occur at midnight at the beginning of the day in question (if it's inclusive) or at the end of the day in question (if it's exclusive), and an ending point in time could occur at midnight at the end of the day in question (if it's inclusive) or at the beginning of the day in question (if it's exclusive). Or a party might decide that it had in mind some other time of day, for example the close of business. As such, referring a point in time by reference to a day is an example of undue generality (see 7.20).

Alternatives to Uncertainty

10.15 Instead of simply tolerating the uncertainty inherent in references to points in time, you can make it explicit whether the date for a given point in time is inclusive or exclusive. One way to accomplish that would be to say as much, as in *Acme may exercise the Option any time from February 1, 2014, inclusive, to April 30, 2014, exclusive*, although nonlawyers might find that cryptic.

10.16 You could say *from the beginning of April 15, 2014, to the end of April 30, 2014*, but references to the beginning or end of a day could be understood as referring to business hours rather than a day of 24 hours.

10.17 Another alternative would be to include in contracts a section specifying how references to time are to be interpreted, but to be comprehensive—and

it should be comprehensive—such a section would have to be a couple of pages long. (For a fragment of such a provision, see 15.14.)

Specifying the Time of Day

10.18 A clearer way to avoid uncertainty in references to a point in time is to specify a time of day for each beginning and ending point in time.

10.19 You can state the time of day—*the Option expires at 2:00 p.m. on September 25, 2013*. Or you can refer to it indirectly, as in *the Option expires at the close of business on September 25, 2013*, with the exact time to be determined by reference to the practice of the business in question.

10.20 The simplest time of day to specify in connection with beginning or ending points in time is midnight. For one thing, it's simplest to deal in entire days. And because most businesses are closed at midnight, using *midnight* to specify a point in time reduces the likelihood of dispute as to when a notice or payment was received.

10.21 Don't refer to midnight, or noon for that matter, as *12:00 a.m.* or *12:00 p.m.* Just as noon isn't part of either the 12 *ante meridiem* (before noon) hours or the 12 *post meridiem* (after noon) hours, but represents the boundary between the two, midnight is the boundary between any set of *post meridiem* hours and the following set of *ante meridiem* hours.

10.22 Although simply referring to noon of a given day avoids any confusion as to which day is intended—each day only has one noon—referring to midnight of a given day raises the question whether you are referring to the midnight that marks the beginning of that day or the midnight that marks its end. There's a convention that *midnight of August 15* refers to the midnight that follows August 15, but it's not clear that it has been universally accepted or that the parties to a contract will be aware of it.

10.23 One way that drafters address this ambiguity is by moving forward by one minute to 12:01 a.m. any midnight point in time that begins a period in time and by moving back by one minute to 11:59 p.m. any midnight point in time that ends a period of time, but that's a clumsy way around the problem. An overly subtle variant is to specify that the beginning point in time occurs at one minute before 12:01 a.m. and the ending point in time occurs at one minute after 11:59 p.m. A simpler solution would be to refer to *midnight at the beginning* [or *end*] *of* the date in question. (For another explanation of use of *12:01 a.m.* and *11:59 p.m.*, see 10.27.)

TIME OF DAY AS A BOUNDARY BETWEEN PERIODS OF TIME

10.24 A time of day isn't a period of time. Instead, it's a boundary between the period of time that comes before and the period of time that comes after.

10.25 So if a contract states that a deadline is midnight at the end of a given day, the deadline will pass once the last second of the 11:00 p.m. hour expires and the first second of the next hour begins. Midnight is the boundary between those two seconds.

10.26 It seems that some drafters aren't convinced of that. For example, included in contracts filed on the U.S. Securities and Exchange Commission's EDGAR system are plenty of contracts that use *5:01 p.m.* to state a point in time. The implication is that when you state a time of day, you're in fact referring to a minute-long period of time, so *5:00 p.m.* constitutes a period of time that isn't over until *5:01 p.m.*

10.27 This suggests that although drafters might use *12:01 a.m.* and *11:59 p.m.* to avoid the ambiguity in *midnight* (see 10.23), it's likely that some who use *12:01 a.m.* and *11:59 p.m.* are doing so because they think that a time of day refers to a minute-long period of time.

10.28 There's no simple way to draft around this misconception—you'd have to include a provision specifying drafting conventions (see chapter 15) that says, in effect, a time of day is a boundary between periods of time. It would be silly to indulge the misconception by stating a time of day in hours, minutes, and seconds (for example, *17:00:00*), presumably so that the period of time ostensibly at issue is one second rather than one minute. Instead, be on the lookout for the misconception, a potential

sign of which is a draft that states a time of day that is a minute more or less than what you'd expect.

USING "AT" TO STATE A DEADLINE

10.29 Because a time of day marks the boundary between blocks of time and occupies no time itself, it's impossible for something to take place at a point in time. Instead, it will take place before or after, or it will straddle the point in time.

10.30 It follows that providing in a contract for an act to occur *at* a given time is to invite confusion, as it's not clear how much time before or after that time the party in question has to perform the act.

10.31 A court might conclude that for something to happen at a specified time, it's sufficient that it happen in the minute after that point in time. See, e.g., a Canadian case, *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board*, [1999] 42 O.R.3d 723 (O.C.A.). That's presumably because if you tell someone that it's 12:05 p.m., they likely would understand that as meaning that the exact time is some point within the sixty seconds after 12:05 p.m.

10.32 But it would be pointless to add risk by expecting contract parties, or a court, to resolve such uncertainty, so don't use *at* to state a deadline.

HOW TO STATE A TIME OF DAY

10.33 Use digits, not words, to state the time of day—say *5:30 p.m.*, not *five thirty p.m.* And don't use both words and digits, as in *five thirty (5:30)*

p.m. (Regarding using words and digits to state numbers generally, see 14.1.)

10.34 Don't include *o'clock* when stating a time of day, as in *2:00 o'clock p.m.*

10.35 The abbreviations *a.m.* and *p.m.* can instead be stated in capitals, in which case periods are unnecessary—*5:30 PM*. In book publishing it would be standard to use small capitals, but that would be unnecessarily fussy for purposes of contracts.

10.36 In jurisdictions that use the 24-hour system, it would be appropriate to use that system in contracts—*1730* instead of *5:30 p.m.* But don't state time in hours, minutes, and seconds (*17:30:00*) unless extraordinary circumstances require it.

Time Zones

10.37 If a contract is between parties based in different time zones, or if a contract contemplates business being transacted across time zones, specify in any reference to the time of day which time zone is to be used for determining when that time of day has come.

10.38 You could accomplish that by stating the applicable time zone, but doing so poses three minor problems relating to daylight saving time. Daylight saving time—also referred to as "summer time"—is the convention of adjusting clocks forward in spring, so that afternoons have more daylight and mornings have less, and then adjusting them backward in

autumn. The time when daylight saving time is not in effect is referred to as "standard time."

10.39 First, it's commonplace for drafters to forget to take into account daylight saving time and when it applies. And many people are unaware that the initialisms PST, MST, CST, and EST refer to standard time and so shouldn't, strictly speaking, be used for references to time on days when daylight saving time is in effect. As a result, many drafters use incorrect time-zone designations—for example Pacific Standard Time rather than Pacific Daylight Time, as in *1:00 p.m. PST* [read *PDT*] *on July 5, 2014*.

10.40 Second, it might be that within a given time zone some jurisdictions observe daylight saving time and others do not. For example, in the Mountain Time Zone, Colorado observes daylight saving time, but not Arizona (except for the Navajo Nation), meaning that in the notation *1:00 p.m. MDT on July 5, 2014*, the time-zone designation would be correct if you're referring to time in Colorado but incorrect if you're referring to time in most parts of Arizona.

10.41 Third, if you're specifying the time of day on a day that could occur any time during the year—as in *Acme shall cause Product Support personnel to be on call from 6:00 a.m. to 6:00 p.m. PST each Business Day*—it would arguably be preferable to use instead the neutral, albeit informal, designation *PT*, given that on some days Pacific

Standard Time would be observed and on the other days Pacific Daylight Time.

10.42 A simple way to avoid such annoyances and any potential uncertainty is to refer to time in a city, presumably one that has some bearing on the transaction—*6:00 p.m., New York time*. You could elect to do so by means of a provision specifying drafting conventions; see 15.4. It can be safer to refer to time in a city rather than in a state, as some states are in more than one time zone.

PERIODS OF TIME

10.43 A period of time can run either forward or backward from a point in time.

Forward-Running Periods of Time

10.44 A forward-running period of time is usually indicated by *from*, *following*, or *after* (as in *Smith may exercise the Option during the 10 days from his receipt of* [or *following his receipt of* or *after he receives*] *the Option Notice*). To determine the ending date of a forward-running period of time using any of these prepositions, the convention is that you leave out the day from which you are counting and include the last day of the specified period, unless it's clear that the period must consist of a certain number of entire days, in which case both the first and last days are excluded, or unless it's clear that the parties intend that the first day be included. Applying this convention to the preceding example, if Smith receives the Option Notice on

January 1, the first day of the 10-day period is January 2 and Smith must exercise the Option before midnight at the end of January 11. This convention is generally recognized by courts, so usually contracts aren't explicit as to how the ending date of a forward-running period of time is to be determined. But if you want to avoid any uncertainty, be explicit.

10.45 When drafting you know the beginning and end points of a forward-running period of time, it would be clearer to express it by paired points in time, as that would render irrelevant having to determine when the forward-running period ends.

Backward-Running Periods of Time

10.46 A backward-running period of time is usually indicated by *before* (as in *Acme may exercise the Option during the 10 days before the Exclusivity Period expires*) and *prior to.* (Regarding *prior to*, see 17.14.) To determine when a backward-running period of time begins, the convention is that you count one of the terminal days and don't count the other. Using the preceding example, if the Exclusivity Period expires December 31, then December 30 is the first day before expiration, December 21 is the tenth day before expiration, and the first day that Acme may exercise the Option is December 21. As with forward-running periods of time (see 10.44), you might want to avoid any chance of uncertainty by making it explicit how the beginning date of a

backward-running period of time is to be determined.

10.47 Backward-running periods of time are often used to specify the minimum amount of notice that must be given in a certain situation, as in *Smith shall provide Jones with at least* [or no *fewer than*] *10 days' prior notice of any Proposed Transfer*. (Regarding *prior notice*, see 13.458.) Many courts have held that in this context too the general rule applies—you count one of the terminal days but not the other. But other courts have held that requiring at least a certain number of days' (or weeks' or months') advance notice means that those days (or weeks or months) must be "clear" or "entire" days, so you must exclude both the first and last terminal days. Consider how these differing approaches would play out using the preceding example, with December 31 being the date of the Proposed Transfer: Using the exclude-one-day approach, December 21, the tenth day before December 31, would be the last day on which notice could validly be given. Using the exclude-both-days approach, December 20, the eleventh day before December 31, would be the last day on which notice could validly be given.

10.48 Given the divided caselaw on minimum-notice provisions, it would be best to eliminate the ambiguity in such provisions, at least to avoid confusion on the part of contract parties and their lawyers. In addition to being explicit as to how the beginning date is to be calculated (see 10.46),

you could accomplish that by denoting a minimum-notice period in *entire days*, "entire" being a term that occurs in the caselaw. The term "clear" occurs more frequently in caselaw, but it might be less comprehensible to nonlawyers.

Don't Use "Within"

10.49 It's best not to use *within*: depending on the context, it can denote a period of time that is both forward- and backward-running, a fact that might escape a party and its lawyers. For example, if a contract provides that *to validly exercise the Option, Acme must submit an Option Notice to Widgetco within seven days of the first anniversary of this agreement*, that could be interpreted as meaning that Acme may exercise the Option no more than seven days before and no more than seven days after the anniversary. If that's the intended meaning, you should make it explicit. If a narrower meaning is intended, use a different preposition.

10.50 In a given context it might be apparent that the period of time could only run forward, as in *to validly exercise the Option, Acme must submit an Option Notice to Widgetco within seven days of receiving a Sale Notice*, but it would be clearer to use instead *no later than seven days after it receives a Sale Notice*. That's because instead of presenting the reader with the ambiguity caused by *within*, then resolving it, it would be clearer to avoid the ambiguity.

Which Unit of Time to Use

10.51 Drafting a provision referring to a period of time requires determining not only when the period begins or ends and how long it lasts, but also what unit of time to state it in.

10.52 The smallest unit is the day. Often it's preferable to denote periods of time in *business days* rather than simply *days*. (A business day is usually defined in contracts to mean any day other than a weekend or a public holiday in a specified jurisdiction, or any day that banks generally are, or a named bank is, open for business.) For one thing, denoting a period of time in business days gives the parties a better sense of the working days available to take a given action. It would also ensure that the last day is a business day, which would make it more feasible for a party to act at the last minute. Similarly, denoting in business days a period for giving notice would ensure that the last day is a business day; this could be significant if the contract also provides—as is often the case—that notice given on a day other than a business day is not effective until the next business day. On the other hand, using simply *days* makes it easier to quickly determine without a calendar when the period begins or ends, as applicable. It's unnecessary, and potentially confusing, to use *calendar days* instead of *days*.

10.53 You can also state periods of time in months. It's a generally accepted convention that a period of a month counting forward from a given date ends at midnight at the beginning of the

corresponding day of the following month, the day from which one is counting having been excluded. If next month doesn't have a corresponding day, the period ends on the last day of that month; in other words, a period of a month counting from March 31 ends on April 30. Because one can quickly determine without referring to a calendar the end date of a period denoted in months, it can simplify matters to denote in months periods of time of longer than, say, 90 days.

10.54 You can denote periods of time in weeks, but doing so provides no advantages over using days or months. In fact, it's simpler to determine the end date of a period of time if it's denoted in months rather than weeks. In this context, *week* is generally defined as a space of any seven consecutive days, irrespective of the time from which it is reckoned, rather than seven successive days beginning with the day traditionally fixed as the first day of the week, whether it be Sunday or Monday.

10.55 A period of time can also last one or more years, in which case it runs through the day before the relevant anniversary of the first day included.

10.56 Some drafters are reluctant to express periods of time in months or years for fear that a court will construe *month* to mean one of the 12 months of the year, starting on the first day of that month, or *year* to mean a period of 12 consecutive months starting January 1. Because a period of time is measured from a stated beginning or ending point, this isn't a valid concern. (But see 10.63–67.)

10.57 The prefixes *bi-* and *semi-* are confusing. *Bimonthly* means "occurring every two months" and *semimonthly* means "occurring twice a month." *Biweekly* and *semiweekly* reflect the same distinction. But *biannual* and *semiannual* both mean "occurring twice a year," although some dictionaries also have *biannual* meaning the same thing as *biennial*, namely "occurring every two years." To avoid this confusion, use instead "twice a week/month/year" and "every two weeks/months/years."

Using "On" to Denote a Day-Long Period of Time

10.58 A period of time doesn't need to be anchored to a stated beginning or ending point in time in one context—when an act or event must take place *on* a specified date. In that case, the period of time is the 24 hours of the day in question, and no beginning or ending point in time need be explicitly stated—they are midnight at the beginning and end of that day, respectively. A reference to an event that is to occur on a given day can be supplemented by adding a beginning or ending time of day, or both (see 10.18).

Another Ambiguity Relating to Periods of Time

10.59 Consider the following: *If the Buyer delivers a Claim Notice to the Seller before 2:00 p.m. on the date that is 20 Business Days after the Closing . . . .*

10.60 Because that sentence conveys two possible meanings, it's not clear how long the buyer has to deliver a claim notice. The first possible meaning is

that the condition would be satisfied if the notice were delivered anytime during the 20 business days up to 2:00 p.m. on the 20th business day. To convey that meaning, say instead *If the Buyer delivers a Claim Notice to the Seller between the Closing and 2:00 p.m. 20 Business Days after the Closing*.

10.61 The second possible meaning is that the condition would be satisfied if the notice were delivered before 2:00 p.m. on the 20th business day, whereas delivery on any of the preceding 19 business days would not satisfy the condition. To express that meaning, say instead *If the Buyer delivers a Claim Notice to the Seller on the 20th Business Day after the Closing, before 2:00 p.m.*

APPORTIONING QUANTITIES PER UNIT OF TIME

10.62 When apportioning quantities per unit of time (as in *Acme shall pay Doe an annual salary of $250,000*), two issues arise. First, the alternative meanings of the unit of time used. And second, how to deal with any short period at the beginning or end of the contract.

The Possible Meanings of Certain Units of Time

10.63 When apportioning quantities per unit of time (as opposed to stating periods of time; see 10.56), the word *year* can be ambiguous, in that it could mean a year from the date of the agreement and each subsequent anniversary or it could mean the 12-month period from any January 1. In this

context, most courts have held that *year* means the 12-month period from January 1.

10.64 In this context, the same ambiguity afflicts *month*, in that *month* can mean the period from one day to midnight at the beginning of the corresponding day of the following month (see 10.53), but it can also mean one of any of the 12 months of the year.

10.65 It would be best to avoid this ambiguity by stating what *year* or *month* means. You could do so by using a more specific alternative to *month* or *year* consistent with the alternative meanings given in 10.63 and 10.64. Or you could use a defined term, although it would make sense to do so only if you were to use the term several times (see 6.91).

10.66 The caselaw suggests that using the term *calendar year* might increase the odds of having a court interpret *year* to mean the period from January 1 through December 31. On the other hand, it's not the clearest usage—the fact that there's caselaw regarding what it means suggests as much.

10.67 Similarly, caselaw suggests that for purposes of apportioning quantities per unit of time as opposed to measuring a period of time, a court would likely hold that *calendar month* refers to one of the months of the year. But it's not the clearest way of expressing that meaning.

10.68 You can use *day* when apportioning quantities per unit of time, but it's not often that parties need to apportion quantities daily. As regards

using *week*, the ambiguity that afflicts *year* and *month* would be aggravated—not only could *week* mean any seven consecutive days or seven consecutive days beginning with the day traditionally fixed as the first day of the week, it's also unclear what that tradition is. If you wish to apportion quantities by the week, specify what *week* means.

Handling Short Periods

10.69 In apportioning quantities per unit of time you use *year* to mean the 12-month period beginning any January 1 or use *month* to mean one of the 12 months of the year beginning with the first day of each month, it might be necessary to state how the parties are to treat any short period between the date of the agreement and the beginning of the next month or year, as applicable, as well as any short period between the end of the last complete month or year and the date of termination. If instead the meaning of *month* or *year* is keyed to the date of the agreement, one is still faced with the possibility of an ending short period.

10.70 It might be sufficient to say that any short period is to be handled by prorating the number or amount—such as the number of vacation days to which an employee is entitled—that applies in the case of a complete month or year; you would probably also need to provide for rounding up, down, or to the nearest whole number. (Regarding rounding, see 14.41.)

10.71 If the number or amount apportioned to a period is expressed as a percentage of a performance or other index—as is the case when Roe's bonus is based on his employer's annual gross revenue—it might be appropriate to provide that if there is a short period, the percentage will be of that portion of the index that applies to the short period rather than of a pro-rata portion the entire period. Doing so in the case of Roe would result in Roe's receiving the stated percentage of gross revenue for the short period between his starting work and January 1 of the next year rather than the stated percentage of a pro-rata portion of gross revenue for the entire year. This approach might produce an unfair result; for example, giving Roe the stated percentage of gross revenue for a short period consisting of the last two months of the year would be particularly favorable to Roe if his employer is a retailer that collects the bulk of its earnings during the holiday season. Also, it might be difficult or impossible to determine what portion of the index is attributable to the short period.

10.72 An alternative would be to use the entire index and prorate the percentage figure, but that might not make sense in the case of a performance bonus. For example, that approach would mean that Roe's first bonus would depend in part on how his employer's business performed during a period that preceded Roe's becoming an employee. Also, if the short period comes at the end of the contract, it might not be reasonable to expect Roe to wait until after the end of the year in which he was terminated

to receive any bonus to which he is entitled for the short period starting January 1 of that year.

10.73 Given these difficulties, it might be necessary to make special arrangements for beginning and ending short periods.

Apportioning Time

10.74 When what is being apportioned in a unit of time is one or more other units of time, that raises the question whether the units of time being apportioned have to constitute a single block of time.

10.75 Consider the following: *For two months each year the Employee shall work in Acme's Budapest office*. Leaving aside what *year* means (see 10.63), it's not clear whether to comply with this obligation the employee has to spend one two-month block of time working in the Budapest office or instead can accumulate the required time over the course of two or more visits to Budapest.

10.76 The simplest way to make it clear that an apportioned period of time must constitute a block of time is to use the word *consecutive*, as in *For two consecutive months each year*. (For that to work, the block of time would have to consist of more than one unit of time, so you would need to convert a reference to one month to *30 consecutive days*.) If that's not the intended meaning, make that clear. For example, you could say *Over the course of one or more visits, each no shorter than five business days,*

excluding travel days, the Employee shall work in Acme's Budapest office for two months of each year.

CHAPTER 11

AMBIGUITY OF THE PART VERSUS THE WHOLE

11.1 Use of plural nouns and the words *and*, *or*, *every*, *each*, and *any* can result in ambiguity. In each case, the question is whether it is a single member of a group of two or more that's being referred to, or the entire group, so this manual uses the phrase "the part versus the whole" to refer to this sort of ambiguity. This chapter explores the sources of this kind of ambiguity and how to avoid it or eliminate it. The level of detail is justified, given the shifting complexity of the topic and the alternative meanings riding on subtle distinctions. So as not to introduce unhelpful complexity, the terminology used ignores some linguistics nuances.

11.2 To illustrate the analysis, this chapter contains numbered example sentences. (Chapter 12 also contains such example sentences.) Each such sentence that is ambiguous is followed by one or more italicized sentences that convey its alternative meanings, in the following manner:

> [0] Each numbered example in regular text is either ambiguous or unambiguous.

[0a] *Each numbered-and-lettered example in italics represents one of the possible meanings of the immediately preceding numbered example.*

PLURAL NOUNS

§ 1.3 Sentences containing plural nouns can be unambiguous—for example, *The Acme Subsidiaries are Delaware corporations.* But in many sentences a plural noun can engender ambiguity, with the nature and extent of the ambiguity being a function of context. In the following examples, adding *all of* to a plural noun—for example, saying *all of the Stockholders* rather than simply *the Stockholders*—wouldn't affect the analysis.

Subject Ambiguity

¶ 1.4 When a plural noun is the subject of a sentence that uses any category of contract language other than language of discretion, as in [1] (which uses language of obligation), it can be unclear whether the persons or things constituting the subject are to act individually, as in [1a], or collectively, as in [1b], such that a group is treated as one. Often when a contract requires that parties act collectively, an agent is appointed to act on their behalf. That precludes ambiguity of the sort exhibited by [1].

[1] The Stockholders shall notify Acme.

[1a] *Each Stockholder shall notify Acme.*

[1b] *The Stockholders, acting collectively, shall notify Acme.*

When language of discretion is used, an additional meaning is possible. Imposing an obligation on each member of a group, as in [1a], has the same effect as imposing that obligation on all members of that group. By contrast, saying that the members of a group have discretion to take a given action could mean either (1) that any one member may take that action irrespective of whether any other member takes that action (see [2a]) or (2) that no member may take that action unless all members do (see [2b]).

[2] The Stockholders may notify Acme.

[2a] *One or more Stockholders may notify Acme.*

[2b] *The Stockholders may notify Acme, but only if they all do.*

[2c] *The Stockholders, acting collectively, may notify Acme.*

Direct-Object Ambiguity

When a plural noun is other than the subject of a sentence, the potential ambiguity is similar to the ambiguity that arises when a plural noun is the subject. See [3], in which the plural noun serves as the direct object. But when it doesn't make sense to

distinguish between treating the persons or things constituting the direct object individually and treating them collectively, the potential number of meanings is reduced accordingly. For example, whereas [3b] is one of the possible meanings of [3] because giving a single notice could serve to notify a group, no analogous meaning is possible in the case of [4].

[3] Acme shall notify the Stockholders.

[3a] *Acme shall notify each of the Stockholders.*

[3b] *Acme shall notify the Stockholders, considered collectively.*

[4] Acme shall sell the Shares.

11.7 As is the case when the plural noun is the subject of the sentence, the potential number of meanings in [3] increases when the sentence is expressed using language of discretion: when the members of the object group are considered individually rather than collectively, it's not clear whether the subject has discretion to act with regard to all the members, as in [5a], or some or all of them, as in [5b]. The same ambiguity is present when one restates [4] using language of discretion (see [6]).

[5] Acme may notify the Stockholders.

[5a] *Acme may notify the Stockholders, but only if it notifies all of them.*

[5b] *Acme may notify one or more Stockholders.*

[5c] *Acme may notify the Stockholders, considered collectively.*

[6] Acme may sell the Shares.

[6a] *Acme may sell the Shares, but only if it sells all of them.*

[6b] *Acme may sell one or more Shares.*

Subject-and-Direct-Object Ambiguity

11.8 When both the subject and the direct object are plural nouns, it can be unclear whether the plural direct object relates to each member of the plural subject considered separately or to all members considered as a whole. In the case of [7], the question is whether each Stockholder is required to submit one questionnaire or more than one. Often it will be clear from the context which is the intended meaning.

[7] The Stockholders shall promptly submit the completed questionnaires.

[7a] *Each Stockholder shall promptly submit a completed questionnaire.*

[7b] *Each Stockholder shall promptly submit the completed questionnaires.*

[7c] *The Stockholders, acting collectively, shall promptly submit the completed questionnaires.*

"AND"

11.9 Related to the ambiguity caused by plural nouns is that engendered by nouns or adjectives linked by *and.*

11.10 *And* concerns a set in its totality. *We'll invite Kim, Pat, and Alex* entails inviting all of them. See *The Cambridge Grammar of the English Language* (referred to in this chapter as *CGEL*), at 1293.

11.11 Often *and* is unambiguous, as in the sentence *Acme and Widgetco are Delaware corporations.* But *and* can engender ambiguity—it can convey that the members of a group are to be considered together but can also convey that they are to be considered together and separately. This has been acknowledged in the literature on drafting. See, e.g., F. Reed Dickerson, *The Fundamentals of Legal Drafting* (2d ed. 1986), at 105; *Garner's Dictionary of Legal Usage*, at 639. Furthermore, in contracts it can be unclear whether nouns linked by *and* are acting, or are being acted on, individually or collectively. (The latter kind of ambiguity also arises

in connection with plural nouns; see 11.4). Whether *and* is ambiguous, and in what way, depends on the grammatical context, something that the literature on drafting has not explored in any detail.

Subject Ambiguity

11.12 When contract parties linked by *and* constitute the subject of a sentence using any category of contract language other than language of discretion, as in [8] (which uses language of obligation), it can be unclear whether the persons or things constituting the subject are to be considered individually, as in [8a], or collectively, as in [8b]. (The ambiguity in [8] is analogous to that in [1].)

[8] Able and Baker shall notify Acme.

[8a] *Able and Baker shall each notify Acme.*

[8b] *Able and Baker, acting collectively, shall notify Acme.*

11.13 Language of discretion gives rise to greater ambiguity than does language of obligation. (The ambiguity in [9] is analogous to that in [2].)

[9] Able and Baker may notify Acme.

[9a] *Both Able and Baker, as opposed to just one or the other of them, may notify Acme.*

[9b] *Able or Baker, or both of them, may notify Acme.*

[9c] *Able and Baker, acting collectively, may notify Acme.*

Direct-Object Ambiguity

11.14 A similar range of potential meanings arises when parties linked by *and* are other than the subject of the sentence. See, for example, [10], in which nouns linked by *and* serve as direct objects. But when the persons or things constituting direct objects cannot be considered collectively, as in [11], the potential ambiguity is reduced accordingly.

[10] Acme shall notify Able and Baker.

[10a] *Acme shall notify both Able and Baker.*

[10b] *Acme shall notify Able and Baker, considered collectively.*

[11] Acme shall dissolve Subsidiary A and Subsidiary B.

11.15 As with [8], the number of potential meanings conveyed by [10] increases when it is expressed using language of discretion; when the members of the object group are considered individually rather than collectively, it's not clear whether the subject has discretion to act with regard to all the members, as in [12a], or some or all of them, as in [12b]. The same ambiguity is present

when one restates [11] using language of discretion; see [13].

[12] Acme may notify Able and Baker.

[12a] *Acme may notify both Able and Baker, as opposed to one or the other of them.*

[12b] *Acme may notify either Able or Baker, or both of them.*

[12c] *Acme may notify Able and Baker, considered collectively.*

[13] Acme may dissolve Subsidiary A and Subsidiary B.

[13a] *Acme may dissolve both Subsidiary A and Subsidiary B, as opposed to one or the other of them.*

[13b] *Acme may dissolve one or both of Subsidiary A and Subsidiary B.*

A1.16 A range of ambiguity comparable to that in [12] and [13] arises when instead one uses language of prohibition, as in [14] and [15]. The more natural meaning of [14] and [15] is conveyed by [14a] and [15a], respectively. If you wish to convey the meaning in [14b] or [15b], you shouldn't rely on [14] or [15] to do so.

[14] Acme shall not notify Able and Baker.

[14a] *Acme shall not notify Able and shall not notify Baker.*

[14b] *Acme shall not notify both Able and Baker but may notify just one or the other of them.*

[14c] *Acme shall not notify Able and Baker, considered collectively.*

[15] Acme shall not dissolve Subsidiary A and Subsidiary B.

[15a] *Acme shall not dissolve Subsidiary A and shall not dissolve Subsidiary B.*

[15b] *Acme shall not dissolve both Subsidiary A and Subsidiary B but may dissolve one or the other of them.*

Subject-and-Direct-Object Ambiguity

11.17 Example [16] demonstrates the ambiguity found in [8], but in addition, it's unclear whether the *and*-coordination of the subjects is "distributive" (as in [16a]) or "joint" (as in [16b]). See *CGEL*, at 1282. In other words, it's unclear whether each of the subjects is to notify one or both of the objects.

(Regarding *respectively*, as used in [16b], see 13.582.)

[16] Able and Baker shall notify Acme and Widgetco.

[16a] *Able and Baker shall each notify Acme and Widgetco.*

[16b] *Able and Baker shall notify Acme and Widgetco, respectively.*

[16c] *Able and Baker, acting collectively, shall notify Acme and Widgetco.*

Multiple Verb Phrases

11.18 A variant of the ambiguity present in [12] occurs when in language of discretion the subject and a single *may* are used with two verb phrases, as in [17]. Using *may* in each verb phrase, as in [17b], would make it clear that Acme's discretion is not limited to either selling assets and making capital expenditures or doing neither. Example [17c] accomplishes the same goal. When there are three or more verb phrases, it may be most efficient to express this meaning by stating that the subject *may do any one or more of the following*.

[17] Acme may sell assets and make capital expenditures.

[17a] *Acme may sell assets and make capital expenditures, but not just one or the other.*

[17b] *Acme may sell assets and may make capital expenditures.*

[17c] *Acme may sell assets or make capital expenditures, or it may do both.*

¶ 19 When the first verb phrase logically leads to the second, it is likely that the sense *together and not separately* is intended, as in [18].

[18] Parent may dissolve Sub and liquidate its assets.

Ambiguity of Direct Object Plus Objects of Preposition

¶ 20 When a direct object is accompanied by nouns separated by *and* that are functioning as objects of a preposition (in the case of [19], [20], and [21], the indirect objects *Echo* and *Foxtrot*), the ambiguity can be analogous to that exhibited in [10], [12], and [14].

[19] Delta shall issue a promissory note to Echo and Foxtrot.

[19a] *Delta shall issue a promissory note to each of Echo and Foxtrot.*

[19b] *Delta shall issue a promissory note to Echo and Foxtrot jointly.*

[20] Delta may issue a promissory note to Echo and Foxtrot.

[20a] *Delta may issue a promissory note to each of Echo and Foxtrot, as opposed to just one or the other.*

[20b] *Delta may issue a promissory note to Echo, to Foxtrot, or to each of them.*

[20c] *Delta may issue a promissory note to Echo and Foxtrot jointly.*

[21] Delta shall not issue a promissory note to Echo and Foxtrot.

[21a] *Delta shall not issue a promissory note to each of Echo and Foxtrot, as opposed to just one or the other.*

[21b] *Delta shall not issue a promissory note to Echo or Foxtrot.*

[21c] *Delta shall not issue a promissory note to Echo and Foxtrot jointly.*

B1.21 when the objects of prepositions cannot be considered collectively, there is reduced scope for ambiguity. Because it would not be possible to construct a factory that is located in both California and Florida, the language of obligation in [22] is unambiguous and the language of discretion in [23] and language of prohibition in [24] exhibit fewer possible meanings than the analogous [20] and [21].

[22] Acme shall construct a factory in California and Florida.

[23] Acme may construct a factory in California and Florida.

[23a] *Acme may construct a factory in California, in Florida, or in both states.*

[23b] *Acme may construct a factory in both California and Florida, as opposed to in just one state or the other.*

[24] Acme shall not construct a factory in California and Florida.

[24a] *Acme shall not construct a factory in California or in Florida.*

[24b] *Acme shall not construct a factory in both California and Florida, as opposed to in one or the other.*

The Effect of Adjectives

11.22 Another form of ambiguity associated with *and* is that which derives from (1) adjectives that modify a noun and are linked by *and* (as in *temporary and part-time employees*) and (2) nouns that are modified by adjectives and linked by *and* (as in *temporary employees and part-time employees*).

11.23 The ambiguity that arises in a provision using a plural noun modified by adjectives joined by *and* is a function of context and of the kind of contract language used. Below are two examples; [25] uses language of obligation and [26] uses language of discretion. Because [26] uses language of discretion, it exhibits a greater number of possible meanings than does [25] (see 11.5).

[25] Tango shall terminate the employment of Acme's temporary and part-time employees.

[25a] *Tango shall terminate the employment of those Acme employees who are temporary and those Acme employees who are part-time.*

[25b] *Tango shall terminate the employment of those Acme employees who are both temporary and part-time.*

[26] Tango may terminate the employment of Acme's temporary and part-time employees.

[26a] *Tango may terminate the employment of no fewer than all Acme employees who are temporary and no fewer than all Acme*

employees who are part-time. Tango shall not terminate all the employees in one group without also terminating all the employees in the other group.

[26b] *Tango may terminate the employment of one or both of the following: (1) no fewer than all Acme employees who are temporary and (2) no fewer than all Acme employees who are part-time.*

[26c] *Tango may terminate the employment of (1) one or more Acme employees who are temporary and (2) one or more Acme employees who are part-time.*

[26d] *Tango may terminate the employment of no fewer than all Acme employees who are both temporary and part-time.*

[26e] *Tango may terminate the employment of one or more Acme employees who are both temporary and part-time.*

B1.24 But in the case of an *and*-coordination featuring mutually exclusive attributes, ambiguity would be reduced. An example of mutually exclusive attributes is seen in *full-time and part-time*

employee—an employee cannot be both full-time and part-time at the same time. Using that *and*-coordination in [25] would have the effect of eliminating the ambiguity, because the meaning conveyed by [25b] wouldn't be possible, leaving as the only possible meaning that of [25a]. Using that *and*-coordination in [26] would have the same effect, eliminating [26d] and [26e] as possible meanings.

11.25 An alternative to having a noun modified by two or more adjectives is to repeat the noun with each adjective, as in *temporary employees and part-time employees*. Using that *and*-coordination in [25] and [26] would have the same effect as using an *and*-coordination featuring mutually exclusive attributes (see 11.24).

"Every X and Y" and "Each X and Y"

11.26 When *every* and *each* are used before two or more nouns that are linked by *and*, another kind of ambiguity results. In [27], the question arises whether every director and every officer is entitled to indemnification, or whether only persons who are both a director and an officer are entitled to indemnification. Context will often suggest the intended meaning; in the case of [27], the intended meaning is presumably that expressed in [27a] rather than that expressed in [27b].

[27] Acme shall indemnify every director and officer of Widgetco.

[27a] *Acme shall indemnify every director and every officer of Widgetco.*

[27b] *Acme shall indemnify every person who is both a director and an officer of Widgetco.*

Adding Contingency to "And"

11.27 Drafters might find it helpful to acknowledge a contingent quality in one or more elements linked by *and*.

11.28 Consider *County of Du Page v. Illinois Labor Relations Board*, 231 Ill. 2d 593, 900 N.E.2d 1095 (2008). At issue was section 9(a-5) of the Illinois Public Labor Relations Act, which provides that as an alternative to an election, the Illinois Labor Relations Board may certify a union on the basis of evidence showing that a majority of the employees wish to be represented by the union for the purposes of collective bargaining.

11.29 Section 9(a-5) provides in part as follows (emphasis added):

If the parties to a dispute are without agreement on the means to ascertain the choice, if any, of employee organization as their representative, the Board shall ascertain the employees' choice of employee organization, on the basis of dues deduction authorization *and* other evidence, or, if necessary, by conducting an election.

11.30 An employer objected to certification of a union. Among other things, it argued that section 9(a-5) required the union to submit both evidence of authorization to deduct dues and some other evidence of majority support. The Illinois Labor Relations Board rejected this argument, but the appellate court vacated the Board's decision and remanded the matter to the Board for further proceedings.

11.31 On appeal, the Illinois Supreme Court reversed, holding "that the word 'and,' as used in the phrase 'dues deduction authorization and other evidence,' was intended by the legislature to mean 'or.'" In other words, the union wasn't required to submit evidence in addition to a dues checkoff card.

11.32 This protracted and unedifying litigation could have been avoided if the drafters had simply inserted the word *any* after *and*. That would have made it clear that the union wasn't required to submit additional evidence but instead had the option to do so.

11.33 Although this case involved the language of a statute, it applies equally to contracts. So, drafters, bear in mind the utility of *and any*.

"OR"

11.34 *Or* indicates that the members of a set are regarded as alternatives. Whereas *We'll invite Kim, Pat, and Alex* (see 11.10) entails inviting all of them,

We'll invite Kim, Pat, or Alex entails only that we'll invite (at least) one of them. See *CGEL*, at 1293–98.

11.35 The literature on drafting says that *or* can be "inclusive," with *A or B* conveying *A or B or both*, or "exclusive," with *A or B* conveying *A or B, but not both.* See F. Reed Dickerson, *The Fundamentals of Legal Drafting* 104 (2d ed. 1986); *Garner's Dictionary of Legal Usage*, at 639. But the literature on drafting hasn't explored this subject in any depth.

Background

11.36 By contrast with the ambiguity caused by plural nouns and the ambiguity caused by *and*, the ambiguity engendered by nouns or adjectives linked by *or* is not simply a function of context. One must also address a broader issue—the distinction between the exclusive *or* and the inclusive *or.*

11.37 According to *CGEL*, *or* is most characteristically used when the speaker believes that only one of the component propositions joined by *or* is true, and as a result *or* typically conveys the implicature that not all of the propositions are true. An implicature is a proposition that is implicitly conveyed rather than being explicitly said. It is not strictly part of the meaning of the sentence itself: as *CGEL* says, "*or* doesn't **mean** that only one of the alternatives is true."

11.38 *CGEL* provides the following explanation of the "not and" implicature of *or:*

In general we don't use the weaker of two terms if we could use the stronger—e.g. we don't generally say *'P or Q' if we know 'P and Q' to be true. If I know they appointed Kim and Pat to oversee the election*, it will normally be inappropriate to say *They appointed Kim or Pat to oversee the election*, for this is likely to suggest that they appointed just one but that I don't know which of the two it was. Similarly, if I intend to invite Kim and Pat to dinner, it is normally misleading to say *I'll invite Kim or Pat to dinner.* The most likely reason for saying *'P or Q'* rather than *'P and Q',* therefore, is that the latter would be false, which leads to the "not and" implicature. But that isn't the only reason for saying *'P or Q'*: it may be that I know that one or other of 'P' and 'Q' is true, but don't know whether both are . . . .

11.39 As an example of use of *or* when the speaker doesn't know whether both propositions are true, *CGEL* offers *Either the mailman hasn't got here yet or there's no mail for us*, saying that this example "certainly does not rule out the case where the mailman is still on his way but has no mail for us."

11.40 *CGEL* uses the example *They are obtainable at Coles or at Woolworths* to suggest that even a speaker who knows that both propositions are true might nevertheless use *or.* The reason for using *or* here even though the speaker could have said *and* is that it reflects the fact that you have a choice as to which store you obtain them from.

11.41 *CGEL* points out that alternatives joined by *or* are often mutually exclusive, as in *He was born on Christmas Day 1950 or 1951*. In such contexts, our knowledge of the world allows us to rule out the possibility that both propositions are true.

11.42 Regarding confusion as to whether a given *or* is inclusive or exclusive, *CGEL* says that "the implicature can be made explicit in a *but*-coordinate: *He'll invite Kim or Pat, but not both*" and that "it can be cancelled in similar ways: *He'll invite Kim or Pat, perhaps both.*"

11.43 And *CGEL* says that *either* tends to strengthen the "not and" implicature:

I'll be seeing her on either Friday or Saturday conveys somewhat more strongly than the version without *either* that I'll be seeing her on just one of those days. Exclusiveness nevertheless is still only an implicature: *They are obtainable at either Coles or Woolworths* emphasizes the choice but, like the version without *either*, could readily be used in a context where they are obtainable at both stores.

11.44 *CGEL* notes that "When a sub clausal *or*-coordination falls within the scope of a negative, it is equivalent to an *and*-coordination of negative clauses"—*I didn't like his mother or his father* means *I didn't like his mother and I didn't like his father*. (In the context of negation, the distinction between the inclusive and exclusive *or* doesn't apply.) That's also the meaning derived from application of one of the pair of logic rules known as

De Morgan's laws, the relevant rule being in effect *Not (A or B) = (Not A) and (Not B)*. But *CGEL* goes on to note that "wide scope readings are possible as less likely interpretations." A less likely reading of the preceding example is *I didn't like his mother or his father, I liked them both*. Using a *neither . . . nor* structure—*I liked neither his mother nor his father*—would preclude the possibility of such an alternative meaning. Another less-likely reading is *I didn't like his mother or his father, I can't remember which*.

As Applied to Contracts

11.45 In contract, it might be that a given *or* could only be exclusive. One example is the *or* in *Parent shall incorporate Sub in Delaware or New York*—a company cannot be incorporated in more than one state at the same time.

11.46 But regarding how the inclusive and exclusive *or* is manifested in contracts, consider [28], which is language of obligation. It may be that the drafter intended the *or* to be exclusive and didn't think of making the implicature explicit, as in [28a]. Alternatively, the drafter may have focused on expressing that Acme has a choice and didn't think of canceling the implicature, as in [28b]. (Regarding alternative ways of expressing *or both*, see 11.75.) Which is more likely would depend on the context. The same alternatives are present in other categories of contract language, except for language of prohibition; [29] is language of discretion.

[28] Acme shall dissolve Subsidiary A or Subsidiary B.

[28a] *Acme shall dissolve Subsidiary A or Subsidiary B but not both.*

[28b] *Acme shall dissolve Subsidiary A or Subsidiary B or both.*

[29] Acme may dissolve Subsidiary A or Subsidiary B.

[29a] *Acme may dissolve Subsidiary A or Subsidiary B but not both.*

[29b] *Acme may dissolve Subsidiary A or Subsidiary B or both.*

11.47 As explained in 11.44, the inclusive and exclusive *or* plays no role in language of prohibition. But uncertainty remains: According to *CGEL*'s analysis, the more likely meaning of [30] is [30a]. Using *neither* . . . *nor*, as in [30b], conveys that meaning more economically. Another possible meaning is that the prohibition applies to only one or the other of Subsidiary A and Subsidiary B. That's articulated more clearly in [30c]. A third possible meaning is [30d]. It's unlikely that anyone would derive the meaning of [30d] from [30] without the benefit of the language of discretion in [30d], but it's conceivable that a disgruntled contract party might attempt such a leap. A fourth possible meaning is [30e], which is analogous to the example

in 11.44, *I didn't like his mother <u>or</u> his father, I liked them both*. But no reader could derive the meaning of [30e] from [30] without stress on the *or* in [30] and the benefit of the second clause in [30e].

[30] Acme shall not dissolve Subsidiary A or Subsidiary B.

[30a] *Acme shall not dissolve Subsidiary A and shall not dissolve Subsidiary B.*

[30b] *Acme shall dissolve neither Subsidiary A nor Subsidiary B.*

[30c] *Acme shall not dissolve both Subsidiary A and Subsidiary B but may dissolve just one or the other of them.*

[30d] *Acme shall not dissolve just one or the other of Subsidiary A and Subsidiary B, but it may dissolve both.*

[30e] *Acme shall not dissolve just one or the other of Subsidiary A and Subsidiary B but shall instead dissolve both.*

11.48 Alternative meanings analogous to the possible meanings of [30] can be found in negation used in other contexts, for example in language of declaration (*Acme has not dissolved Subsidiary A or*

Subsidiary B) and condition clauses (*If Acme has not dissolved Subsidiary A or Subsidiary B*).

11.49 drafter should seek to avoid having a court decide what a given provision means. So if you're looking for a particular *or* to be exclusive and an inclusive meaning is possible, you shouldn't rely on the "not and" implicature, whether or not bolstered by *either*, to ensure that the provision in question has the intended meaning.

11.50 if you're looking for a particular *or* to be inclusive, you shouldn't assume that the context will be sufficient to override the "not and" implicature. Consider the case of *SouthTrust Bank v. Copeland One, L.L.C.*, 886 So. 2d 38 (Ala. 2003). Defendant SouthTrust operated an automated teller machine, or "ATM," at an Alabama mall. It did so under a lease with the landlord that provided in pertinent part as follows: "Tenant [SouthTrust] shall have the exclusive right during the term of this lease and any renewals to operate an ATM or any other type of banking facility on the Property." This gave rise to litigation over whether the *or* in this provision was exclusive or inclusive. After deciding that the provision was ambiguous, the court construed it against the drafter, SouthTrust, holding that the *or* was exclusive.

11.51 ad, you should express explicitly the meaning intended. In other words, instead of [28] use either [28a] or [28b], and instead of [29] use either [29a] or [29b]. The same principle applies to using *or* in the context of negation. For example, it

would be reckless for anyone to draft on the assumption that a court would invoke De Morgan's laws (see 11.44).

When One of a Series Linked by "Or" Is Modified by a Conditional Clause

11.52 In addition to uncertainty over whether a given *or* is exclusive or inclusive, ambiguity can also arise when one of a series of items linked by *or* is modified by a conditional clause.

11.53 Consider the following example featuring two items linked by *or*:

[31] Charles will have dinner with Fred or, if she's in town, Nancy.

[31a] *Charles will have dinner with Fred or Nancy; if Nancy isn't in town he'll have dinner with Fred.*

[31b] *Charles will have dinner with Nancy if she's in town; if she isn't he'll have dinner with Fred.*

[32] Charles will have dinner with Nancy, if she's in town, or with Fred.

11.54 In [31], the second item (Nancy) is modified by a conditional clause. Examples [31a] and [31b] are the possible alternative meanings of [31], with [31a] perhaps being the more natural reading. Examples [31a] and [31b] are also the

possible alternative meanings of [32], with [31b] perhaps being the more natural reading. The difference between [31] and [32] is that in [32], the conditional clause is associated with the first item.

11:55 The difference between [31a] and [31b] is that the more limited meaning of [31b] isn't derived from a strict reading of [31]; instead, the reader understands that it's implied. That reading is encouraged by the fact that Nancy's presence in town is referred to at all. If the choice were between Fred and Nancy, regardless of whether Nancy were in town, then it wouldn't be necessary to refer to Nancy's presence in town: if she were out of town, it would follow that Charles wouldn't be having dinner with her.

11:56 The analysis changes when more than two items are linked by *or*, as in the following examples:

[33] Charles will have dinner with Inga, Fred, or, if she's in town, Nancy.

[33a] *If Nancy is in town Charles will have dinner with Inga, Fred or Nancy; if Nancy is out of town Charles will have dinner with Inga or Fred.*

[33b]* *If Nancy is in town Charles will have dinner with Nancy; if Nancy is out of town Charles will have dinner with Inga or Fred.*

[34] Charles will have dinner with Inga or Fred or, if she's in town, Nancy.

[34a] *If Nancy is in town Charles will have dinner with Inga, Fred or Nancy; if Nancy is out of town Charles will have dinner with Inga or Fred.*

[34b] *If Nancy is in town Charles will have dinner with Nancy; if Nancy is out of town Charles will have dinner with Inga or Fred.*

11.57 Example [33a] conveys the same meaning as [33], perhaps more clearly. But most readers of [33] likely wouldn't conclude that it conveys the meaning of [33b], which is analogous to [31b] (hence the asterisk next to [33b]). That's because if dinner with Nancy were to take priority, you would expect the three names to be presented not in a group of three, as in [33], but in two groups, with Nancy by herself and Inga and Fred in a second group separated from Nancy by one *or*, with a second *or* between Inga and Fred, as in [34]. So [33] isn't subject to the same ambiguity as [31] and [32].

11.58 One of the two alternative meanings of [34] is [34b], which is the same as [33b]. If you wish to convey the meaning of [34b], you'd be advised to use the wording of [34b] rather than [34], so as to avoid also conveying the meaning of [34a].

11.59 A late language analogous to [31] was at issue in *Brooks Capital Services, LLC v. 5151*

Trabue Ltd., No. 10CVE-07-10386, 2012 Ohio App. LEXIS 3901 (Sept. 27, 2012). A member of 5151 Trabue Ltd., a limited liability company (LLC) whose management had not been reserved to its members, fraudulently signed a promissory note and mortgage on behalf of the LLC. Before the court was the issue of whether those documents were valid under Ohio Rev. Code Ann. section 1705.35, which provides as follows:

Instruments and documents providing for the acquisition, mortgage, or disposition of property of a limited liability company are valid and binding upon the company if the instruments or documents are executed by one or more members of the company or, if the management of the company has not been reserved to its members, by one or more of its managers.

¶60 The lender argued that under the statute, loan documents signed by one of the members served to bind the LLC; the LLC argued that they did not. The trial court granted summary judgment to the LLC; the Court of Appeals affirmed. In reaching its conclusion, the Court of Appeals said that "R.C. 1705.35 is ambiguous and susceptible of different interpretations." The dissent disagreed.

¶61 The Court of Appeals in effect held that the language at issue conveyed a meaning analogous to [33b]; the dissent was in effect of the view that it conveyed a meaning analogous to [33a]. In its analysis, the Court of Appeals distinguished the language at issue from Ohio Rev. Code Ann. section

1705.44, which features three items linked by *or*. The Court of Appeals in effect held that section 1705.44 conveyed a meaning analogous to [33a].

31.62 *Brooks Capital Services* involved statute language, but this kind of ambiguity is just as likely to occur in a contract. To avoid it, use unambiguous language—language analogous to the examples above in italics.

Plural Nouns

31.63 When nouns linked by *or* constitute the subject of a sentence, the number of potential meanings increases when the direct object is plural, as in [35], whatever the category of contract language. The added uncertainty relates to whether the items constituting the direct object are to be treated individually or as a group.

[35] Able or Baker shall submit invoices to Charlie.

[35a] *Able or Baker shall submit invoices to Charlie, with all invoices being submitted by Able and none by Baker, or vice versa.*

[35b] *Able or Baker shall submit invoices to Charlie, with any invoice being submitted by Able or Baker individually and not by Able and Baker jointly.*

[35c] *Able or Baker shall submit invoices to Charlie, with any invoice being submitted by Able or Baker individually or by Able and Baker jointly.*

11.64 The same issue arises when the direct object is plural and is accompanied by nouns separated by *or* that are functioning as objects of a preposition (in the case of [36], the indirect objects *Echo* and *Foxtrot*).

[36] Delta shall issue promissory notes to Echo or Foxtrot.

[36a] *Delta shall issue promissory notes to Echo or Foxtrot, with Echo being issued all the promissory notes and Foxtrot none of them, or vice versa.*

[36b] *Delta shall issue promissory notes to Echo or Foxtrot, with any promissory note being issued to Echo or Foxtrot individually and not to Echo and Foxtrot jointly.*

[36c] *Delta shall issue promissory notes to Echo or Foxtrot, with any promissory note being issued to Echo or Foxtrot individually or to Echo and Foxtrot jointly.*

11.65 ambiguity arises when the nouns linked by *or* are plural. For example, in [37], which uses language of obligation, it's uncertain whether each group of fruit should be considered collectively. This ambiguity also arises in language of discretion.

[37] Acme shall sell apples or oranges.

[37a] *Acme shall sell apples and not oranges or shall sell oranges and not apples, without alternating from selling one to selling the other.*

[37b] *Acme shall sell apples and not oranges or shall sell oranges and not apples, but it may as often as it wants alternate from selling one to selling the other.*

[37c] *Acme shall sell apples or oranges and may sell both concurrently.*

The Effect of Adjectives

11.66 With *and*, another form of ambiguity associated with *or* is that which derives from (1) adjectives that modify a noun and are linked by *or* (*temporary or part-time employees*) and (2) nouns that are modified by adjectives and linked by *or* (*temporary employees or part-time employees*).

CUMULATION OF ATTRIBUTES

11.67 first, determining the meaning conveyed by adjectives in an *or*-coordination requires considering what this manual refers to as "cumulation of attributes." For example, [38] raises the question whether termination of an Acme employee who is both a temporary employee *and* a part-time employee would mean that Tango has complied with the obligation expressed in [38]. If [38] is understood as conveying the meaning of [38a], that would mean Tango has complied; if it's understood as conveying the meaning of [38b], that would mean Tango hasn't complied.

> [38] Tango shall terminate the employment of one Acme temporary or part-time employee.
>
> [38a] *Tango shall terminate the employment of one Acme employee who is temporary or part-time or both.*
>
> [38b] *Tango shall terminate the employment of one Acme employee who is temporary or part-time but not both.*

11.68 More generally, the question raised by [38] is whether an *or*-coordination featuring attributes that aren't mutually exclusive applies to anything that combines those attributes. The issue of cumulation of attributes arises in connection with not only adjectives but also adjectival phrases; see

for example the sample language in 13.421. But it doesn't arise in the case of *or*-coordination featuring mutually exclusive attributes, for example *full-time or part-time employee*—an employee cannot be both full-time and part-time at the same time.

11.69 If a provision applies to anything exhibiting one of two or more attributes in an *or*-coordination, economy of hypothesis would suggest that it also applies to anything exhibiting any combination of those attributes. That presumption might be strong enough that it wouldn't be reasonable to describe the alternative meanings of [38] as rising to the level of ambiguity—it's hard to imagine why the parties would intend that terminating an Acme employee who is both temporary and part-time, as opposed to terminating an Acme employee who is one or the other, wouldn't represent compliance with that obligation. So if you wish to preclude cumulation of attributes, it would be reckless not to make that explicit by using language analogous to [38b].

11.70 Making it explicit that you can cumulate attributes would preclude a disgruntled contract party from arguing otherwise. Whether making that explicit is worthwhile involves balancing the added certainty against the cost, namely the extra effort involved in having the drafter articulate that you can cumulate attributes and having the reader digest it (see 11.120).

PLURAL NOUNS

11.71 Examples [39] and [36] demonstrate the ambiguity in a provision using a plural noun modified by adjectives that are joined by *or*. Just as [26] exhibits a greater number of possible meanings than does [25], use of language of discretion results in [40] exhibiting a greater number of possible meanings than does [39]. The variants of [39] and [40] don't reflect the alternative meanings relating to cumulation of attributes—each variant would give rise to two cumulation-of-attributes alternative meanings.

[39] Tango shall terminate the employment of Acme's temporary or part-time employees.

[39a] *Tango shall terminate the employment of those Acme employees who are temporary or those Acme employees who are part-time.*

[39b] *Tango shall terminate the employment of all those Acme employees who are temporary and all those Acme employees who are part-time.*

[40] Tango may terminate the employment of Acme's temporary or part-time employees.

[40a] *Tango may terminate the employment of no fewer than all Acme employees who are temporary or no fewer than all Acme employees who are part-time.*

[40b] *Tango may terminate the employment of one or more of those Acme employees who are temporary or one or more of those Acme employees who are part-time.*

[40c] *Tango may terminate the employment of no fewer than all those Acme employees who are temporary and no fewer than all those Acme employees who are part-time, but Tango shall not terminate the employment of all the employees in one group without also terminating the employment of all the employees in the other group.*

[40d] *Tango may terminate the employment of one or more of those Acme employees who are temporary and may terminate the employment of one or more of those Acme employees who are part-time.*

11.72 An alternative to having a plural noun modified by two or more adjectives would be to

repeat the noun for each adjective, as in *temporary employees or part-time employees*. Using that *or*-coordination in [39] would have the effect of eliminating the ambiguity, because the meaning conveyed by [39b] wouldn't be possible, leaving as the only possible meaning that of [39a]. Using that *or*-coordination in [40] would have the same effect, leaving only the two alternative meanings arising from use of language of discretion with plural nouns.

"AND/OR"

11.73 Since the mid-20th century, judges and legal-writing commentators have railed against use of *and/or* to convey the meaning of the inclusive *or* (see 11.35). But given all that ails traditional contract language, it seems that *and/or* has gotten more than its fair share of spittle-flecked invective. And *and/or* does have a specific meaning—*X and/or Y* means *X or Y or both*. One could conceivably use *Acme may dissolve Subsidiary A and/or Subsidiary B* as an alternative to [13b].

11.74 *X or Y or both* is clearer than *X and/or Y*. (Depending on how *X* and *Y* are worded, it may be preferable to use the structure *one or both of X and Y*, or even *one or both of the following: X; and Y*.) And drafters sometimes use *and/or* when the only possible meaning is that conveyed by *or*: *Acme shall incorporate the Subsidiary in Delaware and/or New York.*

11.75 Furthermore, it's confusing to use *and/or* in language of obligation or language of prohibition, with the obligation or prohibition in effect being stated two different ways. Instead of *Acme shall purchase Widget A and/or Widget B*, say *Acme shall purchase Widget A or Widget B and may purchase both*.

11.76 Also, if *and/or* is used to link more than two items, it would be clear whether the *or* is inclusive or exclusive (see 11.46). In other words, *A, B, and/or C* could mean either *one or all of A, B, and C* or *one or more of A, B, and C*. One suspects that usually the latter meaning is intended.

11.77 Given these issues, don't use *and/or*. If you find that using *and/or* in a provision offers significant economy, that's a sign that you should consider restructuring the provision.

"AND . . . OR"

11.78 When in any string of three nouns (as in [41]), verbs, adjectives, or adverbs the first and second are separated by *and* and the second and third are separated by *or*, or vice versa, the meaning varies depending on which conjunction "has scope over" the other. See *CGEL*, at 1279–80. In [41], either *or* has scope over *and* (with the choice being between Able and Baker on the one hand and Charlie on the other) or *and* has scope over *or* (with the choice being between Baker and Charlie).

[41] Acme shall hire Able and Baker or Charlie.

[41a] *Acme shall hire (1) Able and Baker or (2) Charlie.*

[41b] *Acme shall hire either Able and Baker or Charlie.*

[41c] *Acme shall hire Able and Baker, on the one hand, or Charlie, on the other hand.*

[41d] *Acme shall hire (1) Able and (2) Baker or Charlie.*

[41e] *Acme shall hire Able and either Baker or Charlie.*

[41f] *Acme shall hire Able, on the one hand, and Baker or Charlie, on the other hand.*

11.79 Enumeration, as in [41a] and [41d], is the simplest way to eliminate this ambiguity. Alternatively, you could use *either* to mark the beginning of the first coordinate in an *or*-coordination, with [41b] as a variant of [41a] and [41e] as a variant of [41d]. A third solution is to use *on the one hand . . . on the other hand* (see 13.487), as in [41c] and [41f], and as in the following example:

any other transaction involving Parent or any Restricted Subsidiary, on the one hand, and Invest Bank or any of its Affiliates, on the other hand

11.80 For an example of legislation featuring this kind of ambiguity, see California Corporations Code § 313, which refers to the effect of a document "signed by the chairman of the board, the president *or* any vice president *and* the secretary, any assistant secretary, the chief financial officer or any assistant treasurer" of a corporation (emphasis added).

11.81 The question is, does the "or" have scope over the "and," or is it the other way around? If the "or" has scope over the "and," the document has to be signed by (1) the chairman, (2) the president, or (3) both (A) any vice president and (B) one of the secretary, any assistant secretary, the chief financial officer, or any assistant treasurer. If the "and" has scope over the "or," the presumption of authority is established if the document in question is signed by (1) the chairman, the president, or any vice president and (2) the secretary, any assistant secretary, the chief financial officer, or any assistant treasurer. California courts have held that the latter meaning is the one intended (see *Snukal v. Flightways Manufacturing, Inc.*, 23 Cal. 4th 754, 3 P.3d 286 (2000)), but it would be preferable to have the statute preclude alternative meanings.

11.82 Another example of this kind of ambiguity can be found in Montana Code Annotated § 61-4-503, which refers to "any defect or condition that substantially impairs the use *and* market value

or safety of the motor vehicle to the consumer" (emphasis added).

"EVERY," "EACH," AND "ANY"

1.83 *Every* is used to refer to all of the individual members of a set without exception. *Each* means every one of two or more people or things, regarded and identified separately. Use of both words in *each and every* (see 1.60) is an indication of the overlap between the two words.

1.84 In certain contexts, one can use *every* and *each* without risk of ambiguity; [42] is an example. But if you use language of discretion, as in [43], *every* and *each* become ambiguous. The effect would be the same if in [43] you were to say instead *all vehicles*.

[42] Acme shall purchase [every] [each] vehicle included in the Roe Assets.

[43] Acme may purchase [every] [each] vehicle included in the Roe Assets.

[43a] *Acme may purchase no fewer than all vehicles included in the Roe Assets.*

[43b] *Acme may purchase one or more of the vehicles included in the Roe Assets.*

11.85 *Any* exhibits similar ambiguity, except that it manifests itself in language of obligation (see [44]). Analogous to the use of *any* in [44] to convey the meaning of [44a] is how *any* is used in the sentence *Take the name of any person who comes through the door*: the speaker presumably had in mind that *any* means "every," with the added implication that no one might come through the door. And analogous to use of *any* in [44] to convey the meaning of [44b] is how it's used in *Pick any card*—the reasonable interpretation is that one is being invited to pick a single card. By contrast, with language of discretion (see [45]) the question is whether the drafter intended *any* to mean "one," as in [45a], or "one or more," as in [45b].

[44] Acme shall purchase any vehicle included in the Roe Assets.

[44a] *Acme shall purchase no fewer than all vehicles included in the Roe Assets.*

[44b] *Acme shall purchase one of the vehicles included in the Roe Assets.*

[45] Acme may purchase any vehicle included in the Roe Assets.

[45a] *Acme may purchase only one of the vehicles included in the Roe Assets.*

[45b] *Acme may purchase one or more of the vehicles included in the Roe Assets.*

11.86 *Every*, *each*, and *any* are also ambiguous in the context of a sentence expressing failure or inability. Example [46] is an example of such a sentence; it could have the meaning of either [46a] or [46b].

[46] "Disability" means the Employee's inability to perform [every] [each] [any] duty under this agreement.

[46a] *"Disability" means the Employee's ability to perform no duties under this agreement.*

[46b] *"Disability" means the Employee's inability to perform one or more duties under this agreement.*

A CASE STUDY

11.87 The nuances of ambiguity of the part versus the whole are sufficiently intricate that one could sympathize with anyone who would rather ignore the topic. But drafters ignore this kind of ambiguity at their peril, as it creates confusion in practitioners, clients, and judges.

11.88 A noteworthy example of that is the opinion by the U.S. Court of Appeals for the Third Circuit in

Meyer v. CUNA Mutual Insurance Society, 648 F.3d 154 (3d Cir. 2011). Because its flawed analysis caused the court to find ambiguity in an insurance policy—a kind of contract—where a reasonable reader would have found none, the court decided the case incorrectly. This case offers some general lessons in how to handle ambiguity of the part versus the whole.

Background

Plaintiff Meyer, a railroad employee, purchased a credit disability insurance policy from defendant CUNA Mutual Group in connection with Meyer's purchase of a car with financing provided by a credit union. Under the policy, CUNA would make car-loan payments on Meyer's behalf if he was deemed disabled. After Meyer injured himself on the job, CUNA made his car payments for approximately three years, then notified Meyer that it would be stopping the payments: Meyer no longer met the definition of "Total Disability," as stated in CUNA's policy, in that Meyer's doctors had determined that he could return to work in some capacity.

Here's how "Total Disability" was defined in the policy:

during the first 12 consecutive months of disability means that a member is not able to perform substantially all of the duties of his occupation on the date his disability commenced because of a medically determined sickness or accidental bodily

injury. After the first 12 consecutive months of disability, the definition changes and requires the member to be unable to perform any of the duties of his occupation or any occupation for which he is reasonably qualified by education, training or experience.

Meyer responded to CUNA's stopping payments on the car by filing a class action with the District Court for the Western District of Pennsylvania. He argued that the policy language was unambiguous and meant that after the first 12 consecutive months, he qualified as totally disabled if he could show either that (1) he was unable to perform the duties of his occupation or (2) he was unable to perform the duties of any occupation for which he was reasonably qualified by education, training, or experience. By contrast, CUNA argued that for the post-12-month period, the "any occupation" standard applied.

The district court granted Meyer's motion for partial summary judgment, holding that the definition of the term "Total Disability" was ambiguous and so should be construed in favor of Meyer. CUNA appealed; the Third Circuit affirmed.

The Third Circuit's Analysis

In its opinion, the Third Circuit noted that contract language is ambiguous when it's reasonably susceptible of being understood in different ways; that ambiguous language in an insurance policy should be construed against the insurance company;

and that words in an insurance policy "should be construed in their natural, plain and ordinary sense."

11.94 After considering the dictionary definition of *or* and citing two cases, the court concluded that "The commonly used and understood definition of 'or' suggests an alternative between two or more choices." In other words, the *or* was, to use the court's terminology, disjunctive rather than conjunctive. The court found unpersuasive the caselaw cited by CUNA to support its interpretation. The court noted that its conclusion that Meyer's interpretation was reasonable was bolstered by the fact that CUNA could have avoided any ambiguity by using the word *and* instead of *or* to convey that it indeed intended a conjunctive meaning. The court summarized its position as follows: "Based on our analysis of a plain reading of the language and common, disjunctive meaning of the word "or," we find that Meyer's interpretation is not unreasonable."

11.95 The court went on to decline to accept arguments to the effect that CUNA's interpretation was consistent with the relevant Pennsylvania statute and industry practice. It also rejected, on the grounds that the "substantially all" standard of the first half of the definition differed from the "any" standard of the second half, the argument that the meaning sought by Meyer would result in the same standard applying to both the first 12 months and the following period.

31.96 The court noted a "potential contextual defect" that arises from attributing a disjunctive meaning to the *or* in question—it renders meaningless the second part of the provision relating to the period after the first 12 months. That caused the court to conclude that the definition is ambiguous and that CUNA's interpretation too was reasonable. But the court held that due to Pennsylvania's policy of construing against the insurer any ambiguities in an insurance policy, the meaning claimed by Meyer was the one that applied.

What Are the Possible Meanings?

31.97 The Third Circuit accepted Meyer's argument that the definition applied to him because he was unable to perform any of the duties of his occupation—all that was required for him to fall within the scope of the definition was that his inability apply to one of the alternatives presented.

31.98 The court's reasoning is deficient in terms of how it determined the possible alternative meanings and which should apply. The approach taken by the Third Circuit is broadly comparable to that taken by other courts, but that doesn't make it any less mistaken. In relying on the dictionary definition of *or* and caselaw that was essentially irrelevant, the Third Circuit failed to consider unavoidable nuances of the English language. A broader analysis is required, one that recognizes that the ambiguity associated with *or* is a complex issue of English usage rather than a narrow legal question.

11.99 As a first step in such an analysis, let's consider the possible alternative meanings. Here's the relevant portion of the definition (emphasis added):

[a member is] unable to perform any of the duties of his occupation *or* any occupation for which he is reasonably qualified by education, training or experience.

11.100 By analogy with [30a], a natural interpretation of the language at issue in *Meyer* is the following:

[a member is] unable to perform any of the duties of his occupation and [a member is] unable to perform any of the duties of any occupation for which he is reasonably qualified by education, training or experience.

11.101 This is the meaning advocated by CUNA. The only other possible meaning is that advanced by Meyer, which is analogous to [30c]. (Because negation is inherent in unable rather than achieved by using not, a meaning analogous to [30d] isn't possible.)

Is CUNA's Meaning Reasonable?

11.102 The language at issue gives rise to two alternative meanings isn't enough to make it ambiguous. For that to be the case, each alternative meaning would have to be reasonable. Given that *CGEL* acknowledges the reading giving rise to the meaning advanced by CUNA (see 11.44), any court

should be willing to hold that that meaning is a reasonable one.

But the Third Circuit pointed to use of "any occupation" in the language at issue rather than "any other occupation" as an argument against CUNA's interpretation.

Reading the phrase conjunctively, one could argue that inclusion of continued coverage if one cannot perform "any of the duties of one's former occupation" is redundant or unnecessary if "duties of any occupation for which one is reasonably qualified" includes one's own occupation.

The court was correct—omitting *other* does render superfluous the reference to "his occupation," and drafters should aim to avoid redundancy. But omission of *other* doesn't leap out at the reader—in everyday English it's commonplace to link with *or* a reference to a member of a class and a reference to the entire class, without carving out that member—for example, *I can't eat ice cream or any dairy products*. (In speech, you would stress the *any*.)

And more importantly, that overlap is benign—the meaning conveyed by the whole is unaffected. So the court had no basis for hinting that omission of *other* brings into question whether the language at issue conveys CUNA's meaning.

Is Meyer's Meaning Reasonable?

11.107 By contrast, Meyer's meaning is problematic—if you assume that the *or* is disjunctive, the remainder of the definition is rendered superfluous.

11.108 Understanding how this plays out requires first considering a second potential ambiguity in the definition of "Total Disability"—the alternative meanings conveyed by the word *any*, which can mean one of a number of items, or all of them (see 11.85).

11.109 The word *any* occurs twice in the language at issue. The phrase "any of the duties of his occupation" could be taken to mean *one of* the member's duties, but the context makes it clear that the intended meaning is *all* duties—the standard for the first 12 months refers to substantially all duties, and it's clear that the intention was to make the standard for the following period more onerous.

11.110 The second instance of *any* occurs in the phrase "any occupation for which he is reasonably qualified." This could be taken to mean "one of the occupations for which he is reasonably qualified." But that would suggest that inability to perform the duties of a single occupation—say, truck driver—would be enough to satisfy the second part of the standard relating to the post-12-month period. The member's ability to perform any number of other occupations would be irrelevant. But it would be nonsensical to allow the member to meet the requirements for total disability simply by finding a single occupation that the member is unable to

perform the duties of. Instead, the phrase makes sense only if it's understood as referring to all occupations for which the member is qualified.

With that in mind, if you accept that the language at issue conveys Meyer's meaning, a member who is unable to perform any of the duties of his former occupation wouldn't have to worry about establishing that no suitable occupation remained available to him. The court said as much:

If he cannot perform any of the duties of his occupation, construing 'or' disjunctively, he is qualified for coverage, and there is no need to move to the second part of the clause—whether he can perform the duties of any occupation for which he is qualified—to determine coverage.

And the court noted that second part of the language at issue is similarly superfluous if the member is able to perform any of the duties of his former occupation:

If, on the other hand, an insured can perform one or more tasks of his former occupation, he is not qualified for coverage and there is no need to look to the second part of the clause because he has already failed to qualify for coverage—his own occupation is a subset of any occupation for which he is qualified.

So accepting Meyer's meaning requires that you disregard the second part of the language at issue. As a matter of contract interpretation, that's deeply problematic, particularly when compared to

the benign overlap in CUNA's meaning caused by the absence of *other*. If the meaning that you seek to apply to a provision renders redundant half that provision, the only possible conclusion is that the meaning doesn't make sense—that it's unreasonable.

The court noted that "Courts should not distort the meaning of the language or strain to find an ambiguity," but that's exactly what the Third Circuit did in nevertheless endorsing Meyer's meaning. It blithely dismissed the problem as a "potential contextual defect," offering in support of its disregard of the redundancy only one case, one that has only the most remote bearing on the issue.

Mixing Analyses of Different Meanings

The court capped its flawed analysis by concluding that the redundancy inherent in accepting Meyer's meaning "does lead us to find that the phrase is capable of being understood in more than one sense and that a conjunctive interpretation is also reasonable." That doesn't make sense. When weighing the reasonableness of alternative possible meanings, you consider them independently. The defects in one possible meaning go only to its reasonableness—they don't serve to bolster the reasonableness of the other possible meaning. The conclusion that follows from the redundancy required by Meyer's meaning is that Meyer's meaning is unreasonable, not that CUNA's meaning is somehow made more palatable.

Similarly, it didn't make sense for the court to conclude that reasonableness of Meyer's meaning was bolstered by the court's mistaken view that CUNA could have avoided any ambiguity by using the word *and* instead of *or*. Again, the ostensible weakness of one alternative meaning doesn't serve to bolster the reasonableness of another alternative meaning.

PRACTICAL CONSIDERATIONS

The Third Circuit's analysis of the contract language at issue in *Meyer* has lessons to offer drafters.

The Risks

Meyer serves as a reminder that if you draft contracts, it would be reckless of you not to be alert to ambiguity of the part versus the whole. Unless you're attuned to it, the odds are that you'll be oblivious to alternative possible meanings unless they give rise to a dispute.

Meyer is one of many cases in which judges have shown themselves ill-equipped to analyze issues relating to ambiguity of the part versus the whole. The judge in *Meyer* instead relied on a dictionary definition, something judges are increasingly doing. See Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. Times, June 13, 2011, at A11. That's usually a poor substitute for the semantic acuity required to rigorously parse

confusing contract language. So don't expect judges to be equipped to sort out in a sensible manner any part-versus-the-whole mess you create.

Whether to Eliminate Alternative Meanings

11.120 The court's opinion in *Meyer* serves as a reminder that drafters should consider how far to go in seeking to avoid ambiguity of the part versus the whole.

11.121 Alternative meanings caused by *or* and *and* are virtually inescapable in contract language. Consider two components of the definition of "Total Disability" that weren't at issue in *Meyer*. The definition refers to "a medically determined sickness or accidental bodily injury." Does that mean that disability that is due to both sickness and injury doesn't fall within the definition? And consider the reference to "any occupation for which he is reasonably qualified by education, training or experience." Does that mean that if the member is qualified because of some combination of education, training, and experience, it would be irrelevant for purposes of the definition?

11.122 You could revise contract language to eliminate the possibility of alternative meanings, but that would make it more wordy. If any alternative meanings aren't reasonable, you could elect to leave the language as is, on the grounds that the limited risk of ambiguity doesn't warrant the extra verbiage. For example, it would be outlandish to revise the definition of "Total Disability" to rule out the

possible meanings suggested in the immediately preceding paragraph.

But you cannot expect courts to be equipped to determine whether the alternative meanings of a given provision are reasonable and so give rise to ambiguity—after all, the court in *Meyer* wasn't. If an alternative meaning appears unreasonable but could result in mischief if misconstrued by a court, the cautious drafter should consider redrafting that provision to eliminate the alternative meaning. The meaning attributed by Meyer to the language at issue in his dispute perhaps represents just such an alternative meaning.

[47] and [48] provide examples of the sort of judgment calls required when determining whether to eliminate possible alternative meanings. Each example expresses two possible meanings, but anyone inclined to recommend that a drafter restructure them to eliminate one of those meanings should consider two factors. First, of the two possible meanings of each example, one is clearly the more natural, namely [47a] and [48a]. Second, given the extra verbiage required to avoid ambiguity, prose stylists would likely steer clear of [47a] and [48a]. Whether to eliminate a possible meaning involves a balancing—whether conscious or not—of expediency and risk, and in a particular contract expediency might well trump risk.

> [47] The Seller has complied with all laws applicable to the Business and the Acquired Assets.

[47a] *The Seller has complied with all laws applicable to the Business and all laws applicable to the Acquired Assets.*

[47b] *The Seller has complied with each law applicable to both the Business and the Acquired Assets.*

[48] The Seller has complied with all laws applicable to the Business or the Acquired Assets.

[48a] *The Seller has complied with each law applicable to the Business or the Acquired Assets.*

[48b] *The Seller has complied with all laws applicable to the Business or all laws applicable to the Acquired Assets.*

11.125 Incidentally, note how [47a] and [48a] convey the same meaning. That happens when alternative meanings arise in a provision whether you use *and* or *or* and the most likely meaning using *and* is identical to the most likely meaning using *or*. This adds an ironic twist to analysis of alternative meanings associated with *and* and *or*.

Drafting to Avoid Alternative Meanings

11.126 Let's also offers a lesson to companies seeking to put their contract process on a more

efficient footing. It's ironic that the language at issue was compiled as part of an effort by CUNA to make its policies easier to read. In addition to the three sets of alternative meanings included in, and omission of the word *other* from, the second sentence of the definition, the definition as a whole isn't a model of clarity.

11.127 The following version eliminates the alternative meanings and restores the missing *other*.

due to sickness or accidental bodily injury, as determined by a physician, (1) the member is unable to perform substantially all the duties of the member's occupation (applies only during the first 12 consecutive months of that disability) and (2) the member is able to perform none of the duties of the member's occupation and each other occupation for which the member is reasonably qualified by education, training, or experience (applies thereafter).

11.128 It's often the case that instead of requiring just targeted adjustments of the sort discussed in this chapter, eliminating alternative part-versus-the-whole meanings becomes part of broader redrafting.

CHAPTER 12

SYNTACTIC AMBIGUITY

12.1 Syntactic ambiguity arises principally out of the order in which words and phrases appear and how they relate to each other grammatically. (See 11.2 for an explanation of the conventions used in the numbered example sentences in this chapter.)

MODIFIERS

12.2 A modifier is a word or phrase that changes the meaning of a word or phrase to which it is grammatically related. Modifiers can lead to ambiguity in various ways.

Modifiers Preceding or Trailing Two or More Nouns

PRECEDING MODIFIERS

12.3 It is often unclear whether a modifier that precedes two or more nouns modifies all the nouns or only the first. For example, in [1] *children's* could modify just *apparel*, or it could modify all three nouns. If the former is the intended meaning, using enumeration, as in [1a], would eliminate the ambiguity. So would using semicolons, as in [1b],

although that's a bit less clear than using enumeration.

[1] Acme may sell in the Stores only children's apparel, accessories, and footwear.

[1a] *Acme may sell in the Stores only (1) children's apparel, (2) accessories, and (3) footwear.*

[1b] *Acme may sell in the Stores only the following: children's apparel; accessories; and footwear.*

[1c] *Acme may sell in the Stores only accessories, footwear, and children's apparel.*

[1d] *Acme may sell in the Stores only children's apparel, children's accessories, and children's footwear.*

[1e] *Acme may sell in the Stores only the following items for children: apparel, accessories, and footwear.*

12.4 Another way to avoid ambiguity when you intend that a preceding modifier modify only one of a series of nouns would be to put that noun last, as in [1c]. If instead the modifier modifies all the nouns, you could repeat it before each noun, as in [1d], or you might be able to be more economical, as in [1e].

12.5 *Agency Commercial Associates, LLC v. Lopax, Inc.*, 869 N.E.2d 310 (Ill. App. Ct. May 4, 2007), provides a good example of how a preceding modifier can create ambiguity leading to a dispute. Here's the contract language that was at issue: "any fast food . . . restaurant or restaurant facility whose principal food product is chicken on the bone, boneless chicken or chicken sandwiches." The question was whether the preceding modifier, "fast food," modified just "restaurant" or modified both "restaurant" and "restaurant facility."

TRAILING MODIFIERS

12.6 Similarly, it's often unclear whether a clause that follows two or more nouns (a "trailing" modifier) modifies all the nouns or only the last one. In [2], it's not clear whether the $500,000 limit applies to just capital expenditures or to debt and capital expenditures. When faced with such ambiguity, a court may well apply the "rule of the last antecedent," which is an arbitrary principle of interpretation that states that a qualifying phrase is to be applied to the word or phrase immediately preceding it and shouldn't be interpreted as modifying others more remote.

[2] Acme shall not incur any debt or make any capital expenditure in excess of $500,000.

[2a] *Acme shall not do any of the following: incur any debt; or make*

any capital expenditure in excess of $500,000.

[2b] *Acme shall not do any of the following:*

(1) incur any debt; or

(2) make any capital expenditure

in excess of $500,000.

[2c] *Acme shall not make any capital expenditure in excess of $500,000 or incur any debt.*

[2d] *Acme shall not incur any debt in excess of $500,000 or make any capital expenditure in excess of $500,000.*

12.7 Enumeration by itself cannot rectify the ambiguity caused by a trailing modifier, since the trailing modifier would not be isolated in one enumerated clause—nothing would preclude a reader from assuming that it modifies all the enumerated clauses, not just the final one.

12.8 If a trailing modifier modifies just the last noun, you can make that clear using semicolons, as in [2a], although as with [1b], that's not as clear as it might be. If it modifies all nouns, you'd need to add tabulation too, as in [2b]. But tabulation mainly serves to make clauses that are relatively lengthy and complex easier to read by breaking them out

(see 4.34). Tabulating short clauses might eliminate ambiguity but it doesn't make them easier to read and can be a waste of space. Furthermore, if the trailing modifier modifies each of the nouns, tabulation would result in the trailing modifier being positioned flush left underneath the tabulated clauses, as in [2b]. Such "dangling" text is awkward (see 4.37).

12.9 If you intend that a trailing modifier modify only one of a series of nouns, another way to avoid ambiguity would be to put that noun first, as in [2c]. If instead you intend that the modifier modify all the nouns, repeating the trailing modifier after each noun, as in [2d], would make that clear.

12.10 *Anderson v. Hess Corp.*, 649 F.3d 891 (8th Cir. 2011), involved a dispute caused by a trailing modifier. In the mineral leases at issue, the phrase "drilling or reworking operations" occurred several times. In this context, is "drilling" a noun, or is it an adjective modifying "operations"? In other words, the question posed was, according to the court, "whether the term 'engaged in drilling or reworking operations' included 'drilling operations' and 'reworking operations,' or 'drilling' and 'reworking operations'." This was a significant distinction, as to engage in drilling you would have to actually drill into the ground, whereas "drilling operations" could include activities other than drilling.

12.11 This instance of syntactic ambiguity generated a couple of years' worth of litigation. That could have been avoided had the drafter referred to

"drilling operations or reworking operations" or "reworking operations or drilling," depending on which meaning was intended.

PRECEDING AND TRAILING MODIFIERS

12.12 When sets of nouns are modified by both preceding and trailing modifiers, four different meanings are possible; [3] represents a simple example of this. If the intention is that the trailing modifier *qualified to do business in New York* not modify the first noun phrase *Delaware corporations*, the simplest way to make that clear would be to switch the order of the noun phrases, as has been done in [3a] and [3b]; if the opposite is intended, the simplest way to avoid ambiguity on that score would be to repeat the trailing modifier, as in [3c] and [3d]. These changes also have the effect of eliminating the ambiguity caused by the preceding modifier *Delaware*. In [3a] and [3c] *Delaware* modifies *LLCs* as well as *corporations*; that's made clear by repeating the adjective *Delaware*. In [3b] and [3d] it does not; that's made clear by switching the order of the noun phrases.

[3] Delaware corporations and LLCs qualified to do business in New York

[3a] *Delaware LLCs qualified to do business in New York and Delaware corporations*

[3b] *LLCs qualified to do business in New York and Delaware corporations*

[3c] *Delaware corporations qualified to do business in New York and Delaware LLCs qualified to do business in New York*

[3d] *LLCs qualified to do business in New York and Delaware corporations qualified to do business in New York*

12.13 Ambiguity caused by a trailing modifier was one of the issues raised in *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 813 (Del. Ch. 2007), a case about a $6.6 billion transaction that failed to close. The contract at issue contained the following language:

. . . and in no event shall the Company seek equitable relief or seek to recover any money damages in excess of such amount from [the RAM entities and related entities].

12.14 The plaintiff, United Rentals, argued that that the trailing modifier "in excess of such amount" modified not only the phrase "seek to recover any money damages" but also went farther back up the sentence and modified the phrase "seek equitable relief." The defendants argued that that interpretation was unreasonable. From a drafting perspective, what matters is not which meaning is the more likely but that meaning was disputed at all.

Modifiers Occurring Between Two or More Nouns

12.15 When a modifier follows one noun in a string of nouns, as in [4], it can be unclear whether the subsequent nouns are incorporated in the modifier or are grammatically equivalent to the noun that precedes the modifier. This ambiguity can be remedied in various ways. You could use enumeration, as in [4a] and [4b]. Or you could enclose the modifier in parentheses, as in [4c] and [4d]. Or, if the intent is to have the modifier not incorporate any of the nouns that follow, you could move the modifier and the noun that it modifies to the end of the string of nouns, as in [4e], although that's less clear than the other alternatives, given the potential for confusion inherent in trailing modifiers (see 12.6). You could also use tabulation, but as explained in 12.8 that approach isn't recommended.

[4] Widgetco shall sell to Acme the Roe Assets, excluding the Smith Assets, the Jones Assets, and the Doe Assets.

[4a] *Widgetco shall sell to Acme (1) the Roe Assets, excluding the Smith Assets, (2) the Jones Assets, and (3) the Doe Assets.*

[4b] *Widgetco shall sell to Acme the Roe Assets, excluding (1) the Smith Assets, (2) the Jones Assets, and (3) the Doe Assets.*

[4c] *Widgetco shall sell to Acme the Roe Assets (excluding the Smith Assets), the Jones Assets, and the Doe Assets.*

[4d] *Widgetco shall sell to Acme the Roe Assets (excluding the Smith Assets, the Jones Assets, and the Doe Assets).*

[4e] *Widgetco shall sell to Acme the Jones Assets, the Doe Assets, and the Roe Assets, excluding the Smith Assets.*

Squinting Modifiers

12.16 A modifier is described as "squinting" if it's not clear whether it modifies what comes before or what comes after. In [5], *within 10 days* could refer to the time by which Acme has to reject any Asset or the time by which the Seller has to reimburse Acme. Although placing a comma before the modifier, as in [5a], or after the modifier, as in [5b], would go a long way toward indicating which meaning was intended, it can be risky to rely only on a comma to avoid ambiguity (see 12.34). It would be clearer to resolve the ambiguity by moving the modifier; in [5c], the modifier occurs twice, in revised form, to convey both possible meanings.

[5] If Acme rejects any Asset within 10 days the Seller shall reimburse Acme that portion of the Purchase Price allocated to that Asset.

[5a] *If Acme rejects any Asset within 10 days, the Seller shall reimburse Acme that portion of the Purchase Price allocated to that Asset.*

[5b] *If Acme rejects any Asset, within 10 days the Seller shall reimburse Acme that portion of the Purchase Price allocated to that Asset.*

[5c] *If no later than 10 days after the Closing Acme rejects any Asset, the Seller shall no later than 10 days after receiving the notice of rejection reimburse Acme that portion of the Purchase Price allocated to that Asset.*

12.17 Because they require particularly clumsy drafting, squinting modifiers are rare in contracts.

Modifiers of Uncertain Length

12.18 Ambiguity can also arise when it's unclear whether a modifier incorporates a following relative clause. In [6], the modifier could be either *not constituting a Product* or *not constituting a Product that* . . . . The simplest way to eliminate the ambiguity would be to place the modifier in a conditional clause, as in [6a] and [6b]. (The intended meaning is that in [6a].)

[6] Acme may sell at any Store any item of apparel not constituting a Product that Widgetco has at any time during the previous 12 months sold at any of the stores that Widgetco operates.

[6a] *Acme may sell at any Store any item of apparel, on condition that it does not constitute a Product that Widgetco has at any time during the previous 12 months sold at any of the stores that Widgetco operates.*

[6b] *Acme may sell at any Store any item of apparel that Widgetco has at any time during the previous 12 months sold at any of the stores that Widgetco operates, on condition that the item does not constitute a Product.*

Poorly Placed Modifiers

12.10 An objective reading of [7] would suggest that the modifier *no later than five Business Days after the closing of the related sale* relates to when Galactic has to designate an account. The drafter had in fact intended that the modifier serve to indicate the timing for delivery of the Proceeds; that would have been better accomplished by moving to the front of the sentence a slightly revised version of the modifier, as in [7a].

[7] The Sellers shall deliver the Proceeds to Galactic by wire transfer of immediately available funds to an account designated by Galactic no later than five Business Days after the closing of the related sale.

[7a] *No later than five Business Days after the closing of a sale, the Sellers shall deliver the Proceeds of that sale to Galactic by wire transfer of immediately available funds to an account designated by Galactic.*

12.20 A similar problem afflicts [8]: an objective reading would suggest that the modifier *that is in Acme's possession* modifies a *motor vehicle included in the Assets.* The intention had in fact been that it would modify *every certificate of title.* Repositioning the modifier, as in [8a], would have made that clearer.

[8] Acme has provided Widgetco with a copy of every certificate of title relating to a motor vehicle included in the Assets that is in Acme's possession.

[8a] *Acme has provided Widgetco with a copy of every certificate of title that is in Acme's possession relating to a motor vehicle included in the Assets.*

12.21 Analogous to the ambiguity caused by modifiers that precede or trail two or more nouns (see 12.3–14) is the ambiguity that can result when a phrase begins or ends a sentence containing two or more other elements, as in [9] and [9a]: it can be unclear whether the phrase that begins or ends the sentence modifies one or both of the other elements.

12.22 In [9] and [9a] the adverbial phrase *other than in the Ordinary Course of Business* modifies both of the verb clauses in the remainder of the sentence, and if both verb clauses have the same subject, the simplest course would be to combine the verb clauses and place the adverbial phrase in front of the resulting clause, as in [9b]. (Placing the adverbial phrase at the end would not eliminate the ambiguity.) If the adverbial phrase relates to the first verb clause but not the second, place the adverbial phrase after the first verb clause and before the second, as in [9c]. If the adverbial phrase relates to the second verb clause but not the first, reverse the order of the verb clauses and place the adverbial phrase after what had previously been the second verb clause and is now the first, as in [9d].

[9] Other than in the Ordinary Course of Business, Acme shall not incur debt and Acme shall not make any capital expenditures.

[9a] Acme shall not incur debt and Acme shall not make any capital

expenditures, other than in the Ordinary Course of Business.

[9b] *Other than in the Ordinary Course of Business, Acme shall not incur debt or make any capital expenditures.*

[9c] *Acme shall not incur debt other than in the Ordinary Course of Business or make any capital expenditures.*

[9d] *Acme shall not make any capital expenditures other than in the Ordinary Course of Business or incur any debt.*

12.23 This limiting modifier was at issue in a dispute between two Canadian companies. In 2002, the cable unit of Rogers Communications Inc., a telecommunications company, entered into a contract with Aliant Inc., (now Bell Aliant Regional Communications) in which Aliant agreed to string Rogers cable lines across utility poles for an annual fee per pole. But in 2005, Aliant informed Rogers that it wished to terminate the contract and increase its rates. Rogers objected, on the grounds that the contract couldn't be terminated until after the first five-year term. Aliant disagreed, claiming that the agreement could be terminated at any time on one year's notice.

12.24 The contract between the parties had been drafted by Canadian regulators. Here's the language that was at issue:

Subject to the termination provisions of this Agreement, this Agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.

12.25 The dispute concerned whether the closing modifier—the phrase "unless and until terminated by one year prior notice in writing by either party"—modified both preceding clauses or just the immediately preceding clause.

12.26 The dispute reached the Canadian Radio-television and Tele-communications Commission. Echoing an argument offered by Aliant, the Commission noted that based on "the rules of punctuation," the presence of a comma immediately before the word "unless" meant that the closing modifier modified both preceding clauses. That initially led the Commission to side with Aliant in concluding that under the contract Aliant could terminate on one year's notice during the initial five-year term. In invoking that comma, the Commission might have been relying on a variation on the rule of the last antecedent (see 12.6) to the effect that if a closing modifier is preceded by a comma, it modifies more than just what precedes it.

12.27 The Commission's finding made the news, with headlines such as "The Comma That Costs 1 Million Dollars (Canadian)." The author of this manual, acting as expert witness for Rogers

Communications, submitted an affidavit to the Commission stating that the presence of a comma could not reasonably be used to resolve the ambiguity created by the closing modifier. Regarding the possible significance of the two commas in the language at issue, see 12.35.

12.28 On appeal, the Commission was able to find in favor of Rogers without having to revisit the question of punctuation. Instead, it decided that the dispute should be governed by the French-language version of the contract, which provided for a markedly different, and more sensible, arrangement than that in the English-language version.

12.29 For another dispute involving a closing modifier, see *Payless Shoesource, Inc. v. Travelers Companies, Inc.*, 585 F.3d 1366 (10th Cir. 2009).

Closing Modifiers with Offsetting Commas

12.30 A subset of closing modifiers is a closing modifier that a drafter seeks to link with one or both of two preceding components by using offsetting commas. Omitting one or both offsetting commas from a sentence can greatly affect its meaning.

12.31 For example, if the commas in [11] are included, *of the Asset that is the subject of the Claim* is semantically linked to *the Redemptive Value*; without the commas, it could be linked to *as of the Cut-off Date*.

> [11] Acme shall pay Roe 100% of the Redemptive Value [,] as of the

Cut-off Date [,] of the Asset that is the subject of the Claim.

12.32 If you include the comma in [12], the commas make it clear that the sentence addresses expenses incurred in redeeming the Excluded Assets; if you omit the commas, it could be read as addressing only expenses incurred in redeeming any Grantor's interest in the Excluded Assets.

[12] Alpha shall promptly reimburse BCSC any expenses incurred by BCSC in redeeming [,] or protecting any Grantor's interest in [,] the Excluded Assets.

12.33 If you include the comma in brackets, the security interest granted in [13] covers only the inventory that Roe sold to Acme; if you omit the comma, the security interest covers all inventory.

[13] Acme grants Roe a security interest in all Acme inventory, including but not limited to all agricultural chemicals, fertilizers, and fertilizer materials [,] that Roe sold to Acme.

12.34 It's best to avoid drafting a provision in such a way as to give great significance to the presence or absence of a comma—it's too easy to misconstrue the intended meaning. For example, in *Shelby County State Bank v. Van Diest Supply Co.*, 303 F.3d 832 (7th Cir. 2002), the court, in interpreting language analogous to [13], ignored the

absence of a comma and held that the security interest covered only a subset of all inventory.

12.35 Furthermore, if what comes before the first comma of a pair of ostensibly offsetting commas can stand on its own, as opposed to requiring what follows the second offsetting comma for completion (as in the case of [12]), that makes it debatable whether the commas are, in fact, offsetting. The language at issue in the dispute between Rogers and Aliant (see 12.24) features two commas. They could be considered offsetting commas linking to the initial five-year period the right to terminate on giving one year's notice. But one could equally argue that the commas are independent, with each serving its own syntactic function, so that there's nothing to link the closing modifier to what precedes the first comma. This type of ambiguity is another reason to be wary of commas.

ONE WAY TO ELIMINATE POTENTIAL OFFSETTING-COMMA CONFUSION

12.36 Consider the following:

The Vendor will not be liable to Acme or any Buyer, and neither Acme nor any Buyer will be liable to the Vendor, for any damages that are not a reasonably foreseeable consequence of breach.

12.37 The offsetting commas indicate that the closing modifier *for any damages* . . . is meant to modify both *The Vendor will not* . . . and *neither Acme nor any Buyer will* . . . . But someone might be willing to argue the point and claim that the

Vendor isn't liable to Acme or any Buyer, period. (These potential alternative meanings resemble the ambiguity noted in 12.24–25.)

12.38 as is, this provision could cause a reader miscue—you might not realize that the opening phrase isn't self-contained until after you encounter the second comma and what follows. So it would be clearer to revise this provision to read as follows:

The Vendor will not be liable to Acme or any Buyer for, and neither Acme nor any Buyer will be liable to the Vendor for, any damages that are not a reasonably foreseeable consequence of breach.

12.39 By moving *for* before each comma—in effect subdividing a single prepositional phrase, namely *for any damages . . .*—you make it clear that in both instances something is yet to come. That makes life easier for the reader and eliminates any possibility of confusion.

12.40 You could eliminate the potential confusion in other ways—for example, by using two separate sentences. But depending on the context, the economy offered by an offsetting-commas structure might make it more efficient to tweak that structure instead of scrapping it in favor of a different approach.

"THAT" AND "WHICH"

Background

12.41 Good drafting, like good writing, requires that you distinguish between restrictive clauses and nonrestrictive clauses. Authorities on general English usage recommend using *that* for restrictive clauses and comma-*which* for nonrestrictive clauses.

12.42 In the sentence *The cakes that George baked were delicious*, the clause *that George baked* is restrictive, in that it gives essential information about the preceding noun (*cakes*) so as to distinguish it from similar items with which it might be confused (cakes baked by someone else).

12.43 By contrast, in the sentence *The cakes, which George baked, were delicious*, the clause *which George baked* is nonrestrictive, in that it gives us supplemental information that doesn't further delimit the meaning of the preceding noun; we are being told that not only are the cakes delicious, it so happens that George baked them. Use of *which* and the offsetting commas serves to tell us that the clause constitutes an aside.

Current Usage

12.44 Many drafters don't observe a clear distinction between *that* and *which.* In contracts, *which* is often used instead of *that* in restrictive clauses: *There is no fact known to any Credit Agreement Party or any of its Subsidiaries which* [read *that*] *has had, or could reasonably be expected to have, a Material Adverse Effect.*

12.45 Sometimes comma-*which* is used instead of *that: In the case of an assignment to a Purchasing*

Lender, which [read *Purchasing Lender that*] *is an Affiliate of the assigning Lender, that assignment will be effective between that Lender and its Affiliate . . . .*

12.46 sometimes *which* is used instead of *that* and is preceded by the closing comma of a subordinate clause, which makes the restrictive clause look even more like a nonrestrictive clause: "*Pension Plan*" *means any Employee Benefit Plan, other than a Multiemployer Plan, which* [read *Multiemployer Plan, that*] *is subject to the provisions of Title IV of ERISA or section 412 of the Code . . . .*

12.47 the case of nonrestrictive clauses, the comma is sometimes inappropriately dropped before *which*: *All outstanding promissory notes issued by the Borrower to the Existing Lenders under the Existing Credit Agreement must be promptly returned to the Administrative Agent which* [read *Agent*, *which*] *shall forward them to the Borrower for cancellation*. (*That* cannot be used instead of *which* in nonrestrictive clauses.)

12.48 Inconsistent use of *that* and *which* in restrictive and nonrestrictive clauses can result in ambiguity. In [10], the clause *which are subject to section 4.3* could be a restrictive clause using *which* instead of *that*; were that the case, the intent would not have been that the clause constitute an aside, but instead that it serve to limit the scope of the exception. [10a] uses *that* instead of *which*, to make it clear that one is dealing with a restrictive clause. If

the clause were instead a nonrestrictive clause with a comma missing in front of *which,* the exception would apply to *all Assumed Contracts*, and the clause would essentially serve as a cross-reference. [10b] inserts a comma in front of *which*, to make it clearer that one is dealing with a nonrestrictive clause.

> [10] This section 4.7 applies to all Contracts other than Assumed Contracts which are subject to section 4.3.
>
> [10a] *This section 4.7 applies to all Contracts other than Assumed Contracts that are subject to section 4.3.*
>
> [10b] *This section 4.7 applies to all Contracts other than Assumed Contracts, which are subject to section 4.3.*

12.49 inconsistent usage also means that a court might not take a given usage at face value. For example, in *AIU Insurance Co. v. Robert Plan Corp.*, 836 N.Y.S.2d 483 (Sup. Ct. 2006), the court concluded that a comma-*which* in the contract language at issue was restrictive, even though, as the court acknowledged, authorities recommend that comma-*which* be used to introduce a nonrestrictive clause.

Recommendation

For two reasons, it's best not to use nonrestrictive clauses in contracts.

First, the *AIU Insurance* case suggests that even if you use *that* for restrictive clauses and comma-*which* for nonrestrictive clauses, your drafting wouldn't be immune from the confusion between restrictive and nonrestrictive clauses. That's because any nonrestrictive clause risks being construed as a restrictive clause, as happened in *AIU Insurance.* By contrast, it would seem less likely that a restrictive clause would be construed as being a nonrestrictive clause.

Second, and more importantly, a nonrestrictive clause typically gives supplemental, nonessential information. Contract prose isn't the place for nonessential asides—you should either tackle an issue head-on or omit it entirely.

Also use *that* rather than *which* in restrictive clauses. If you were to use *which*, all that would distinguish a restrictive clause from a nonrestrictive clause is the presence or absence of a comma. That's asking for trouble.

But in some contexts using *that* rather than *which* in a restrictive clause might not be enough to avoid confusion. For example, even as revised, the definition in 12.46 could result in confusion as to whether *that* modifies *any Employee Benefit Plan* or *a Multiemployer Plan*, as all that points to *that* modifying *any Employee Benefit Plan* is the comma before *that*. The simplest way to make it clearer that

that is the intended meaning would be to put parentheses around *other than a Multiemployer Plan*.

THE SERIAL COMMA

12.55 When the last two elements in a series of three or more are joined by a conjunction (*and* or *or*), a comma used immediately before the conjunction is commonly referred to as a serial comma or Oxford comma.

12.56 American English, use of the serial comma is standard except in journalistic writing; *The Chicago Manual of Style*, at 6.18, strongly recommends using the serial comma. But in British English it's standard to do without the serial comma. This manual recommends using the serial comma to avoid the ambiguity described in this section.

Inadvertent Combined Elements

12.57 One kind of ambiguity that can result from omitting the serial comma is that the reader might be uncertain whether the last two elements in the series constitute a combined element. Consider this sentence: *John ordered the following flavors of ice cream: chocolate, vanilla, strawberry, chocolate chip* [,] *and cherry*. Without the serial comma, the reader would be entitled to wonder whether chocolate chip and cherry were two separate flavors or one mixed flavor; the serial comma makes it clear that they're separate flavors.

12.58 consider this sentence: *John ordered the following flavors of ice cream: chocolate, vanilla, strawberry, raspberry and chocolate chip* [,] *and cherry.* Without the serial comma, the reader would be entitled to wonder whether the combined flavor is raspberry and chocolate chip or is chocolate chip and cherry; the serial comma makes it clear that it's the former.

Inadvertent Apposition

12.59 Omitting the serial comma can also result in the reader seeing apposition—two noun phrases side by side, with one serving to define the other—where no apposition had been intended.

12.60 Consider the following book dedication: *To my parents, Ayn Rand* [,] *and God.* With the serial comma, the dedication tells the reader that the book is dedicated three ways. Without the serial comma, the reader could think either that the book is dedicated three ways or that the book is dedicated to the writer's parents, who happen to be Ayn Rand and God. The latter meaning is obviously ludicrous, but change the elements and real confusion could result.

12.61 But the serial comma can also create ambiguity. Consider the following adjusted version of the dedication: *To my mother, Ayn Rand* [,] *and God.* With the serial comma, the reader could understand the dedication as meaning either that the book is dedicated three ways or that the book is dedicated to the writer's mother, who happens to be

Ayn Rand, and to God. Omitting the serial comma makes the latter meaning less likely.

12.62 The presence or absence of a serial comma can give rise to contract disputes. *Telenor Mobile Communications AS v. Storm LLC*, 587 F. Supp. 2d 594, 605–08 (S.D.N.Y. 2008), is a case involving alternative meanings due to absence of a serial comma. At issue was the following definition of "control" in a shareholders agreement:

[C]ontrol (including, with its correlative meanings, "controlled by" and "under common control with") shall mean, with respect to any Person, the possession, directly or indirectly, of power to direct or cause the direction of management or policies (whether through ownership of securities or partnership or other ownership interests, by contract or otherwise) of a Person.

12.63 The litigants offered two different meanings for the phrase in the second set of parentheses. One argued that "by contract or otherwise" referred to the sources of ownership rights. The other argued that the phrase listed the three sources of "power to direct or cause the direction of management or policies." The court held that the latter meaning was the more reasonable one, but it noted that including a serial comma before "or otherwise" would have made that clearer.

12.64 For the drafter, the simplest approach would be always to use the serial comma in a list of three or more items, while watching for

circumstances in which a serial comma creates ambiguity rather than resolves it.

12.65 if you want to use apposition, you shouldn't rely on omitting or including the serial comma to achieve it. Instead, restructure the provision. For example, instead of the example in 12.61, you could say *To God and to Ayn Rand, who is my mother*.

12.66 more generally, contracts have little need for apposition, which gives rise to needless elaboration (see 1.55). For purposes of a contract, it would be redundant to refer to your parents and then identify them as Ayn Rand and God.

CHAPTER 13

SELECTED USAGES

"ACTION OR PROCEEDING"

13.1 It's commonplace for drafters to use the phrase *action or proceeding*, as in *any legal action or proceeding arising out of this agreement*.

13.2 *Proceeding* encompasses *action*. For example, *Black's Law Dictionary*, quoting an 1899 source, notes that *proceeding* "is more comprehensive than the word 'action,'" and 1A *Corpus Juris Secundum* Actions § 22 says "The term 'proceeding' is broader than the word 'action.'"

13.3 So nothing is gained by using *action or proceeding* rather than simply *proceeding*.

"AFFILIATE" AND "SUBSIDIARY"

13.4 A provision that applies to affiliates or subsidiaries of a party can give rise to confusion if it's not made clear whether it applies only to those affiliates or subsidiaries who were such when the contract was signed, as opposed to when the provision is being applied. That type of confusion gave rise to the dispute featured in *GTE Wireless,*

Inc. v. Cellexis International, Inc., 341 F.3d 1 (1st Cir. 2003).

13.5 To avoid such confusion, adjust the provision in question or a related definition. The following definition contains two adjustments (shown in italics) intended to make it clear that its scope isn't limited to the time of signing:

"**Subsidiary**" means, with respect to a given Person *at a given time*, a . . . legal entity of which that Person or one of that Person's Subsidiaries . . . *then* owns . . . .

13.6 See 2.88 regarding why it's preferable not to include affiliates and subsidiaries in the definition of the defined term for a party name.

"ALLONGE"

13.7 According to *Black's Law Dictionary, allonge* means "A slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." (An indorsement serves to transfer or guarantee a negotiable instrument or to acknowledge payment.) *Black's Law Dictionary* gives 1859 as the date of earliest usage, so *allonge* is a relative newcomer. It's obscure and studiously foppish; *indorsement supplement*, *indorsement addendum*, or *indorsement certificate* are clearer alternatives. A further problem with *allonge* is that it has come to have another meaning: you see it used instead of *amendment* for

purposes of promissory notes, as in the title *FIRST ALLONGE TO PROMISSORY NOTE*. Use *amendment* instead. (This other use is an example of how the meaning of obscure terms of art can drift. Another example of that is *attorn*; see 13.56.)

"ANNIVERSARY"

13.8 *Anniversary* means a day that marks the occurrence of an event on that date in a previous year, but it's also used informally to mark a milestone in months or even weeks. The latter use of *anniversary* is routine in contracts, and eliminating it results in prose that's not only more logical but also more concise. Here's an example:

The Company shall redeem this debenture in 24 equal installments of principal and accrued interest monthly beginning ~~on the one-month anniversary following~~ [*read* one month after] the First Closing Date.

13.9 Silly but nonetheless commonplace is *12-month anniversary*, as in *ending on the 12-month anniversary of the Termination Date*. Because 12 months make a year, the phrase *12-month* is superfluous.

"ANNUAL MEETING"

13.10 It's generally accepted that an annual meeting doesn't have to take place on the same day every year. So what does *annual meeting* mean? The

notion that *annual meeting* should mean roughly 365 days apart is hopelessly vague: how many days can you add or subtract before your meeting no longer qualifies as annual? The meaning of *annual meeting* was at issue in *Airgas, Inc. v. Air Products & Chemicals, Inc.*, 8 A.3d 1182 (Del. 2010).

13.11 Avoiding this uncertainty would require being more specific. You could, for example, specify that a meeting qualifies as the annual meeting for a given year if it's held anytime in that year.

"APPLICABLE"

13.12 The adjective *applicable* is used in contracts in three different ways.

"Applicable" Plus Noun

13.13 Sometimes *applicable* is used before a noun; in this context, it means "whichever is relevant." It's possible to use *applicable* appropriately in this manner:

The Company shall provide the Employee with pension and welfare benefits and group employee benefits such as sick leave, vacation, group disability, and health, life, and accident insurance, and any similar indirect compensation offered generally to the Company's executive personnel, subject in each case to the terms of the *applicable* benefit plan or program.

13.14 often, as in the three examples that follow, *applicable* should be omitted. That's because it inappropriately suggests that the provision applies to a subset of a whole, whereas in fact it applies to the whole.

Recipient shall pay all ~~applicable~~ taxes incurred in connection with the Consultant's performance of services under this agreement.

Conveyance of the Mortgage Notes and the Mortgages by the Company under this agreement is not subject to the bulk transfer laws of any ~~applicable~~ jurisdiction.

Acme's execution and delivery of this agreement and performance of its obligations under this agreement do not violate any ~~applicable~~ law.

13.15 often *applicable* is used where greater precision is called for:

The Company shall pay the Employee a bonus of $33,000 not later than 30 days after each of the first three anniversaries of the Commencement Date, *on condition that the Employee is employed by the Company on the applicable anniversary* [read *except that the Company will not be required to make a payment with respect to a given anniversary if the Employee is then no longer employed by the Company*].

The Verb "To Be" Plus "Applicable"

13.16 *Applicable* is also used with the verb *to be*. Generally, you would be better off instead using the verb *apply*, as in the following examples. If you have a choice, it's better to use verbs rather than adjectives or abstract nouns (see 17.7).

The provisions of this section 7.2 will *be applicable* [read *apply*] solely to work that the Tenant performs, or causes to be performed, before the Commencement Date.

Any such modification or revocation will be effective upon receipt by the Advisor of notice of that modification or revocation and will not *be applicable* [read *apply*] to investment transactions to which the Advisor has committed the Company before the date the Advisor receives that notice.

Any adjustment in the Applicable Margin will *be applicable* [read *apply*] to all Extensions of Credit then existing or subsequently made or issued.

"As Applicable"

13.17 The phrase *as applicable* is unobjectionable. It's equivalent to, but a little more succinct than, the phrase *as the case may be* (see 13.53):

The terms of this warrant will apply to the shares of stock and other securities and property received on exercise of this warrant after consummation of that reorganization, consolidation, or merger or the effective date of dissolution following any such transfer, *as applicable*.

"ARISING OUT OF OR RELATING TO"

Implications

13.18 The phrase *arising out of or relating to* is a fixture of contracts. It's primarily associated with dispute-resolution provisions (notably governing-law provisions, forum-selection provisions, and arbitration provisions), which routinely state that they cover all matters "arising out of or relating to" the contract in question. For example, the American Arbitration Association's standard arbitration clause refers to "Any controversy or claim arising out of or relating to this contract." The phrase also features in provisions that seek to limit liability.

13.19 What's the concern that use of the phrase is intended to address:

13.20 If the parties to a transaction get into a dispute, any claims they bring against each other might be based on the contract between them. Alternatively, the parties might bring other kinds of claims: a tort claim, such as a claim for misrepresentation; a claim challenging a patent; or a claim authorized by statute.

13.21 Contracts offer predictability in business transactions. It follows that drafters would likely be inclined to arrange matters so that a contract's provisions cover all possible disputes, not just those grounded in contract. (Whether that's in fact a good idea would depend on the circumstances.) And it's

not surprising that drafters should avail themselves of *arising out of or relating to*, as *arising out of* expresses a narrower meaning than does *relating to*. Think of how one arises out of one's parents but is related to a broader group of people.

13.21 Is *arising out of or relating to* the best way to articulate this intended meaning? In a passage relating to drafting arbitration provisions, Morton Moskin, *Commercial Contracts: Strategies for Drafting and Negotiating* § 5.04[D][1] (2012) (citations omitted), summarizes the conventional wisdom regarding *arising out of or relating to*:

> It is essential that an arbitration clause cover precisely the subject matter that the parties intend to be submitted to arbitration. In most contracts that provide for arbitration, the parties intend that all disputes arising out of or relating to the contract be subject to arbitration, and in the United States the phrase "arising out or relating to" has become the model for broad arbitration clauses. Also effective is the phrase "in connection with." By using a more limited description—e.g., one which covers only disputes "arising out of" the contract, and not those "relating to" the contract—the parties create the risk that a court will conclude that the parties did not intend the clause to be broad and, in particular, intended to exclude tort claims, which may be considered to "relate to" the contract but not to "arise out of" the contract.

13.22 It would indeed be a good idea to state precisely the types of claims that are to be submitted

to arbitration. But instead of precision, *arising out of or relating to* uses two vague standards that offer little predictability as to what falls within the scope of the provision.

13.24 In particular, invoking the broader *relating to* standard could result in a party's being unpleasantly surprised by the consequences of something unexpectedly falling within the scope of a provision. Imagine that in drafting a contract you provide that California law will govern all disputes *arising out of* it, since you know that from your perspective, California law would treat more favorably a key issue under the contract. But you also provided that California law will govern all disputes *relating to* the contract. Thereafter, you find yourself embroiled in a tangential dispute that you hadn't anticipated, and you certainly didn't check the pros and cons of having that particular dispute governed by California law. In such a context, *relating to* could represent a roll of the dice.

13.25 For a case in which a party unsuccessfully argued that a dispute didn't fall within the scope of an arbitration provision that used *related to*, see *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI, 2011 WL 2650689 (N.D. Cal. July 6, 2011).

An Alternative Approach

13.26 If you want to bring a broad but predictable set of claims within the scope of a provision, it would make sense to focus not on the contract but

instead on the activities that the parties will be engaging in as part of the transaction contemplated by the contract. That would allow you to dispense with *or relating to*, as you wouldn't need to make the leap from contract claims to other claims—any claim, whatever its nature, would necessarily have to arise out of the activities that the parties would be engaging in under the contract.

13.27 could articulate this meaning by using *arising out of the subject matter of this agreement*, but you would be trading one kind of vagueness for another—there's no shortage of litigation as to what *the subject matter of this agreement* means for purposes of a given contract. You would be better off instead saying what the subject matter of the contract is.

13.28 example, if you're dealing with a confidentiality agreement, you could say *any disputes arising out of this agreement or the Recipient's handling, disclosure, or use of any Confidential Information*.

13.29 if you want to make sure that a fee-shifting provision in a limited-liability-company operating agreement would apply to proceedings seeking dissolution, then instead of referring to "any action or proceeding brought to enforce any provision of this Agreement," refer to "any dispute arising out of this agreement, ownership of any Interest, or management or operations of the Company." Regarding the dispute over the scope of the narrower alternative, see *Henderson v.*

Henderson Investment Properties, L.L.C., 148 Idaho 638, 227 P.3d 568 (2010).

13.30 This approach allows you to articulate clearly the intended meaning. Instead of establishing an overly narrow set—the contract—and relying on a vague standard to reach beyond it, you establish the relevant set—activities under the contract.

13.31 Plenty of courts have had occasion to assess the meaning of *arising out of or relating to*, but that hasn't served to make it any less vague. You can count on its continuing to blindside contract parties and their lawyers.

13.32 If in fact you want to limit the scope of a dispute-resolution provision to claims arising under the contract, it would be reckless to assume that using only *arising out of* would accomplish that. Instead, include a provision excluding extracontractual liability (see 3.292).

"AS AMENDED"

13.33 The phrase *as amended* can be used in a contract to modify references to statutes or to other contracts, as in *Acme shall comply with the Securities Act*. It's standard practice for drafters to tack on *as amended* after each such reference, the idea being to ensure that at any time compliance is measured against the statute or contract as it is then in effect.

13.34 Adding *as amended* serves no purpose: compliance with a statute or contract could be measured against the statute or contract only as it is then in effect, even without *as amended*.

13.35 In a contract dated November 3, 2013, you say that since January 1, 2011, Acme has complied with the Securities Act, it would be unreasonable to interpret that to mean that throughout that period Acme complied with the Securities Act not as then in effect but as in effect in 1933 or on the date of the contract. You can't comply with a version of a statute that no longer exists or a version that has yet to exist.

13.36 And if in that same contract you say "Acme shall comply with the Securities Act," it would be unreasonable to interpret that to mean that thereafter complying with the Securities Act as in effect in 1933 or on the date of the contract, regardless of any subsequent amendments, would constitute compliance with that obligation. Again, you can't comply with a version of a statute that no longer exists.

13.37 A contract might also refer to a statute or another contract not with respect to compliance but instead with respect to an element of that statute or contract.

13.38 For example, a contract might refer to a term as it is defined in a statute or other contract. If the intent is to freeze the definition as it is on the date of the agreement, then refer to the statute or the

other agreement *as in effect on the date of this agreement*. If the intent is to incorporate any future amendments to the definition, then refer to the statute or the other agreement *as in effect at any time*. (Simply saying *as amended* wouldn't serve to specify the time that you're referring to. Saying *as amended from time to time* wouldn't represent much of an improvement—*from time to time* means "once in a while" (see 3.199), whereas one amendment could be immediately followed by another. Using *as in effect* in the recommended language makes more sense than using *as amended*, as at the time in question the statute or contract might not have been amended.)

13.39 When in a contract you're referring to an element of a statute or another contract, make it clear whether you're referring to the statute or the other contract as in effect on the date of the contract you're drafting or as in effect at any time in the future. But when referring to compliance with a statute or another contract, don't tack on *as amended*.

"AS CONSIDERATION"

13.40 In addition to featuring in the traditional recital of consideration (see 2.147), the word *consideration* is used in the body of the contract, particularly in language effecting a release. There are better alternatives. Here are some examples of use of *consideration* in release language:

As additional *consideration* for the assignment made under this agreement, the Assignee hereby releases the Assignor . . .

In *consideration* of the payments made and benefits provided under this agreement, and except for any claims the Executive has under this agreement, the Executive (on behalf of himself and his personal representatives) hereby releases the Company . . .

As further *consideration* for the amendments, consents and waivers in this agreement, each Borrower hereby releases the Agent and each Lender . . .

In exchange for the above-referenced *consideration*, the Employee hereby releases . . .

13.41 Consideration references in the body of the contract raise two issues:

13.42 First, whether a contract refers to something as consideration has no bearing on whether as a matter of law it actually is consideration (see 2.146). So saying in the body of the contract that something is consideration accomplishes nothing other than adding a pointless legalism.

13.43 Second, the bargained-for exchange that constitutes consideration usually consists of more than single tit-for-tat promises. Instead, one party exchanges a parcel of promises in exchange for the other party's parcel of promises. Why single out one promise in particular as being supported by consideration?

13.44 it's likely that drafters allude to consideration in release language because often it's an add-on to the deal. Because releases can seem free-standing, drafters are inclined to reiterate the notion of consideration as a means of tying the release to the deal. To accomplish that using the word *consideration*, the simplest alternative would be the phrase *in consideration*, which is used colloquially; it expresses the notion of exchange. But it would be even simpler and clearer to say that the release is *in exchange for* a specified action or promise on the part of the party being released, omitting any mention of consideration.

"AS LIQUIDATED DAMAGES AND NOT AS A PENALTY"

13.45 The phrase *as liquidated damages and not as a penalty* occurs in provisions in which the parties, instead of having actual damages determined in a dispute, specify what damages a party is to pay on breach of a particular obligation.

13.46 *Williston on Contracts*, at § 65:1 (footnotes omitted), provides some background:

Under the fundamental principle of freedom of contract, the parties to a contract have a broad right to stipulate in their agreement the amount of damages recoverable in the event of a breach, and the courts will generally enforce such an agreement, so long as the amount agreed upon is not unconscionable, is not determined to be an illegal

penalty, and is not otherwise violative of public policy.

3.47 If the parties say that a given payment constitutes liquidated damages and not a penalty, doesn't that settle it? Apparently not. According to the *Restatement (Second) of Contracts* § 356 cmt. c (1981), "Neither the parties' actual intention as to its validity nor their characterization of the term as one for liquidated damages or a penalty is significant in determining whether the term is valid."

3.48 It doesn't follow that instead of saying "Acme shall pay Widgetco $3 million, as liquidated damages and not as a penalty," you might as well just say "Acme shall pay Widgetco $3 million." That's because courts have given varying weight to the language used by the parties. See, e.g., *Ludlow Valve Manufacturing Co. v. City of Chicago*, 181 Ill. App. 388 (1913), in which the court said, "The fact that parties fix a sum to be paid in case of a breach of the contract and call that sum 'liquidated damages' is not conclusive, but is one of the circumstances tending to prove the actual intent of the parties." (Recent Illinois cases have cited *Ludlow*, so it's still good law.)

3.49 Because at least some courts pay some attention to how a contract characterizes a payment to be made on breach of an obligation, you should include that sort of characterization when providing for liquidated damages in a contract.

13.50 do more than just trot out *as liquidated damages and not as a penalty*. It's sufficiently rote and terse as to be jargon. Because drafters and their clients don't give it much thought, courts would be entitled not to pay much attention to it either.

13.51 It's a more meaningful way of saying that liquidated damages don't constitute a penalty:

Acme acknowledges that the actual damages likely to result from breach of this section X are difficult to estimate on the date of this agreement and would be difficult for Widgetco to prove. The parties intend that Acme's payment of the Liquidated Damages Amount would serve to compensate Widgetco for any breach by Acme of its obligations under this section X, and they do not intend for it to serve as a penalty for any such breach by Acme.

13.52 It would also be helpful to explain why actual damages are difficult to estimate.

"AS THE CASE MAY BE"

13.53 When in a contract a sentence provides for alternative courses of action, often one or more sentences that follow go on to address the consequences. When the contract is signed it won't be known, for purposes of those following sentences, which of the alternative courses of action will be relevant, so those sentences have to track the alternative scenarios. But they have to make it clear that whichever choice is made with respect to the initial sentence, that choice will flow through to the

sentences that follow. That's the function of *as applicable* (see 13.17) and *whichever applies*, and it's also the function of *as the case may be*:

Able shall transfer the Shares to Baker or Charlie no later than March 31, 2013. No later than five days after that transfer, Baker or Charlie, *as the case may be,* shall enter into a noncompetition agreement with Widgetco in the form of exhibit A.

13.54 It's rare to see *as the case may be* used properly. For one thing, generally you can convey the required meaning more economically. For example, in the above example one could refer to *the transferee* instead of *Baker or Charlie, as the case may be*.

13.55 Often *as the case may be* is misused, in that it's tacked on to an expression of simple alternatives:

"Date of Termination" means the date on which a Covered Change in Control Termination or Covered Termination Prior to a Change in Control occurs~~, as the case may be~~.

"ATTORN"

13.56 *Attornment* is a term of art. Here's how *Garner's Dictionary of Legal Usage*, at 95, defines the related noun:

attornment has two analogous senses, the first relating to personal property and the second relating to land. It may mean either (1) "an act by a bailee in

possession of goods on behalf of one person acknowledging that he will hold the goods on behalf of someone else" . . . ; or (2) a person's agreement to hold land as the tenant of someone other than the original landlord; a tenant's act of recognizing that rent is to be paid to a different person. Both senses are used in [British English] and [American English].

13.57 Although in the United States real-estate lawyers are familiar with *attorn*, it's likely to befuddle anyone else. Some terms of art add unnecessary complexity (see 1.7). *Attorn* is an example of such a term of art—in the context of a provision effecting an attornment, the word *attorn* simply serves to convey consent. Use that word instead:

Tenant shall *attorn* [read *consent*] to any party's succeeding to the Landlord's interest in the Premises, whether by purchase, foreclosure, deed in lieu of foreclosure, power of sale, or otherwise, at that party's request, and shall execute any agreements confirming *that attornment* [read *the Tenant's consent*] as that party reasonably requests.

13.58 Nevertheless you feel you must refer to attornment, use *Attornment* as a section heading.

13.59 Interestingly, in Canada the word *attorn* is also used in connection with consent to a court's having personal jurisdiction. In addition to occurring in legislation and court opinions, it appears in contracts:

The parties to this agreement hereby *attorn* to the nonexclusive jurisdiction of the courts of the Province of Quebec.

Lender hereby irrevocably *attorns* to the nonexclusive jurisdiction of the courts of the Provinces of Ontario in respect of all matters arising out of this power of attorney.

13.60 As with other uses of *attorn*, the problem with this use of *attorn* is that the meaning sought to be conveyed has nothing to do with the doctrinal connotations of *attorn*. Here too, all that's being conveyed is consent.

13.61 The Canadian use of *attorn* in this context highlights two additional problems. First, some Canadian commentary suggests that consenting by contract to the jurisdiction of specified courts doesn't constitute attornment. A term of art can be used inadvertently in contexts that are inconsistent with doctrinal subtleties that are attached to the word, and this use of *attorn* might be an example of that.

13.62 Second, Canadians use *attorn* in a way that drafters in no other jurisdiction do. The result is pointless inconsistency that can create confusion in cross-border transactions.

"AUTOMATICALLY"

13.63 For purposes of contract drafting, *automatically* is often dispensable.

13.64 For example, eliminating *automatically* from each of the following examples wouldn't affect its meaning, as it would nevertheless be clear that the example doesn't involve action by the parties. (A drafter might be inclined to use instead *immediately* in the second and third examples, but even without *immediately*, the reasonable reader would conclude that the result in question would occur all at once.)

. . . and restrictions on any such awards will ~~automatically~~ lapse at midnight at the beginning of the Date of Termination . . .

. . . when that restriction is lifted, that property will ~~automatically~~ become part of the Collateral . . .

On occurrence of a Change of Control, all unvested SARs will ~~automatically~~ vest . . .

13.65 In other contexts *automatically* has a role to play. Consider the following example:

. . . and each January 1 thereafter, this agreement will be [automatically] extended for one additional year unless not later than . . .

13.66 This example is in the passive voice, and the most likely candidate for the missing *by*-agent (see 3.11) is *the parties*. Without *automatically*, this example could conceivably be understood as suggesting that action by the parties would be required to extend the term of the agreement. Adding *automatically* would make it clear that that's not the case.

13.67 Sometimes *automatically* is inappropriate because it suggests that a given action will actually take place, whereas in fact a legal fiction is being established. Legal fictions are best expressed using *deem* (see 13.141):

. . . the distribution terms and Acme's other rights to that payment or benefit *will be automatically* [read *will be deemed to have been*] modified to conform to the tax law requirements to ensure that constructive receipt does not occur.

"BASIS" (INCLUDING "TIMELY")

13.68 Be careful how you use the word *basis*. As noted in *Garner's Modern American Usage*, at 88, it "often signals verbosity in adverbial constructions."

13.69 Instead of *on a daily basis*, try *daily*, as in "Interest will accrue *on a daily basis* [read *daily*]." In other words, use *daily* as an adverb rather than as an adjective. Analogous fixes would take care of *on a weekly basis*, *on a regular basis*, and other such phrases.

13.70 The same applies to *on a pro-rata basis*, as in "Those shares will be allocated *on a pro-rata basis* [read *pro rata*] to the Remaining Holders."

13.71 In *on a timely basis*, *in a timely manner*, and *in a timely fashion*, the word *timely* is used as an adjective. But in American English *timely* can also be used as an adverb, so in the interest of concision you would be better off replacing those phrases with

timely, as in "a material adverse effect on the Company's ability to *perform on a timely basis* [read *timely perform*] its obligations under any Transaction Document." (*Garner's Dictionary of Legal Usage*, at 895, notes that "This adverbial use of *timely* is archaic in [British English].")

13.72 Sometimes eliminating *basis* requires a bigger fix, as in the following example: "Acme shall not enter into any transaction with any Affiliate *unless that transaction is made on an arm's-length basis and* [read *other than an arm's-length transaction that*] has been approved by a majority of the disinterested directors of the Company."

"BECAUSE"

13.73 Contracts serve to regulate conduct rather than explicate, so drafters should have little need for the word *because* in the body of the contract (see 1.59). But *because* does occur in conditional clauses, to express the concept *If X because of Y, then Z*. That raises the possibility of a dispute: does Y have to be the sole cause of X, or is it enough that Y was one of a number of factors contributing to X?

13.74 This is an issue that the U.S. Supreme Court addressed in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), holding that a statute's requirement that an adverse employment action be taken "because of" age meant that a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision.

13.75 Whenever you use *because* in a contract, consider being specific regarding the type of causation required.

"BOOKS AND RECORDS"

13.76 In the standard phrase *books and records*, the word *books* is redundant.

13.77 *Books* could mean corporate books, which *Black's Law Dictionary* defines as "Written records of a corporation's activities and business transactions." Or it could mean books of account, also known as shop books, which *Black's* defines as "Records of original entry maintained in the usual course of business by a shopkeeper, trader, or other businessperson."

13.78 *Black's* doesn't offer a definition of *records*—it's too general a word. But for our purposes, all that matters is that the *Black's* definitions in the previous paragraph lead with the word *records*—books are an example of records. That's why in the phrase *books and records*, the word *books* is redundant.

13.79 If you want to capture the narrower, accounting-related meaning of *books*, you could use *accounting records* (the term used in the UK Companies Act 2006) or *financial records*. Using a narrower term might spare a contract party an unpleasant surprise when the other party asks to audit many types of records.

13.80 Some drafters might be inclined to leave the phrase *books and records* as is, because it features in the Delaware General Corporation Law (particularly in section 220, which addresses the rights of a shareholder to inspect the "books and records" of the corporation), as well as in other statutes. But the vast majority of contract references to "books and records" are unrelated to use of the phrase in statutes. And even if a statute reference to "books and records" were somehow related to a contract, that's no reason to parrot the statute's mushy terminology. If an explicit link to the statute is required, you would be better off saying something like "in accordance with" the statute in question.

"BUY"

13.81 The verb *purchase* is used in contracts more often than the verb *buy*. Given that, generally, simpler words are better, why not use *buy* instead of *purchase*? Here's what that would look like:

Acme hereby *purchases* [read *buys*] the Shares . . .

13.82 Setaside from ingrained habit, an obstacle to making this change might be the noun form of *buy*:

The buying of the Shares . . .

13.83 The gerund *buying* is awkward. By contrast, the noun *purchase* doesn't pose this problem.

13.84 References to a fundamental concept in a contract are easier to read if you use related verb and noun forms to express that concept. It follows that the brevity of the verb *buy* is more than offset by the awkwardness of the noun form of *buy*. Use the verb *purchase*. (For a similar analysis regarding the verb *end*, see 13.180.)

"BYLAWS"

13.85 *Bylaws* is spelled both with and without a hyphen. For example, *Black's Law Dictionary* gives a definition for *bylaw* but notes that it's sometimes spelled *by-law*.

13.86 It appears that *bylaws* is gaining the upper hand. For example, the 1915 edition of *Robert's Rules of Order Revised* used *by-laws* but the current edition of *Robert's Rules of Order Newly Revised* uses *bylaws*. And although its predecessor used *by-laws*, the Massachusetts Business Corporation Act, effective 2004, uses *bylaws*. So this manual recommends that you use *bylaws*.

13.87 according to *Garner's Modern American Usage*, at 124, both the spelling and the sense of *bylaw* differ on the two sides of the Atlantic:

In [American English], *bylaws* are most commonly a corporation's administrative provisions that are either attached to the articles of incorporation or kept privately. In [British English], *bylaws* are

regulations made by a local authority or corporation, such as a town or a railway.

The spelling without the *-e-* is preferred in [American English]. Though etymologically inferior, *byelaw* (sometimes hyphenated) is common in [British English].

"CERTAIN"

13.88 In addition to featuring in the archaism *that certain* (see 13.673), the word *certain*—meaning "not named or described, though definite and perhaps known"—is sometimes used inappropriately in a way that suggests that a subset of a whole is being referred to. Here's one example: *certain assets* [read *the assets*] *listed in schedule B*. Here's another: *Executive may provide certain services* [read *provide services*] *to Acme, if provision of those services does not . . . .*

"CERTIFY"

13.89 The verb *certify* is commonplace in contracts, as in the following sentence: *At the Seller's request, the Customer shall certify in writing to the Seller that the Customer has complied with these requirements.*

13.90 In such contexts, *certify* isn't the best choice. *Black's Law Dictionary* gives as a definition of *certify* "To attest as being true or as meeting certain criteria." That certainly fits, but *certify*

implies a level of formality that isn't necessary in this context—it suggests use of a certificate, which *Black's Law Dictionary* defines as "A document in which a fact is formally attested."

13.01 In the example above, the Customer should be able to meet the obligation in question by sending a one-sentence letter stating that it has done whatever was required. That could be expressed by saying *the Customer shall notify the Seller that . . . .* And if the agreement has a notices provision that says that notices have to be in writing, you wouldn't need to specify that this particular notice has to be in writing.

"CHANGE IN CONTROL" OR "CHANGE OF CONTROL"?

13.02 The phrases *change in control* and *change of control* are equally acceptable, and searches on EDGAR system of the U.S. Securities and Exchange Commission (SEC) and on Google suggest that they're used with similar frequency. But to facilitate copying and pasting between contracts, pick one phrase and stick with it.

"COMPETITIVE"

13.03 The word *competitive* is routinely misused in contracts. That's not surprising, given that it's routinely misused in legal and business writing generally.

13.94 *Competitive* means (1) "of, involving, or based on competition" and (2) "likely to succeed in competition." In the following contract provision, *competitive* is used to express the first meaning:

The Executive acknowledges the highly *competitive* nature of the Company's business.

13.95 In the following contract provision, it's used, albeit awkwardly, to express the second meaning:

The Customer shall give VEM every opportunity to be included on Approved Vendor Lists for materials and components that VEM can supply, and if VEM is *competitive* with other suppliers with respect to reasonable and unbiased criteria for acceptance established by the Customer, the Customer shall include VEM on those Approved Vendor Lists.

13.96 *Competitive* is also used in contexts where the adjective *competing* or the verb *to compete* would be a better fit:

For purposes of this agreement, the term "*Competitive* [read *Competing*] Business" means any business that is similar to or *competitive* [read *competes*] with the business of the Company with respect to which Executive has had direct responsibility.

"COMPLETE AND ACCURATE"

13.97 Generally, you should be able to do without some or all of *complete and accurate*.

13.98 For purposes of an obligation to compile data, it's hard to imagine that data could be accurate without being complete—that, for example, a court might accept the argument that a database containing names of only half of Acme's customers is accurate because the information provided for each of those customers is accurate.

13.99 So you should be able to dispense with *complete*:

Excelsior shall maintain ~~complete and~~ accurate books of account.

The Servicer shall maintain ~~complete and~~ accurate records pertaining to each Contract to enable it to comply with the terms of this agreement.

13.100 But if possible, it would be better to dispense with both *accurate* and *complete*. For example, instead of saying "Acme shall maintain an accurate database containing the following customer information," say "Acme shall maintain a database that lists for all customers the following information." Inherent in that obligation is the requirement that the information be accurate, even if you don't use the word *accurate*.

13.101 *Accurate* wouldn't encompass *complete* for purposes of a provision that seeks to confirm that the data in question satisfy some requirement stated in the agreement:

All information that Acme has furnished to Widgetco in accordance with section 5 is *complete and accurate*.

B.102 More to the point, the section 5 referred to in the previous example presumably states that Acme is required to provide Widgetco with certain information. It would be more economical to address adequacy of that information by referring to Acme's compliance with section 5:

Acme has complied with its obligations under section 5.

B.103 When you're referring to copies of something, you could safely do without both elements of *accurate* and *complete*. After all, *copy* means "a full reproduction." If Acme gives you a photocopy of its certificate of incorporation but omits page 6, Acme would be hard pressed to claim that it had in fact given you a copy. If that makes you nervous, it would make more sense to retain *complete* and dispense with *accurate*.

B.104 It would be unproductive to eliminate one element from *complete and accurate* and then find yourself in a fight over whether the remainder is in fact as comprehensive as you think it is. So first determine whether you can dispense entirely with *complete and accurate*. If you need to retain at least one element, then you might want to retain the entire phrase. Unlike some other redundant synonyms, the only drawback to *complete and accurate* is a couple

of superfluous words. That's a small price to pay for not risking a fight.

"CONSEQUENTIAL DAMAGES"

13.105 Here's a representative example of a provision excluding certain types of damages:

> Neither party will be responsible or held liable for any consequential, special, or incidental losses or damages.

13.106 Sellers routinely ask for such provisions, and buyers routinely accept including them. But many lawyers and their clients have an uncertain grasp of what such provisions are meant to accomplish. A valuable guide to the subject is Glenn D. West & Sara G. Duran, *Reassessing the "Consequences" of Consequential Damage Waivers in Acquisition Agreements*, 63 Business Lawyer 777 (2008) [referred to below as *West & Duran*].

13.107 In the absence of any limitation, generally losses caused by breach of a contract must be a reasonably foreseeable consequence of the breach for a nonbreaching party to recover damages for those losses. So even in the absence of any limitation, contract damages aren't intended to compensate parties for remote losses.

13.108 Understanding the implications of excluding certain types of damages by reference to that baseline is challenging. The terms of art used are, to varying degrees, difficult to define clearly,

given that each term expresses a vague standard and given the inconsistent guidance provided by the wealth of related caselaw in different jurisdictions. Here's a rough guide:

13.109 *Direct damages*. These are best understood as damages that one would reasonably expect to arise from the breach in question, without taking into account any special circumstances of the nonbreaching party; also referred to as "general" damages.

13.110 *Incidental damages*. These are expenses incurred by a buyer in connection with rejection of nonconforming goods delivered by the seller in breach of contract, or by a seller in connection with wrongful rejection by a buyer of conforming goods delivered by the seller to the buyer.

13.111 *Consequential damages*. These are best understood as losses sustained by the nonbreaching party that are attributable to any special circumstances of the nonbreaching party that the parties were aware of when they entered into the contract; in other words, consequential damages encompass all contractually recoverable damages that are neither direct nor incidental damages; also known as "special" damages.

13.112 It's clear what "consequential damages" don't do: they don't compensate a buyer for remote or speculative losses, which shouldn't even constitute losses. But many people are unaware of

that. Here's what *West & Duran*, at 783–84, says on that subject (footnotes omitted):

> [T]o define "consequential damages" as those losses that are so remote that they were beyond the contemplation of the parties at the time they entered into the contract is to define consequential damages as losses for which the law does not allow recovery in contract, regardless of any provision excluding such damages. Yet, many sellers purport to require waivers of consequential damages because they believe consequential damages relate to losses beyond those that the breaching party would have ordinarily and reasonably foreseen or contemplated.
>
> The rules limiting all contractual damages to those that are "natural, probable, and reasonably foreseeable" impose a judicially created "rule of reasonableness" that generally limits the extent to which any damages, including consequential damages, may be awarded for breach of contract. As a result, even in the absence of a contractual waiver of consequential damages, this standard of reasonableness creates limits on the extent of the non-breaching party's recovery for losses that the breaching party did not otherwise specifically agree to bear.

13.113 Given that background, excluding certain types of damages can be unhelpful for the following four reasons:

13.114 *First*, many of those seeking that certain types of damages be excluded assume incorrectly

that otherwise the nonbreaching party would be entitled to recover remote damages.

13.115 Second, the terms of art used in language excluding consequential damages are ill-understood and so are conducive to dispute.

13.116 Third, it can be arbitrary to exclude certain types of damages recoverable under the contract but not others.

13.117 Fourth, some provisions pile on the exclusions in a way that makes no sense. For example, one of the products offered in October 2011 by Rocket Lawyer, a mass-market seller of contract templates, was a confidentiality agreement that included a provision excluding liability for "direct, indirect, special, or consequential damages." But "special" and "consequential" are generally treated as synonyms by courts. And if you exclude "direct" and "indirect" damages, you've effectively excluded all damages. Furthermore, if the recipient discloses confidential information other than as provided in a confidentiality agreement, any damages that the disclosing party suffers would likely consist of consequential damages, so excluding consequential damages would deprive the disclosing party of a meaningful remedy.

13.118 As noted in *West & Duran*, at 781, "While sellers have legitimate concerns over their potential liability for breach . . . , there are other means of addressing those concerns without the use of terms that have such uncertain meanings." Given the

problems with conventional provisions excluding damages, drafters should consider using instead language that addresses the seller's concerns directly. Here's an example:

Neither party will be liable for breach-of-contract damages that the breaching party could not reasonably have foreseen on entry into this agreement.

13.119 *Ver & Duran*, at 806, in effect endorses this approach: "Instead of waiving 'consequential' damages, buyers should seek waivers of 'remote' or 'speculative' damages." This provision simply states what a court would likely conclude anyway, but that has value, given that many sellers don't understand that a buyer is entitled to only those damages that are foreseeable.

13.120 If that doesn't satisfy the seller—it wants to exclude some otherwise recoverable damages—you could put an absolute cap on damages as an alternative to engaging in the arbitrary and uncertain exercise of excluding certain types of damages.

13.121 If nevertheless you want to limit certain types of damages, consider that it would be simpler to describe what damages are included rather than those that are excluded. In the case of sale of goods, presumably you would articulate, without using those terms of art, expectancy damages (the value of the thing promised less the value of the thing delivered) and cover (the cost of causing the thing

delivered to conform to the promise), with perhaps a cap built in.

13.122 If you also, or instead, want to exclude certain types of damages, it would be best not to use the phrase *consequential damages*, given the widespread confusion as to what it actually means. And from the seller's perspective, it's risky to rely on an exclusion of consequential damages, as courts are prone to holding that elements of damages that the seller might have intended to exclude are in fact direct rather than consequential. See, for example, two English cases, *GB Gas Holdings Ltd v. Accenture (UK) Ltd* [2009] EWHC 2734 (Comm) and *McCain Foods (GB) Ltd v. Eco-Tec (Europe) Ltd* [2011] EWHC 66.

13.123 Instead, be specific as to what you're excluding. Don't use legal terms of art; instead, refer to "lost profits" or whatever other types of damages are of concern. But whatever types of damages you include, think through the implications. To get a sense of what that might involve, see *West & Duran*, which at 795–804 explores two hypothetical situations and the different types of damages involved.

13.124 Finally, a buyer might be more willing to live with a limited range of damages if it's entitled to liquidated damages.

"CONTRACTUAL"

13.125 The adjective *contractual*, meaning "of, pertaining to, or secured by a contract," is an awkward mouthful. It's nevertheless routine to see it in contracts.

13.126 Instead of, for example, *contractual terms* and *contractual obligations*, say *contract terms* and *contract obligations*.

13.127 And rather than referring to *contractual instruments* or *contractual arrangements*, just say *contracts*.

"COSTS AND EXPENSES"

13.128 The couplet *costs and expenses* occurs routinely in contracts, as in the following example:

If an action is instituted to collect this Note, the Company shall pay all *costs and expenses*, including reasonable attorneys' fees and costs, incurred in connection with that action.

13.129 *Black's Law Dictionary* says that *expense* means "An expenditure of money, time, labor, or resources to accomplish a result; esp., a business expenditure chargeable against revenue for a specific period." By contrast, it defines *costs* more narrowly, as "The charges or fees taxed by the court, such as filing fees, jury fees, courthouse fees, and reporter fees."

13.130 In other words, costs are a type of expense. It follows that the couplet *costs and expenses* is

analogous, semantically, to *trousers and clothing*—you can do without one of the two elements. Refer instead to *court costs, other litigation costs, and any other expenses* (or some variation), or drop *costs* and use only *expenses*.

"COUPLED WITH AN INTEREST"

13.130 It's commonplace for a power of attorney to use the phase *coupled with an interest* to describe the nature of that power. Often *coupled with an interest* is used with *irrevocable*, as in *This power of attorney is coupled with an interest and will be irrevocable for the term of this agreement and thereafter as long as any of the Obligations remain outstanding*.

13.131 It's likely that many drafters who use *coupled with an interest* don't know what it means. According to 3 *Am. Jur. 2d* Agency § 60, "If the authority or power of an agent is coupled with an interest, it is not revocable by the act, condition, or death of the principal before the expiration of the interest, unless there is some agreement to the contrary between the parties."

13.132 "[i]n order for a power to be irrevocable because coupled with an interest, the interest must be in the subject matter of the power and not in the proceeds which will arise from the exercise of the power." 3 *Am. Jur. 2d* Agency § 62. For example, in one case the court held that death of the principal terminated the authority of a real-estate

agent to sell on commission, on the grounds that the authority wasn't a power coupled with an interest in the property on which the power was to operate. See *Crowe v. Trickey*, 204 U.S. 228, 240 (1907). (For further such cases, see M.T. Brunner, Annotation, *What Constitutes Power Coupled with Interest Within Rule as to Termination of Agency*, 28 A.L.R.2d 1243 § 2 (1953 & 2012 Supp.).)

13.134 In many powers of attorney, the drafter might well have given no thought as to whether the agent had an interest in the subject matter.

13.135 Furthermore, to determine whether in a given case an interest exists that makes the power irrevocable, courts look at the parties' entire agreement and the circumstances of their relationship. The terminology used by the parties isn't controlling—just saying that a power is coupled with an interest doesn't make it so. 3 *Am. Jur. 2d* Agency § 62; 28 A.L.R.2d 1243 § 2[c].

13.136 It's not a viable alternative simply to say that the power will survive the death of the principal. Unless a power is coupled with an interest, as a matter of law it will cease at the principal's death, even if the power contains a specific provision to the contrary. 3 *Am. Jur. 2d* Agency § 62.

13.137 Before saying that a power of attorney is coupled with an interest, ask yourself whether the power needs to last beyond the death or incompetence of the principal. If it doesn't, then

dispense with *coupled with an interest*—simply saying that the power is irrevocable will serve your purpose.

13.138 If the power does need to survive beyond the death or incompetence of the principal, you should next ask yourself whether the agent has an interest in the subject matter of the power. If the agent does not, *coupled with an interest* likely won't do you any good.

13.139 If the agent does have an interest in the subject matter of the power, then you might want to make the power of attorney clearer by adding, instead of one of the standard formulas, something along the lines of the following: [*The principal*] *acknowledges that this power of attorney is coupled with an interest, in that the agent has an interest in* [*refer to whatever is the subject of the power*]. *As a result, in addition to any other consequences under law, this power is irrevocable and will survive* [*the principal's*] *death or incompetence.*

13.140 The recommended language would make it clear that the question of whether the power is coupled with an interest is a matter of law rather than something that can be agreed to by the parties. It would also ensure that the parties understand the implications of the power's being coupled with an interest. This approach is at odds with the principle that you should never say the same thing twice in a contract (see 1.62), but the benefits outweigh that concern.

"DEEM"

13.141 In contracts, *deem* means to treat a thing as that which it is not or might not be, or as possessing certain qualities that it does not or might not possess. In other words, it's used to create a legal fiction.

13.142 In contracts, *deem* is generally used in the passive and almost always with *shall*, as in *Any notice given by personal or courier delivery shall be deemed given on delivery.* Because no duty is being imposed, it's inappropriate to use *shall* with *deem*. Instead, *deem* is used with language of policy. Because *deem* applies to future events, use *deem* with *will* (see 3.242): *Any notice given by personal or courier delivery will be deemed given on delivery.*

13.143 You could use *deem* in the active rather than passive voice, but that adds nothing other than awkwardness—*The parties will deem given on delivery any notice given by personal or courier delivery*.

13.144 Caselaw muddies the waters to use *deem* in a provision that doesn't establish a legal fiction:

Any violation of the restrictions stated in this section 4.2 by any officer or director of Acme or any investment banker, attorney, or other advisor or representative of Acme *will ~~be deemed to~~ be a breach* by Acme of this section 4.2.

The date of exercise will be ~~deemed to be~~ the date on which the Company receives notice of exercise.

Making a Release Automatic

13.145 You can make a release automatic by using *deem* instead of language of obligation: instead of saying *If X, Acme shall release Widgetco*, say *If X, Acme will be deemed to have released Widgetco*. The release happens automatically, without Acme's being requiring to do anything.

13.146 Making a release automatic can simplify matters for the released party. Consider *Management Strategies, Inc. v. Housing Authority of City of New Haven*, No. X06CV075007102S, 2009 WL 1958170 (Conn. Super. Ct. June 2, 2009): The plaintiff and the defendant were party to a contract under which the plaintiff was required to release the defendant from liability. The plaintiff never issued the release, even though the defendant had satisfied the conditions. In the lawsuit, the plaintiff objected to the defendant's motion for summary judgment, claiming that because the plaintiff hadn't released the defendant, the defendant wasn't entitled to summary judgment. Sensibly enough, the court held that the plaintiff couldn't base its claim on its own failure to issue a release that it had been required to issue under the contract. From a drafting perspective, if the release had been automatic the plaintiff would have been precluded from making its argument.

13.147 More generally, making a release automatic would spare the released party having to follow up with the releasing party to obtain a copy of the document effecting the release.

"DEFAULT"

13.148 Provisions relating to the concept of default are awkward in two respects.

"Default or Event of Default"

13.149 The phrase *default or event of default* is a fixture of loan agreements. Usually *default* and *event of default* are used as defined terms.

13.150 *Event of Default* is straightforward enough—it's defined to mean anything a bank wouldn't want to have happen to its borrowers.

13.151 A problem might not become an event of default until notice has been given or a cure period has run. It's standard for loan agreements to use for such latent events of default the defined term *Default*, with the following definition, or a variation:

"**Default**" means any event that with notice or passage of time, or both, would constitute an Event of Default.

13.152 Default might trigger lesser remedies. For example, the lender might have the right to refuse to make additional advances.

13.153 defined term should give the reader some sense of the definition. Considering the defined terms *Default* and *Event of Default* without consulting the definitions, one would be entitled to wonder whether they don't in fact mean the same thing.

13.154 why instead of *Default* some contracts use the defined term *Potential Event of Default*—it reflects the definition better. To simplify matters further, shorten *Event of Default* to *Default* and *Potential Event of Default* to *Potential Default*.

13.155 Another possible alternative to *Default* is *Incipient Event of Default*, but *incipient*, meaning "beginning to develop," suggests a gradual process towards becoming an event of default, whereas something either is or is not an event of default.

"Has Occurred and Is Continuing"

13.156 contract might refer to remedies that are triggered by an event of default. It might also make it a condition to performance by one party that an event of default (and potential event of default) of the other party not have occurred. In the latter context, contracts often use the phrase *has occurred and is continuing*:

The obligation of Lenders to make any Loan is subject to the further satisfaction or waiver of each of the following conditions: . . . (c) no Potential Event of Default or Event of Default *has occurred and is continuing* as of the date that Loan is made.

13.157 The use of *is continuing* poses two problems. First, as a matter of semantics, *is continuing* makes sense with respect to a status but not with respect to an event. If a lawsuit is pending against Acme, it would be appropriate to say that pendency of that lawsuit "is continuing." By contrast, it would be odd to say that the fact that someone has filed a lawsuit against Acme "is continuing"—an event happens, then it's over. To avoid that awkwardness, phrase events of default in terms of status rather than events. But that won't always be possible. For example, if equipment is destroyed, it wouldn't make sense to describe destruction of that equipment as "continuing."

13.158 And second, if a statement of fact is inaccurate, it's inaccurate at signing or closing; it doesn't make sense to say that the inaccuracy "is continuing" (see 3.311). So *is continuing* doesn't work with an event of default triggered by an inaccurate statement of fact.

13.159 For purposes of conditions to performance, it would make sense to refer to events of default in a way that takes these distinctions into account. In this regard, the notion of curing defaults is more versatile than the phrase *is continuing*: you can refer to whether something is amenable to cure, whereas there's no equally convenient way to express that something is capable of continuing. Here's the extract in 13.156, revised to use *cure*:

The obligation of Lenders to make any Loan is subject to the further satisfaction or waiver of each

of the following conditions: . . . (c) no Potential Event of Default or Event of Default *has occurred and, if it is amenable to cure, has not been cured* as of the date that Loan is made.

13.160 That formulation leaves open to discussion whether a given event of default is amenable to cure.

"DISCLAIM"

13.161 A disclaimer is a renunciation of one's legal right or claim or a repudiation of another's right or claim. And the verb *disclaim* has the corresponding meaning.

13.162 When a party disclaims something (usually warranties), generally a simpler and clearer alternative is available:

The Agent Parties ~~expressly disclaim liability~~ [*read* will not be liable] for errors or omissions in the Communications.

The Seller ~~disclaims~~ [*read* is not making] any warranty of merchantability or fitness for a particular purpose in connection with the Buyer's purchase of units of any Product under this agreement.

13.163 It's relevant that section 2-316 of the Uniform Commercial Code refers to what's required to "exclude or modify" warranties. It doesn't use *disclaim* or *disclaimer*.

"DUE OR TO BECOME DUE"

13.164 The phrase *due or to become due* is standard, but it's also awkwardly archaic. Make it clearer:

. . . any payments ~~due or to become due~~ [*read* that are then due or that become due] in respect of that Collateral . . . .

"DULY"

13.165 According to *Black's Law Dictionary*, *duly* is an adverb meaning "In a proper manner; in accordance with legal requirements." But usually the verb or verb phrase that *duly* modifies itself incorporates the notion of "in a proper manner," making *duly* redundant.

13.166 Consider the following example, which features two sentences, each using *duly*:

The execution, delivery, and performance by that party of this agreement have been ***duly*** and validly authorized by all necessary corporate or similar proceedings (including approval by the board of directors and, if necessary, shareholders). This agreement has been ***duly*** executed and delivered by that party and constitutes the legal, valid, and binding obligation of that party enforceable against that party in accordance with its terms.

13.167 If something has been authorized, then necessarily it was properly authorized. If the appropriate procedures hadn't been followed, then no authorization would have been granted. Similarly, if, say, an imposter signs on behalf of a party, it follows that the contract won't have been signed by that party.

13.168 That's why *Garner's Dictionary of Legal Usage*, at 301, says, with regard to *duly authorized*, "Because *authorize* denotes the giving of actual or official power, *duly* (i.e., 'properly') is usually unnecessary. Likewise, *duly* is almost always redundant in phrases such as *duly signed*."

13.169 Here's another example:

> Notices and all other communications provided for in this agreement … will be deemed to have been *duly* given when delivered or mailed by certified or registered mail, return receipt requested, postage prepaid, addressed to the respective addresses set forth below: …

13.170 *duly* is redundant—because the provision specifies what's required to give notice under the contract, it follows that any notice that complies with those requirements will have been properly given.

13.171 *duly* can also be used to allude to a broader range of concerns. For example, "An opinion that a company has been 'duly incorporated' means that the incorporators complied with all requirements in effect at the time of incorporation

for the company to be incorporated under the applicable corporation statute and that government officials took the steps required by that statute to bring the company into existence as a corporation." Scott T. FitzGibbon, Donald W. Glazer & Steven O. Weise, *Glazer & FitzGibbon on Legal Opinions* § 6.2 (3d ed. 2012). Because in this context "duly incorporated" constitutes shorthand for a parcel of issues, the word "organized" can't by itself incorporate the notion of "in a proper manner," so the word *duly* isn't redundant.

13.172 The same applies to the phrase *duly organized*. Both *duly incorporated* and *duly organized* feature in contracts as well as in legal opinions.

13.173 So if *duly* occurs in a term of art with broader substantive implications, leave *duly* alone. But outside of those contexts, *duly* is usually redundant.

13.174 In the first example above, *duly* is often paired with the equally unnecessary *validly*. In contracts, redundancy loves company.

"DURING . . . EMPLOYMENT"

13.175 In *Mattel, Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 912 (9th Cir. 2010), the court considered the ambiguity inherent in having a provision in an employment contract apply during the "employment" of that employee:

The phrase "at any time during my employment" is ambiguous. It could easily refer to the entire calendar period Bryant worked for Mattel, including nights and weekends. But it can also be read more narrowly to encompass only those inventions created during work hours ("during my employment"), possibly including lunch and coffee breaks ("at any time").

13.176 Instead of saying *during Roe's employment*, be more specific.

"DURING THE TERM OF THIS AGREEMENT"

13.177 *During the term of this agreement* is usually redundant. The default rule is that contract provisions that address party actions apply only during the term of the contract. So if you use *during the term of this agreement* to modify language of obligation, discretion, or prohibition, you're stating the obvious. In the interest of concision, you would be better off omitting it:

During the term of this agreement, the [read *The*] Company shall pay Jones an automobile expense allowance of $1,000 per month, grossed up for income tax purposes, and shall reimburse Jones for all gasoline and maintenance expenses that he incurs in operating his automobile.

13.178 If you're deviating from the default rule, you might well need to include *during the term of this agreement* when specifying the duration of a given provision:

During the term of this agreement and for five years thereafter, the Recipient shall not, and shall cause each of its Representatives not to, disclose any Confidential Information except as contemplated in this agreement.

13.179 Some drafters use the phrase *during continuance of this agreement* instead of *during the term of this agreement*. In general usage, the meanings of *continuance* include "duration," so the word is apt. But it's also very awkward. Furthermore, when used as a legal term, its usual meaning is "postponement; the adjournment or deferring of a trial or other proceeding until a future date." So don't use *continuance* in contracts to convey the meaning "duration."

"END"

13.180 The verb *terminate* is used in contracts more often than the verb *end*. Given that, generally, simpler words are better, why not use *end* instead of *terminate*? Here's what that would look like:

This agreement will *terminate* [read *end*] on October 29, 2014.

Acme may *terminate* [read *end*] this agreement if . . .

13.181 Aside from ingrained habit, an obstacle to making this change might be the noun forms of *end*:

[*At the end of*] [*At the ending of*] this agreement . . .

13.182 A reader might initially think that *at the end of this agreement* refers to the back of the contract. And the gerund *ending* is awkward. By contrast, *termination* poses no such problem.

13.183 References to a fundamental concept in a contract are easier to read if you use related verb and noun forms to express that concept. It follows that the brevity of the verb *end* is more than offset by the awkwardness of the noun forms of *end*. Use the verb *terminate*. (For a similar analysis regarding the verb *buy*, see 13.81.)

13.184 Regarding *termination* and *expiration*, see 13.648.

"ESPECIALLY"

13.185 It's best to omit the word *especially* from contracts.

13.186 It's usually used to mean "in particular," as in the following examples:

If the scope of work of a Work Order changes, *especially* the estimated timelines, then the applicable Work Order may be amended as provided in this section 5.3(a).

Executive's obligations under article 3 and article 4 of this agreement (*especially* those relating to confidentiality, noncompetition, and nonsolicitation) will continue after his employment with the

Company is ended, regardless of the nature or reason for his termination.

The Sellers acknowledge that disclosure of confidential information to others, *especially* the Company's existing and potential competitors, would cause substantial harm to the Company.

13.187 The problem with *especially* is that it's used to indicate that with respect to a provision, some subset of the universe to which that provision applies is particularly important. Necessarily, that denigrates the importance of the rest of that universe; that could hamper attempts to enforce that provision with respect to the rest of that universe. (See also 13.343 regarding *in particular*.)

13.188 If you want to make sure that something falls within the scope of a provision, you can do that in ways that are more neutral than by using *especially*—for example, through disciplined use of *including* (see 13.264).

13.189 Drafters also use *especially* to mean "specifically," as in *a separate committee created especially for this purpose*. Using instead *specifically* would be a better choice.

"EXECUTE AND DELIVER"

13.190 The phrase *execute and deliver* (and *execution and delivery*) is a fixture in contracts, as in the following obligation: *The Borrower shall from time to time execute and deliver to the Bank, at the*

request of the Bank, all Financing Statements and other documents that the Bank requests. And as in the following statement of fact: *This agreement and the New Warrants have been duly executed and delivered by the Company*. It follows that an opinion regarding execution and delivery is a standard element of legal opinions. (For a discussion of use of *execute* and *deliver* in the concluding clause, see 5.9–14.)

13.191 It is not clear what one accomplishes by using *execute* rather than *sign*, particularly as different authorities offer differing definitions of *execute* (see 5.10–11).

13.192 *Deliver* is also problematic. Scott T. FitzGibbon, Donald W. Glazer & Steven O. Weise, *Glazer and FitzGibbon on Legal Opinions* § 9.5 (3d ed. 2011), says as follows:

> Historically, delivery by one party to an agreement to the other has been effected by its physically handing over a signed counterpart of the agreement to a representative of the other party. Today, transactions often are closed electronically, and, when they are, few, if any, documents are physically delivered. Whatever form delivery takes, an opinion that the company has "duly delivered" the agreement means that the company, having duly authorized and executed the agreement, delivered the agreement in a manner that under applicable law . . . had the effect of making the agreement a binding obligation of the company.

13.193 This would suggest that delivery is required for an effective contract. But although one of the requirements of a contract under seal is delivery, that's not the case with other kinds of contracts. Here's what 1 *Corbin on Contracts*, at § 2.11 (footnotes omitted), says regarding "informal" contracts, in other words contracts not under seal:

All that is necessary to the creation of an informal contract, however, whether reduced to writing or not, is an expression of assent in any form. The writing itself is not necessary; if put in writing, a signature is not necessary. Even if in writing and signed, a delivery is not necessary. It is an expression of assent that is required. Delivery of a writing may be sufficient evidence of such an assent. Words of assent are sufficient, and conduct other than delivery may also be sufficient.

. . . If the reduction of the agreement to writing is . . . made necessary, an assent to the writing as a sufficient one must also be manifested. This manifestation commonly consists of signing and delivery. This accounts for the fact that it has been held in many cases that the writing must be delivered. It may be true that merely reading over the terms of a writing is not a manifestation of assent to them. Even affixing one's signature and continuing to hold possession of the paper may not express assent. Delivery to another person is indeed a common and an expressive act. But assent can be expressed effectively in many ways. Delivery is only one of them. One party may sign and hand the

instrument to the other, it being already understood that the other shall retain possession of it. If the other then signs and pockets it, a contract has been made, effective as to both, although the first party made delivery before being bound and the second was bound without making delivery. If there has been expression of assent in no other manner, then there is no written contract without manual delivery.

13.194 Given that signing a contract and handing the signed copy to the other party isn't the only way to indicate assent, in certain contexts it would seem simpler just to refer to entry into the agreement in question: "The Company has all requisite corporate power and authority to *execute and deliver* [read *enter into*] this agreement."

13.195 On the other hand, if Acme is under an obligation to enter into a given contract, or if its entry into a given contract constitutes a condition, the surest way to verify that it has performed that obligation, or to verify that the condition has been satisfied, would be to have Acme sign the contract and deliver a signed copy. So in that context, it would make sense to refer to signature and delivery. (Be prepared to have someone insist on using *execute* rather than *sign*.)

"FAX"

13.196 As between *fax*, *facsimile*, *telefacsimile*, and *telecopier*, your best bet is *fax*.

13.197 "Telecopier" is a brand name, so it's best not to use it to refer to all makes of machine.

13.198 *Fax* is a better option than *facsimile* and *telefacsimile*, with respect to both the machine and that which it transmits. *Garner's Modern American Usage*, at 348, says that *fax* "is now all but universal, in the face of which *facsimile transmission* is an instant archaism—and a trifle pompous at that." It suggest that *fax* "is now perfectly appropriate even in formal contexts."

13.199 Don't write *fax* in all capitals—it's not an acronym.

13.200 The fax machine is heading toward obsolescence, but you can expect that contracts will continue to refer to faxing for a good long while. After all, Telex appears to be all but dead as a means of communication, but plenty of contracts still refer to giving notices by Telex.

"FIXED FEE"

13.201 When in a contract you want to specify the amount of a fee to be paid, it's redundant to use the phrase *flat fee* or *fixed fee*:

The Bank shall pay AZ Financial ~~a fixed fee of~~ $37,500, plus reimbursable expenses, preparing and delivering the original appraisal report.

DigitalGlobe shall pay the Consultant ~~a fixed fee of~~ $10,000 per month for up to 15 hours per month of the Consultant's time.

13.202 These phrases make sense only if you're referring generally to a kind of payment, rather than a specific fee:

At the Landlord's option, the Tenant shall pay that fee as either a fixed fee or an hourly fee that takes into account the time expended by the Landlord's agents and representatives in supervising the Tenant's construction.

"FOR ANY REASON OR NO REASON"

13.203 The phrase *for any reason or no reason* is commonly found in employment contracts between a company and an at-will employee. Even though the point of at-will employment is to allow the company to terminate the employee whenever it wants, a company might want to enter into an employment contract with an at-will employee to address matters such as confidentiality, severance, and ownership of intellectual property. In such a contract, it would make sense also to address employment status, and language relating to at-will employment is routinely supplemented to state that the company may terminate the employee "for any reason or no reason."

13.204 The notion of terminating a contract for no reason doesn't make sense—when someone terminates a contract, there's always a reason. If Acme fires Roe, it might be because Roe has proved himself to be ineffectual; because Roe behaved inappropriately at the Christmas party; because

Acme's CEO wants to hire the CEO's cousin instead; because Acme's CEO doesn't like Roe's hairstyle.

13.205 Furthermore, *any reason* doesn't imply that the company has to have a good reason, so *any reason* on its own is sufficiently comprehensive.

13.206 In referring to termination for no reason, the drafter might be attempting to avoid having to explain why it had terminated the employee. It would be better to address that issue directly by having the contract state that the company won't be required to provide an explanation. (A company might in fact be required by law to provide an explanation.)

13.207 Don't assume that using either or both of *for any reason* and *for no reason* in referring to termination would mean that the employee has in effect waived the benefit of the implied duty of good faith (see 3.169). A more promising approach would be to have the employee acknowledge factors that the company wouldn't be required to take into account if it decides to terminate the employee. (For a different example of this approach, see 3.190.)

13.208 More generally, *for any reason or no reason* is used in other kinds of contracts as an alternative to *at its sole discretion* (see 3.168) as a means of attempting, unhelpfully, to circumvent the implied duty of good faith.

13.209 Regarding use of *for any reason or no reason* as an alternative to the phrase *termination for convenience*, see 13.670.

"FORCE AND EFFECT"

13.210 The phrase *force and effect* is widely used in contracts, in *no force and* [or *or*] *effect* and *the same force and effect* but mostly in *full force and effect*:

> If Doe does not sign and return this agreement by February 15, 2013, the offer of Severance Benefits will be deemed withdrawn and this agreement will be of *no force and effect*.
>
> . . . each of the obligations in the Credit Agreement and the other Loan Documents is hereby reaffirmed with *the same force and effect* as if each were separately stated herein and made as of the date hereof;
>
> . . . the obligations of the Borrower under this section 3 will remain in *full force and effect* until . . . .

13.211 Nonetheless, *force* is redundant—drafters would be better off omitting it from the phrase.

13.212 *Garner's Dictionary of Legal Usage*, at 370, suggests that "the emphasis gained by *force and effect* may justify use of the phrase, more likely in drafting (contracts and statutes) than in judicial opinions." But that misconstrues the nature of

contract language—it doesn't serve to persuade anyone of anything (see 1.59), so that sort of emphasis has no place in a contract.

"FORMAL" AND "FORMALLY"

13.213 The world *formal* occurs often in contracts:

Unless *formal* pleadings are waived by agreement among the parties and the referee . . .

. . . without the necessity of commencing a foreclosure action with respect to this Mortgage, making *formal* demand for the Rents, obtaining the appointment of a receiver or taking any other affirmative action . . .

All arbitrators . . . must have a *formal* financial/accounting, engineering, or legal education.

13.214 Here's the word *formally*:

Lender may conclusively rely on that certificate until *formally* advised by a like certificate of any changes therein.

. . . under valid contracts of license, sale, or service that have been *formally* awarded to a Borrower . . .

. . . nothing herein will require the Purchaser, in connection with the receipt of any regulatory approval, to agree to . . . litigate or *formally* contest any proceedings relating to any regulatory approval process in connection with the Contemplated Transactions.

13.215 Such uses of *formal* and *formally* in contracts. They're puzzling—they suggest that for purposes of the provision in question what matters isn't just the thing involved or the action taken but also unspecified procedures. A drafter who has such procedures in mind should make them explicit.

"FORM AND SUBSTANCE"

13.216 In contracts, the phrase *form and substance* is used exclusively in references to documents to be delivered, as in *an opinion of counsel in form and substance satisfactory to the Buyer*. As with most couplets, it adds nothing more than a rhetorical flourish.

13.217 *Form* arguably relates solely to the appearance of a document. If that's the case, *form* would be dispensable. And if *form* means something more than that, then it would tread on the toes of *substance*. In that case, too, *form* would be dispensable.

13.218 You could say *in substance satisfactory to the Buyer*, but why not dispense with *in substance*, too? Saying *an opinion of counsel satisfactory to the Buyer* is sufficiently all-encompassing. (Regarding *satisfactory* generally, see 13.593.)

13.219 Of course, if you want to avoid any preclosing haggling, your safest bet would be to attach the document in question as an exhibit. The contract would say that the document delivered has to be in the form of that exhibit or, if you want to

build in some flexibility, in a form substantially similar to that exhibit. But if the document relates to some future transaction the terms of which are as yet unknown, it might not be feasible to attach the document as an exhibit.

"FOR THE AVOIDANCE OF DOUBT"

13.220 Use *for the avoidance of doubt*.

13.221 Drafters use this phrase to introduce language that ostensibly clarifies the preceding language, usually by indicating that something either falls within or is excluded from the scope of the preceding language.

13.222 Used in that manner, *for the avoidance of doubt* is merely a "throat-clearing phrase"—what follows has to be able to stand on its own, as in the following example:

This arbitration agreement applies to all matters relating to this agreement, the RSU Agreement, and the Executive's employment with the Company, including disputes about the validity, interpretation, or effect of this agreement, or alleged violations of it, any payments due hereunder or thereunder, and all claims arising out of any alleged discrimination, harassment, or retaliation. *For the avoidance of doubt, this* [read *This*] arbitration agreement does not apply to any dispute under the Indemnification Agreement.

13.223 When *for the avoidance of doubt* is used in this manner in a definition, it would be best to restructure the definition as a single sentence, as in the following example:

"Insider Shares" means all shares of Company common stock owned by an Insider immediately before the Company's *IPO. For the avoidance of doubt, Insider Shares will not include* [read *IPO and excludes*] any IPO Shares purchased by Insiders in connection with or after the Company's IPO.

13.224 *For the avoidance of doubt* is sometimes used, unhelpfully, to state the blindingly obvious. The immediately preceding example is an example of that—you might want to strike the second sentence entirely.

13.225 Sometimes *for the avoidance of doubt* is doubly pointless, in that the language that follows doesn't refer to something that comes within or is excluded from the scope of the preceding language:

Nothing in this agreement gives to any Person other than the parties and their successors, the Owner Trustee, any separate trustee or co-trustee appointed under section 6.10 of the Indenture, the Note Insurer, the Swap Counterparty, and the Noteholders any benefit or any legal or equitable right, remedy, or claim under this agreement. *For the avoidance of doubt, the* [read *The*] Owner Trustee, the Note Insurer, and the Swap Counterparty are third-party beneficiaries of this agreement and are entitled to the rights and benefits under this agreement and may

enforce the provisions of this agreement as if they were a party to it.

13.226 Drafters also use *for the avoidance of doubt* as an inferior alternative to having a party acknowledge a fact:

For the avoidance of doubt, [read *The Seller acknowledges that*] Invest Bank has implemented reasonable policies and procedures, taking into consideration the nature of its business, to ensure that individuals making investment decisions would not violate laws prohibiting trading on the basis of material nonpublic information.

13.227 *For the avoidance of doubt* is also used as a form of rhetorical emphasis (see 1.60). Just as rhetorical emphasis generally is unhelpful, so is this use of *for the avoidance of doubt*:

For the avoidance of doubt, nothing [read *Nothing*] in this agreement gives Acme any rights to any of Pharmaco's compounds or methods of compound synthesis, including the Pharmaco Product, the Pharmaco Technology, any Patent Rights owned, licensed, or controlled by Pharmaco, or any Pharmaco Confidential Information.

The Executive will be responsible for paying any tax and employee's national insurance contributions imposed by any taxation authority in respect of any of the payments and benefits provided under this agreement (other than ~~for the avoidance of doubt~~ any tax or employee's national insurance

contributions deducted or withheld by the Company in paying the sums to the Executive).

13.228 Even without the benefit of these examples, it's clear enough from the awkward buried verb *avoidance* (see 17.7) that *for the avoidance of doubt* is problematic.

"FRAUD" AND "INTENTIONAL MISREPRESENTATION"

13.229 It's commonplace in mergers-and-acquisitions contracts for claims of fraud or intentional misrepresentation to be included in exceptions to limits on indemnification. But how does fraud relate to intentional misrepresentation?

13.230 *Williston on Contracts*, at § 69:2 (footnotes omitted), defines fraud as "a deception deliberately practiced in order to unfairly secure gain or advantage, the hallmarks of which are misrepresentation and deceit, though affirmative misrepresentation is not required, as concealment or even silence can under certain circumstances constitute fraud."

13.231 Because intentional misrepresentation would seem equivalent to "misrepresentation and deceit," intentional misrepresentation would seem to constitute fraud. That much is confirmed by the *Restatement (Second) of Torts* § 526, which states that "misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence

in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies."

13.232 Given the cases cited in *Williston* to the effect that fraud can arise not only through misrepresentation but also concealment, it would seem that intentional misrepresentation is only one kind of fraud. That suggests that for purposes of contracts, it would be more economical and less confusing simply to refer to fraud and omit any reference to intentional misrepresentation, unless for some reason you wish to convey the narrower meaning.

13.233 On the other hand, the elements of a claim for misrepresentation are different from the elements of a claim for fraud. That might lead a court to treat a reference to fraud not as an umbrella term that covers various kinds of claims but instead as a reference to a kind of claim, one distinct from a claim for intentional misrepresentation. So referring to both fraud and intentional misrepresentation would seem the safer approach.

13.234 As with terms of art generally (see 1.7), the exact meaning attributed to the terms "fraud" and "intentional misrepresentation" would likely be unclear to many readers. Furthermore, that meaning would likely vary depending on the jurisdiction.

13.235 Rather than using terms of art, it would be clearer to focus on the underlying conduct: an alternative to "any claim for fraud or intentional

misrepresentation" would be "any claim that the Indemnifying Party intentionally supplied one or more Indemnified Parties with information that the Indemnifying Party knew [or should have known] was inaccurate or any claim that the Indemnifying Party intentionally withheld information from one or more Indemnified Parties."

13.236 This language uses more words, and it's novel. But a drafter might conclude that that's a modest price to pay for greater clarity.

"FROM THE BEGINNING OF TIME"

13.237 A picturesque fixture of release language is *from the beginning of time*, as in *Jones hereby releases Acme from any claims . . . arising from the beginning of time to the date of this agreement.* A comparable phrase is *from the beginning of the world*.

13.238 Besides being quaint, this language is redundant. If you agree to release all claims against Acme, that indeed means all claims, as opposed to just those claims that arose in the past year, or the past century, or some other limited period.

"FULL-TIME"

13.239 Using in a contract the adjective *full-time* with respect to work is an invitation to uncertainty. See, e.g., *In re C.P.Y.*, 364 S.W.3d 411 (Tex. App. 2012) (concerning the meaning of a provision in a

divorce decree requiring payment of alimony until the ex-wife "returns to work on a full time basis"). It raises three issues:

13.240 First, what is the minimum amount of work, in terms of hours per day and days per week, required for work to be full-time work?

13.241 Second, for how long does that level of work have to be maintained for that work to be full-time work? One day? One week? More?

13.242 And third, does someone have to be employed to be engaged in full-time work? What about volunteer work? What if the person is an independent contractor?

13.243 To avoid confusion, be more specific than *full-time*.

"GUARANTEE" AND "GUARANTY"

13.244 Here's what *Garner's Dictionary of Legal Usage*, at 399, says regarding the difference between *guaranty* and *guarantee*, both pertaining to a promise to answer for the payment of a debt or the performance of a duty on failure of another:

The distinction in [British English] was formerly that *guarantee* is the verb, *guaranty* the noun. Yet *guarantee* is now commonly used as both noun and verb in both [American English] and [British English]. . . . .

In practice, *guarantee*, n., is the usual term, seen often, for example, in the context of consumer warranties or other assurances of quality or performance. *Guaranty*, by contrast, is now used primarily in financial and banking contexts in the sense "a promise to answer for the debt of another." *Guaranty* is now rarely seen in nonlegal writing, whether in [British English] or [American English]. Some legal writers prefer *guaranty* in all noun senses.

Guaranty was formerly used as a verb but is now obsolete as a variant of *guarantee*, vb.

13.245 *The New Fowler's Modern English Usage* 343 (R. W. Burchfield ed., 3d revised ed. 2004) offers what appears to be a simple rule:

guarantee, guaranty. 'Fears of choosing the wrong one of these two forms are natural, but needless. As things now are, *-ee* is never wrong where either is possible' (Fowler, 1926). The advice is still sound.

13.246 A review of a small sample of contracts filed on the SEC's EDGAR system suggests that there's a roughly even split between *guaranty* and *guarantee* used as nouns, but that in a finance context—namely in credit agreements—*guaranty* is indeed the preferred form of the noun. But even in a finance context *guarantee* is used as a noun roughly a quarter of the time, so if in all contexts you use *guarantee* as both noun and verb, you would have plenty of company. And it would have the advantage

of simplicity—to insist on a distinction between the noun forms *guaranty* and *guarantee* is to invite continued confusion.

13.247 This manual recommends that in all circumstances you use *guarantee* as a verb and noun.

13.248 Don't use *guarantee* as a counterpart of *guarantor*—in other words, to mean a person to whom a guarantee is given. That's asking for confusion, given the primary meaning of *guarantee*.

13.249 Regarding *guarantee* as a term of art, see 13.250; regarding *guarantees that*, see 13.255.

"GUARANTEE" (THE VERB) AS TERM OF ART

13.250 *Black's Law Dictionary* defines the verb *guarantee* as follows:

> **guarantee,** vb. (18c) 1. To assume a suretyship obligation; to agree to answer for a debt or default. 2. To promise that a contract or legal act will be duly carried out.

13.251 When the verb *guarantee* is used in a contract (and is followed not by a *that*-clause but by a noun, which is usually the case; see 13.255), its complete meaning derives not from the word itself but from the context—in other words, exactly what the party in question is guaranteeing.

13.252 Consider the following example:

The New Borrower hereby guarantees payment and performance when due, whether at stated maturity, by acceleration, or otherwise, of all Obligations.

13.253 If you consider hereby *guarantees* in isolation, it simply conveys the meaning "will be liable for," as does *indemnifies* (see 13.335). What the New Borrower is liable for is spelled out in the rest of the sentence.

13.254 The verb *guarantee* is an example of a misapplied term of art (see 1.11) that could be replaced by a much simpler phrase. Whether that's feasible is a function of inertia and expediency, not semantics.

"GUARANTEES THAT"

13.255 Consider the following contract extract:

Acme hereby *guarantees that*, subject to section 22, it shall deliver all units of Products to the delivery point specified in a given Purchase Order . . . .

13.256 In this context, the verb *guarantee* doesn't serve to convey its legal meaning, namely "To assume a suretyship obligation; to agree to answer for a debt or default." Instead, *guarantees that* is a form of rhetorical emphasis, as in *I guarantee that Accrington Stanley will defeat Spennymoor United!* Contracts aren't the place for rhetorical emphasis (see 1.60).

13.257 And if you use *shall* to impose an obligation on the subject of the sentence, nothing is

accomplished by having the party under the obligation guarantee that it will perform the obligation. The obligation itself is all that's required.

13.258 When it comes to expressing the legal meaning of *guarantee*, the construction *guarantee that* is seldom used. It's likely that instead of saying *Acme guarantees that Widgetco will comply with its obligations under this agreement*, most drafters would opt for *Acme guarantees Widgetco's compliance with its obligations under this agreement*. That's the case even though using a *that*-clause allows you to use a verb rather than an abstract noun, which results in prose that's clearer and more concise (see 17.7). It may be that colloquial use of *guarantees that* has caused drafters to steer clear of it.

13.259 Regarding *guaranty* versus *guarantee*, see 13.244; regarding *guarantee* as a term of art, see 13.250.

"HERE-" AND "THERE-" WORDS

13.260 Use of *here-* words (such as *hereby*, *herein*, and *hereof*) and their *there-* counterparts is one of the hallmarks of legalese. Although they can give rise to ambiguity (see 7.17), the problem with *here-* and *there-* words is not so much imprecision as their deadening effect on prose. (*Hereby* as used in language of performance is a different matter; see 3.20.)

13.261 Instead of, for example, *herein*, use *in this agreement.* Use *there-* words only to avoid awkward or long-winded repetition, as in "the first supplemental indenture dated October 25, 2012, between Acme and Big Bancorp and any amendments *thereto*." Even in that example, you could say instead "any amendments *to it*," although for most drafters that would take some getting used to. (Regarding use of *hereof* in cross-references, see 4.92; regarding *therefor*, see 13.677. Regarding a related provision stating drafting conventions, see 15.12.)

"IN ACCORDANCE WITH" AND "ACCORDING TO"

13.262 *Garner's Modern American Usage*, at 13, says that *according to* "means (1) 'depending on'; (2) 'as explained or reported by (a person)'; or (3) 'in accordance with.'" It's used in contracts to convey the last of these meanings, as in *Any dispute must be resolved by arbitration according to the procedures stated in this section 12.10.*

13.263 By contrast, *in accordance with* doesn't have alternative meanings, so it's preferable to use *in accordance with* rather than *according to* to convey that meaning, to spare readers from having to select from among alternative meanings. But don't use either phrase if *under* would do.

"INCLUDING" AND "INCLUDES"

13.264 It's standard practice to add *without limitation* or *but not limited to* after *including*, and *without limitation* or *but is not limited to* after *includes*. (You also see wordier variants, two of them being *including without limiting the generality of the foregoing* and *including without implication of limitation*.) But these additions are more trouble than they're worth, and they can't be counted on to accomplish the intended purpose. What's required is a more nuanced approach to use of *including* and *includes*.

A Source of Uncertainty

13.265 *Black's Law Dictionary* defines *include* as follows: "To contain as a part of something. The participle *including* typically indicates a partial list <the plaintiff asserted five tort claims, including slander and libel>." In interpreting contracts and statutes, courts have routinely held that *including* or *includes* introduces an illustrative list. See, e.g., *Federal Land Bank of St. Paul v. Bismarck Lumber Co*., 314 U.S. 95, 99-100 (U.S. 1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."). Texas has even adopted this meaning by statute. Tex. Gov't Code Ann. § 311.005(13).

13.266 But a drafter might ill-advisedly use *including* or *includes* to introduce what could only be an exhaustive list, or might use an overbroad noun before *includes* or *including*, so that the list that follows better expresses the intent of the parties.

13.267 This is presumably why many courts have accepted that *including* and *includes* can also be used to introduce an exhaustive list, or a list that limits the scope of the preceding general noun or noun phrase—in other words, that they can convey a restrictive meaning. Some courts have explicitly acknowledged that possibility. See, e.g., *Muller v. Automobile Club of Southern California*, 61 Cal. App. 4th 431, 444 (Ct. App. 1998) (noting that the word *includes* "creates an ambiguity"). Others do so by saying that *including* or *includes* ordinarily conveys the illustrative meaning, the implication being that a restrictive meaning is possible. See, e.g., *DIRECTV, Inc. v. Crespin*, 224 Fed. App'x 741, 748 (10th Cir. 2007) (referring to "the normal use of 'include' as introducing an illustrative—and non-exclusive—list"); *Auer v. Commonwealth*, 621 S.E.2d 140, 144 (Va. Ct. App. 2005) ("Generally speaking, the word 'include' implies that the provided list of parts or components is not exhaustive and, thus, not exclusive."). The "typically" in the *Black's Law Dictionary* definition (see 13.265) serves the same function.

13.268 Furthermore, courts have been willing to hold that *including* or *includes* is restrictive. See, e.g., *Frame v. Nehls*, 550 N.W.2d 739, 742 (Mich. 1996) (holding that a statute that provides that definition of child custody dispute "includes" two types of proceedings limits child custody disputes to those two types of proceedings).

13.269 Some courts have even suggested that the restrictive meaning is the principal or only meaning. See, e.g., *Department of Treasury of Indiana v. Muessel*, 32 N.E.2d 596, 598 (Ind. 1941) (stating that ordinary use of the word *including* "is as a term of limitation"); *Application of Central Airlines*, 185 P.2d 919 (Okla. 1947) (holding, with respect to use of the word *including*, that "if the lawmakers had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes").

An Unhelpful Fix

13.270 Due to this uncertainty regarding the meaning of *including* and *includes*, regrettably it's now standard practice for drafters to use the phrases *including without limitation* and *including but not limited to* (and their equivalents using *includes*) with the aim of making it clear that the unrestricted meaning applies.

13.271 Case law offers a measure of support. See, e.g., *Jackson v. O'Leary*, 689 F. Supp. 846, 849 (N.D. Ill. 1988) (describing "including, but not limited to" as "the classic language of totally unrestricted (and hence totally discretionary) standards"); *Coast Oyster Co. v. Perluss*, 32 Cal. Rptr. 740, 746 (App. Ct. 1963) (noting use of the phrases "includes, but is not limited to" and "including, but not limited to," as opposed to "includes," to make it clear that the intent was to enlarge and not to limit); *Matter of Estate of Meyer*, 668 N.E.2d 263, 265 (Ind. Ct. App. 1996) ("If he

had intended to use the word 'including' as a term of enlargement rather than a term of limitation, [the testator] could have modified 'including' with the phrase 'but not in limitation of the foregoing.'")

13.272 There are two problems with using this approach to make it clear that the unrestricted meaning applies.

13.273 First, given that the illustrative meaning of *including* and *includes* is the primary meaning, in most circumstances the extra verbiage would be redundant. That's presumably why *Black's Law Dictionary* states that *including without limitation* and *including but not limited to* "mean the same thing" as *including*. And at least one court has noted this potential for redundancy. See *St. Paul Mercury Insurance Co. v. Lexington Insurance Co.*, 78 F.3d 202, 206-07 (5th Cir. 1996) (stating that the word "including" "is generally given an expansive reading, even without the additional if not redundant language of 'without limitation'"). It follows that for drafters, it's a nuisance to have to tack on the extra verbiage every time you use *including* or *includes*, and for the reader it's annoying to encounter at every turn. Using a provision specifying drafting conventions (see 15.16) would allow you to eliminate much of the clutter, but in effect you would still be applying by rote extra language that would be redundant in most contexts.

13.274 Second, courts have proved themselves willing to hold that *including* or *includes* is restrictive even when so modified. Consequently

you can't assume that the extra verbiage would ensure that a court attributes an illustrative meaning to *including* or *includes*.

13.275 For example, in *Shelby County State Bank v. Van Diest Supply Co*., 303 F.3d 832 (7th Cir. 2002), the court disregarded the phrase *but not limited to* in holding that an item falls within the scope of the preceding noun only if it falls within one of the items in the list following *including*:

[I]t would be bizarre as a commercial matter to claim a lien in everything, and then to describe in detail only a smaller part of that whole. This is not to say that there is no use for descriptive clauses of inclusion, so as to make clear the kind of entities that ought to be included. But if all goods of any kind are to be included, why mention only a few? A court required to give "reasonable and effective meaning to all terms" must shy away from finding that a significant phrase (like the lengthy description of chemicals and fertilizers we have here) is nothing but surplusage. [Citations omitted.]

13.276 In *Horse Cave State Bank v. Nolin Production Credit Ass'n*, 672 S.W.2d 66 (Ky. Ct. App. 1984), the court held that a list following "including but not limited to" served to limit the scope of the preceding noun phrase:

[Appellee's] description does not merely state that it covers 'all farm machinery' without more. Rather, the description includes the qualifying language 'including but not limited to tractor, plow, and disc.'

The qualifying language gave appellant and other persons notice that [appellee's] financing statement was intended to cover any tractor, plow, and disc owned by the debtor as well as all *similar* farm machinery." [Emphasis added.]

13.277 See also *In re Clark*, 910 A.2d 1198, 1200 (N.H. 2006) ("When the legislature uses the phrase 'including, but not limited to' in a statute, the application of that statute is limited to the types of items therein particularized.").

13.278 That some courts disregard *but not limited to* shouldn't come as a surprise. A court handling a contract dispute will want to determine the meaning intended by the drafter. In the process, it might elect to disregard any language that has no bearing on that. Given that it's routine for drafters reflexively to add *without limitation* or *but not limited to* to each instance of *including* (and *without limitation* or *but is not limited to* to each instance of *includes*), a court could conclude that such phrases are essentially meaningless.

Avoiding Uncertainty

13.279 How to avoid having a court give a restrictive meaning to an *including* or *includes* that you had intended to be illustrative depends, first of all, on the nature of the general word that precedes *including* or *includes*.

13.280 If you're relying on the general word to convey its everyday meaning, don't follow it with a list of obvious examples of that noun or noun

phrase—by saying *fruit, including oranges, lemons, and grapefruit*, you invite a court to conclude that *fruit* includes only citrus fruits, and not melons or bananas. Doing without such lists shouldn't pose a problem. After all, everyone knows that oranges, lemons, and grapefruit are fruit.

13.281 Instead, if you're relying on the general word to convey its everyday meaning, use *includes* or *including* only to make it clear that the preceding noun in fact includes something that otherwise might not fall within its scope—*fruit, including tomatoes*. (Are tomatoes a fruit or a vegetable? Your answer might depend on whether you're a botanist or a cook.) Doing so leaves little possibility for mischief—given that *tomatoes* is lurking on the edge of *fruit*, a court couldn't reasonably conclude that *fruit* in fact means only tomatoes or tomato-like produce. (This manual refers to this technique as using an enlarging item after *including*; see 13.289.)

13.282 You might nevertheless feel compelled to include as an example an obvious member of the general word—*fruit, including oranges*. (Perhaps oranges play a particular important role in a client's business.) Although it would look rather odd, given that oranges are so obviously fruit, a court might have a hard time restricting the meaning of *fruit* if only a single specific item is named. (For a better way to convey this meaning, see 13.288.) But the more items you add, the greater the risk of a court applying a restrictive meaning to *including* or *includes*.

13.283 Instead of relying on the general word that precedes *including* or *includes* to convey its everyday meaning, you might be relying on it to convey a specialized meaning. Perhaps it's a meaning that differs from the everyday meaning of that noun. Or perhaps the noun is a creation of the contract (such as *excluded liabilities*) and so has no everyday meaning. Either way, your best bet would be not to use *including* or *includes*, as the meaning of the noun wouldn't be clear enough for a court to be able to assess whether an illustrative or restrictive meaning of *including* or *includes* had been intended. Instead, provide an exhaustive list, perhaps in the form of a definition, with the noun constituting the defined term.

13.284 In any event, the first step to avoiding uncertainty over *including* or *includes* is to select your general word with care. The more specific you make it, the less mischief *including* or *includes* can cause. And you might be able to do without them entirely.

Putting the General Word at the End

13.285 You could reverse the order—instead of a general word followed by specific items, with *including* as the link, you could have the specific items lead, with the general word bringing up the rear. In other words, instead of *fruit, including oranges, lemons, and grapefruit*, you could say *oranges, lemons, grapefruit, and other fruit*. But generally, doing so wouldn't serve any useful purpose.

13.286 because if you want *fruit* to include melons and bananas, putting the general word last would likely increase the risk of a court's holding that *fruit* does not express that meaning. Most courts are willing to apply to a list of items followed by a catchall phrase, as opposed to a general word followed by specific items, the principle of interpretation known as *ejusdem generis*. It holds that when a general word or phrase follows a list of specifics, the general word or phrase includes only items of the same class as those listed.

13.287 to the point, it's best to avoid the uncertainty that comes with using with a general word a limited list of obvious members of the general word, regardless of where the list is placed in relation to the general word.

13.288 the client's needs leave you with no choice but to include a list of obvious members of the class, putting the general word last can provide a more convenient way to do so. To block any implication that the specific items limit the general word, you can adjust the general word, as in *oranges, lemons, grapefruit, and other fruit, whether or not citrus*. If you were trying to convey the same meaning using *including* (see 13.282), a comparable adjustment would be clumsier—*citrus and noncitrus fruit, including oranges, lemons, and grapefruit*. And if oranges, lemons, and grapefruit loom so large for your client, it's appropriate to lead with them.

Related Problematic Usages

13.289 Use of *for example* to introduce a specific list after a general word raises the same issues as does use of *including*, except that it wouldn't work to use an enlarging item (see 13.281) after *for example*. In other words, it would be a little odd to say *fruit, for example tomatoes*. Given that this manual recommends that you not use *including* in contracts to list obvious examples of a general word (see 13.280), it follows that it also recommends that you not use *for example* before a list of items. But *for example* can serve to introduce illustrative scenarios. It could, for instance, be used to introduce an example of how a formula might operate.

13.290 The phrase *including with limitation* occurs just often enough to make one wonder whether instead of being a mistake, it's a misguided attempt to say "consisting of." Either way, don't use it.

"INCORPORATED BY REFERENCE"

13.291 Sometimes a contract will provide, in referring to a particular exhibit or schedule, that the exhibit or schedule is *incorporated herein by reference.* (A wordier take: *is incorporated by this reference and made a part of this agreement.*) Or it might state, *All of the schedules and exhibits attached to this agreement are deemed incorporated herein by reference.* But if under a contract Acme is required to send notices to the stockholders at the addresses listed on schedule 3.1, that reference is enough to bring schedule 3.1 within the scope of the

contract. Incorporation by reference accomplishes nothing.

13.292 Comparable to this usage is stating in one contract that another contract is being incorporated into it when the only reason for so stating is that both contracts represent separate components of one transaction. For example: *This note is entered into in accordance with a pledge and security agreement between the Borrower and the Lender dated the date of this agreement, which pledge and security agreement is incorporated herein by reference in its entirety.* The interplay between the constituent components of a transaction would be spelled out in the contracts, rendering redundant the notion of incorporation by reference.

13.293 Because one contract is subject to a provision in another contract doesn't mean that the provision must be incorporated by reference:

Recourse to and the liability of any past, present, or future partner of the Borrower is limited as provided in section 9.12 of the Credit Agreement ~~and the provisions of that section are hereby incorporated by reference~~.

13.294 Don't incorporate recitals by reference into the body of the contract (see 2.139).

13.295 incorporation by reference is appropriate to describe the act of importing into an agreement, without repeating them, provisions that are contained in a separate agreement. For example, if Baker is purchasing assets from Able and reselling

them to Charlie, the purchase agreement between Baker and Charlie might incorporate by reference, as if Baker were making them in that agreement, all representations made by Able in the purchase agreement between Able and Baker. But instead of using the jargon *incorporated by reference,* it would be simpler and more concise to describe what is actually happening: *Baker hereby makes to Charlie, as if they were contained in this agreement, all representations made by Able to Baker in the Able–Baker Purchase Agreement*. (In that regard, see the discussion of *mutatis mutandis* at 13.425.)

13.296 In other words, because the concept of incorporation by reference is often misapplied in contracts, and because on those occasions when it is used appropriately there are clearer ways of expressing the concept, don't use the phrase *incorporated by reference* in a contract.

"INDEFINITELY" AND "PERPETUALLY"

13.297 In contracts, the word *indefinitely* is used to convey two different meanings. One meaning is "without limit," the implication being that although a limit hasn't been specified, one could be specified at some point.

Acme may terminate this agreement upon giving 30 days' notice to Widgetco if Acme discontinues or *indefinitely* suspends the development of the Product.

13.298 *definitely* is also used to convey the meaning "perpetually." The word *perpetually* itself conveys that meaning more clearly, in that there's nothing that isn't definite about forever:

During the term of this agreement and ~~*indefinitely*~~ [read *perpetually*] thereafter . . . .

13.299 If the notion of "perpetually," however articulated, is followed by *until*, you can dispense with the notion of "perpetually":

Participant acknowledges that the Securities must be held ~~indefinitely~~ until they are registered under the Securities Act or an exemption from registration is available.

13.300 It doesn't make sense to perpetually (or forever) release someone. You release someone once—you don't keep on releasing them. (Regarding using *irrevocably* in connection with a release, see 3.25.)

13.301 Alternatives to *perpetually*, *forever* has an unfortunate fairy-tale quality to it, *until the end of time* even more so.

"INDEMNIFY"

Function

13.302 If a party makes an inaccurate statement of fact in a contract or fails to comply with a contract obligation, the counterparty will have remedies available. In common-law jurisdictions, it will be

able to bring a claim for damages under the contract or in tort.

13.303 It might benefit contract parties to address in their contract how specified claims are to be handled. That's the function served by indemnification provisions. The potential benefits are described below.

INDEMNIFICATION CAN BENEFIT A PARTY BRINGING A CLAIM

13.304 *Bring In Deep Pockets*. A party with limited resources wouldn't be a promising target for a lawsuit seeking common-law remedies. In an indemnification provision, a party could arrange for someone more substantial—typically a parent company—to be responsible for any liabilities of the other party.

13.305 *Answer for Disclosed Liabilities*. If a party has disclosed a problem—for example, environmental contamination—the other party couldn't base a common-law cause of action on that problem, given that it had been disclosed. An indemnification provision would allow the nondisclosing party to arrange for the disclosing party to compensate it if the disclosed problem causes the nondisclosing party to incur losses or liabilities.

13.306 *Answer for External Events or Circumstances*. Indemnification provides one way to allocate risk for occurrence or nonoccurrence of an event or circumstance that isn't entirely under the

control of the indemnifying party, for example whether a government agency issues a permit.

13.307 *Limiter for Losses Caused by Nonparties*. If Acme incurs losses or liabilities due to a claim by a nonparty that's related to the subject matter of the contract—for example, purchased assets—but that isn't due to the counterparty's having failed to comply with an obligation or having made an inaccurate statement of fact, Acme couldn't bring a claim against the other party to the contract unless the other party had agreed to provide indemnification for any such losses or liabilities.

13.308 *Limiter Losses Aren't Covered by a Provision Excluding Certain Types of Damages*. Seeking to be indemnified for losses incurred due to nonparty claims constitutes a claim under the contract. That would make it difficult for the indemnifying party to argue that those losses constitute consequential damages or some other kind of excluded damages (see 13.105).

13.309 *Limiter Attorneys' Fees and Expenses*. In litigation in the United States seeking common-law remedies, it's the norm that the plaintiff isn't entitled to recover attorneys' fees and expenses. Indemnification provisions could specify otherwise.

INDEMNIFICATION CAN BENEFIT A PARTY SUBJECT TO A CLAIM

13.310 *Provide for a Cap*. Common-law remedies aren't subject to a cap on liability. In

indemnification provisions, the parties can agree to cap indemnification liability.

13.311 *Provide for Shorter Time Limits*. A plaintiff could seek common-law remedies until the applicable statute of limitations expires. In indemnification provisions, the parties could agree to shorter time limits for bringing claims.

13.312 *Provide for a Basket*. A plaintiff could bring a common-law claim for a relatively trifling amount. In indemnification provisions, the parties could agree on a minimum that would have to be reached before indemnification kicks in—in other words, a "basket," whether of the "threshold" or "deductible" variety.

INDEMNIFICATION ADDS PREDICTABILITY

13.313 In indemnification provisions, the parties can specify procedures to be followed in the event of a direct claim for indemnification by one party against another or a claim for indemnification arising out of a proceeding against a party brought by a nonparty. That makes for greater predictability than simply leaving such matters to litigation.

13.314 Predictability is assured only if a set of indemnification provisions specifies that indemnification is the exclusive remedy for such claims.

WHEN YOU CAN DO WITHOUT INDEMNIFICATION

13.315 If you're not worried about gaining access to deeper pockets; if you don't need to address the

consequences of disclosed liabilities; or if your being subject to nonparty claims isn't a major concern (either because they're a remote possibility or because any claims would likely be for modest amounts), then indemnification would probably be more trouble than it's worth. Remedies otherwise available would likely address your needs, so including indemnification provisions in your contract would add a lot of words for little benefit.

13.316 If your main concern is allowing the prevailing party in a dispute to recover attorneys' fees (see 13.508), you could address that issue outside of indemnification provisions.

13.317 Before you provide for indemnification in a contract, ask yourself whether the claims that might arise justify lumbering the contract with full-blown indemnification provisions.

WHAT KINDS OF CLAIMS

13.318 The discussion above anticipates that indemnification provisions can—but don't have to—cover claims between the parties as well as nonparty claims against one or other party. Many practitioners are under the impression that indemnification provisions serve primarily, or exclusively, to address nonparty claims.

13.319 Whatever the historical practice, currently it's unexceptional to have indemnification cover claims between the parties. In fact, in mergers-and-acquisitions transactions it's standard. And in defining *indemnify*, *Black's Law Dictionary*

refers to reimbursing another for "a loss suffered because of a third party's or *one's own* act or default" (emphasis added).

3.320 If you want indemnification to cover claims between the parties, you have to make that clear in the indemnification provisions themselves or risk having a court hold that they cover just nonparty claims. For an example of a court in Canada doing just that, for debatable reasons, see the opinion of the Alberta Supreme Court, Appellate Division, in *Mobil Oil Canada Ltd. v. Beta Well Service Ltd.* (1974), 43 D.L.R. (3d) 745 (A.B.C.A.), aff'd 50 D.L.R. (3d) 158 (S.C.C.). See also *NevadaCare, Inc. v. Department of Human Services*, 783 N.W.2d 459, 470 (Iowa 2010), reh'g denied (June 22, 2010) ("Currently, there is a split of authority as to whether an indemnification provision applies to claims between the parties to the agreement or only to third-party claims.").

Whether to Say "Hereby Indemnifies" or "Shall Indemnify"

3.321 *Black's Law Dictionary* says that *indemnify* means both "To reimburse (another) for a loss suffered because of a third party's or one's own act or default" and "To promise to reimburse (another) for such a loss." So *indemnify* can be used in both language of obligation (*Acme shall indemnify Widgetco*) and language of performance (*Acme hereby indemnifies Widgetco*). Review of an informal sample of contracts filed by public companies on the SEC's EDGAR system suggests

that drafters greatly prefer *indemnify* as language of obligation rather than language of performance.

13.322 Although both usages are adequate to accomplish the intended purpose, there's some value to uniformity, so this manual recommends that you hasten the demise of *hereby indemnifies* by using *shall indemnify*.

"Indemnify and Hold Harmless"

13.323 It's commonplace for drafters to use the phrase *indemnify and hold harmless* (or *save harmless*). As explained below, it's much clearer and safer to use just *indemnify*.

MEANING

13.324 *Black's Law Dictionary* treats *indemnify* and *hold harmless* as synonyms, in that it defines *hold harmless* as follows: "To absolve (another party) from any responsibility for damage or other liability arising from the transaction; INDEMNIFY." (For the *Black's Law Dictionary* definition of *indemnify*, see 13.321.) *Garner's Dictionary of Legal Usage*, at 443–44, collects other dictionary definitions to the same effect, concluding that "The evidence is overwhelming that *indemnify* and *hold harmless* are perfectly synonymous."

13.325 Some courts have come to the same conclusion, notably the Delaware Court of Chancery. In *Majkowski v. American Imaging Management, LLC*, 913 A.2d 572, 588–89 (Del. Ch. 2006), then-Vice Chancellor Strine suggested that

many transactional lawyers would be quite surprised to learn that by adding *hold harmless* to *indemnify* they had been creating additional rights. He continued, "As a result of traditional usage, the phrase 'indemnify and hold harmless' just naturally rolls off the tongue (and out of the word processors) of American commercial lawyers. The two terms almost always go together. Indeed, modern authorities confirm that 'hold harmless' has little, if any, different meaning than the word 'indemnify.'" See also *Paniaguas v. Aldon Companies, Inc.*, No. 2:04-CV-468-PRC, 2006 WL 2788585 (N.D. Ind. Sept. 26, 2006) (holding that *hold harmless* is synonymous with *indemnify*); *Consult Urban Renewal Development Corp. v. T.R. Arnold & Associates, Inc.*, No. CIV A 06-1684 WJM, 2007 WL 1175742 (D.N.J. Apr. 19, 2007) (same); *In re Marriage of Ginsberg*, 750 N.W.2d 520, 522 (Iowa 2008) (same); *Loscher v. Hudson*, 182 P.3d 25, 33 (Kan. Ct. App. 2008) ("[A] hold harmless provision in a separation agreement is the same as an indemnity agreement.").

13:326 Nonetheless, some commentators have seen fit to endorse a distinction between *indemnify* and *hold harmless*. For example, David Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage* 286 (1992), says that "*hold harmless* is understood to protect another against the risk of loss as well as actual loss." It goes on to say that *indemnify* is sometimes used as a synonym of *hold harmless*, but that *indemnify* can also mean "reimburse for any

damage," a narrower meaning than that of *hold harmless*.

13.327 courts have done likewise. For example, in *United States v. Contract Management, Inc*., 912 F.2d 1045, 1048 (9th Cir. 1990), the Ninth Circuit Court of Appeals noted in dicta that "the terms 'indemnify' and 'hold harmless' refer to slightly different legal remedies." And in *Queen Villas Homeowners Ass'n v. TCB Property Management,* 56 Cal. Rptr. 3d 528, 534 (Ct. App. 2007), the court fabricated a distinction—that *indemnify* is an "offensive" right allowing an indemnified party to seek indemnification whereas *hold harmless* is a "defensive" right allowing an indemnified party not to be bothered by the other party's seeking indemnification itself.

13.328 In the Canadian case *Stewart Title Guarantee Company v. Zeppieri*, [2009] O.J. No. 322 (S.C.J.), the Ontario Superior Court of Justice held, without providing any support, that "the contractual obligation to save harmless, in my view, is broader than that of indemnification," in that someone having the benefit of a *hold harmless* provision "should never have to put his hand in his pocket in respect of a claim" covered by that provision.

ELIMINATING RISK

13.329 redundancy in the phrase *indemnify and hold harmless* is pernicious, in that disgruntled contract parties might seek to have unintended

meaning attributed to *hold harmless*. And a court might decide to distinguish *indemnify* from *hold harmless*, prompted by the principle of interpretation that every word in a provision is to be given effect.

13.330 The way out of trouble, never use *hold harmless*. Using just *indemnify* is no obstacle to saying whatever you want to say.

13.331 The basic issue regarding the coverage provided by indemnification is whether you're indemnified just for those losses you've paid for, or whether the indemnifying party also has to step in when you've incurred a liability that you're being asked to pay. That distinction is what Mellinkoff (see 13.326) and the court in *Stewart Title* (see 13.328) allude to in attributing a broad meaning to *hold harmless*. But relying on *hold harmless* to ensure that an indemnified party is covered in both contexts is to shirk a drafter's responsibility to articulate meaning clearly.

13.332 To ensure that indemnification covers both contexts, impose on Acme the obligation to indemnify Widgetco against both losses and liabilities. *Black's Law Dictionary* defines *loss* as "the disappearance or diminution of value, usu. in an unexpected or relatively unpredictable way," and it defines *liability* as "A financial or pecuniary obligation." If you address both those concepts, Acme would be indemnifying Widgetco against both actual loss and risk of loss. It would be redundant to have Acme also hold Widgetco harmless, whatever that might mean.

13.333 Instead of simply alluding to losses and liabilities, indemnification provisions should be more explicit. A defined term—"Indemnifiable Losses" or some variant—should be used to specify exactly what losses and liabilities are covered. For example, including "judgments" as one of the elements would help make it clear that an indemnified party isn't required to pay a court judgment before having it covered by indemnification. And provisions specifying indemnification procedures (see 13.334) should address, among other things, payment of litigation expenses.

"DEFEND"

13.334 Drafters routinely tack *defend* on to *indemnify and hold harmless*, but that doesn't begin to address how defense of nonparty claims is to be handled. To avoid uncertainty and the possibility of dispute, address that explicitly in provisions governing indemnification procedures.

"Indemnify" as a Term of Art

13.335 Many contracts professionals are skittish about assuming indemnification obligations, particularly for purposes of commercial contracts. The concern is that a claim for indemnification provides the claimant advantages not available to a breach-of-contract claimant.

13.336 More specifically, some courts and commentators believe that whereas in connection with a breach-of-contract claim the court determines

how much to compensate a nonbreaching party for nonperformance by the breaching party, an obligation to indemnify (particularly if unrelated to an underlying breach of a contract) actually constitutes an obligation to pay an amount of money if certain specified events occur and as such isn't subject to the rule-of-reasonableness standards to which breach-of-contract claims are subject. See Glenn D. West & Sara G. Duran, *Reassessing the "Consequences" of Consequential Damage Waivers in Acquisition Agreements*, 63 Business Lawyer 777, 785–88 (2008).

13.337 It's not clear how much of an issue this is, and whether it can be drafted around. But the aversion to indemnification is real, and any drafter who encounters it should consider using terminology that's less loaded than *indemnify*. The likeliest candidate is the formulation *Acme will be liable to Widgetco for*. You can make that switch because *indemnify* is a term of art fraught with doctrinal implications that are irrelevant for purposes of establishing contract relations (see 1.7).

"INDENTURE"

13.338 Here's how *Black's Law Dictionary* defines *indenture*: "A formal written instrument made by two or more parties with different interests, traditionally having the edges serrated, or indented, in a zigzag fashion to reduce the possibility of forgery and to distinguish it from a deed poll."

13.339 Obviously contracts are no longer given serrated edges. Nevertheless, the word *indenture* has survived in the terms *bond indenture*, *debenture indenture*, and *trust indenture*.

13.340 *Indenture* is simply a synonym of *contract* that has come to be used to refer to a limited group of contracts. One could just as well refer to a *bond agreement* or *trust agreement*, and such a change would be unobjectionable. All that *indenture* has going for it is tradition.

"IN OTHER WORDS"

13.341 When you use the phrase *in other words* in a contract, you're acknowledging that you failed to state the concept in question clearly enough the first time around. Get it right the first time and you won't need *in other words*.

13.342 The abbreviated Latinism *i.e.* (*id est*, meaning *that is*) is roughly equivalent to *in other words*, so don't use *i.e.* or *that is* either.

"IN PARTICULAR"

13.343 Here's an example of use in a contract of the phrase *in particular*:

The Company has taken all reasonable steps to maintain the confidentiality of or otherwise protect and enforce its rights in its confidential information, *in particular* the trade secrets owned by the Company.

13.344 *Particular* serves to flag something that the drafter wishes to highlight. But attributing special significance to one provision necessarily entails downplaying the significance of others. It's preferable instead to let the provisions speak for themselves. (See also 3.170 regarding *especially*.)

"IT BEING UNDERSTOOD"

13.345 Don't use *it being understood*. There's always a better alternative.

13.346 Usually *it being understood* serves the same function as *for the avoidance of doubt* (see 13.220), in that it introduces language that seeks to clarify or supplement preceding language. The appropriate fix depends on the context. It might involve deleting *it being understood* and performing whatever additional minor surgery is required to carve out what follows as a separate sentence:

Except to the extent that Advances are deemed to be loans, no Seller has any material outstanding loan to any Person Related to the ~~Business, it being understood that~~ [read *Business. For purposes of the immediately preceding sentence,*] obligations to reimburse employees for relocation, business, travel, entertainment, or similar expenses incurred in the Ordinary Course of Business do not constitute loans.

13.347 In the following example, the entire parenthetical beginning *it being understood* can safely be deleted, as the *If* that begins the sentence is all that's required to convey discretion.

If the Company maintains employee benefit plans (including pension, profit-sharing, disability, accident, medical, life insurance, and hospitalization plans) ~~(it being understood that the Company may but shall not be obligated to do so)~~, the Executive will be entitled to participate therein in accordance with the Company's regular practices with respect to similarly situated senior executives.

13.348 Sometimes *it being understood* is used to insert, in parentheses, one provision in the middle of another. That makes for a particularly disjointed provision:

If all of the Equity Interests of any Pledgor owned by the Borrower or any of its Subsidiaries are sold to a Person other than a Credit Party in a transaction permitted under the Credit Agreement, then that Pledgor will be released as a Pledgor under this agreement without any further action hereunder **(***it being understood* that the sale of all of the Equity Interests in any Person that owns, directly or indirectly, all of the Equity Interests in any Pledgor will be deemed to be a sale of all of the Equity Interests in that Pledgor for purposes of this section), and the Pledgee is authorized and directed to execute and deliver such instruments of release as are reasonably satisfactory to it.

13.349 The phrase *it being understood* can also be used to convey the same meaning as *acknowledge* (see 3.313)—that the party in question doesn't have first-hand knowledge of a fact but instead is accepting as accurate that fact as asserted by another

party. If that's the intended meaning, then use *acknowledge*, as it's the simpler and clearer alternative:

If any of the Collateral is in the possession of a warehouseman or bailee, the Borrowing Agent shall promptly notify the Bank and, upon request of the Bank, the Borrowers shall use reasonable efforts to obtain promptly a Collateral Access Agreement~~, it being understood and agreed, however,~~ [read. *The Borrower acknowledges*] that failure to obtain a Collateral Access Agreement might (in accordance with clause (c) of the definition of Eligible Inventory) result in decreased availability under the Borrowing Base.

"JOINT AND SEVERAL"

Theory

13:350 The concepts *joint* and *several* refer to liability, but for purposes of contracts, authorities refer to such liability as arising out of promises. For example, here's what 12 *Williston on Contracts*, at § 36:1, says:

Copromisors are liable "jointly" if all of them have promised the entire performance which is the subject of the contract. The effect of a joint obligation is that each joint promisor is liable for the whole performance jointly assumed. . . .

. . .

When a "several" obligation is entered into by two or more parties in one instrument, it is the same as though each has executed separate instruments. Under these circumstances, each party is bound separately for the performance which he or she promises, and is not bound jointly with anyone else.

A "joint and several" contract is a contract with each promisor and a joint contract with all, so that parties having a joint and several obligation are bound jointly as one party, and also severally as separate parties at the same time.

13.351 Here's an example of a joint obligation: *A and B shall pay C $100*. And here's an example of several obligations: *A shall pay C $50 and B shall pay C $50*. You don't have to use the word *joint* to create joint obligations or the word *several* to create several obligations.

13.352 As regards a joint and several obligation, the *Restatement (Second) of Contracts* § 289 (1981) says, "The standard modern form to create duties which are both joint and several is 'We jointly and severally promise,' but any equivalent words will do as well."

13.353 Making an obligation joint and several doesn't affect what can be recovered. Regarding joint obligations, the *Restatement* says, "A and B owe $100 to C jointly, and C obtains a judgment against A and B for $100. Execution may be levied wholly on the property of either A or B, or partially

on the property of each." That wouldn't change if you made the obligation joint and several.

13.354 Furthermore, the *Restatement* says, "A and B severally promise to pay C the same $100. C may obtain separate judgments against each for $100, and may levy execution under either judgment until $100 is collected." So C is covered to the same extent, whether the obligation is joint or several.

Practice

13.355 Transactional lawyers use the terms *joint*, *several*, and *joint and several* primarily with respect to liability, not obligations. That makes sense—if those terms ultimately relate to liability, why not couch them in those terms, rather than in terms of obligations?

13.356 The substantive redundancy inherent in *joint and several* and in *several* is equally manifest when you speak in terms of liability, with one important exception: *several liability* is sometimes given a meaning that's narrower than the usual meaning, in that it's used, by means of the phrase *several but not joint*, to refer to apportioning liability among holders of ownership interests in an entity in proportion to their respective ownership interests. But given the broader meaning of *several*, it risks confusion to use it also to convey that narrower meaning.

Procedural Implications

13.357 The literature acknowledges the substantive irrelevance of any distinction between *joint* and *several*: the *Restatement (Second) of Contracts* § 288 says that "the distinction between 'joint' and 'several' duties is primarily remedial and procedural."

13.358 The procedural distinction is that if A and B are only jointly liable and not severally liable, failure to join both A and B in a suit for recovery might subject you to dismissal, or at least protracted argument over the issue. If A and B are severally liable, you can proceed against one without the other.

What Should the Drafter Do?

13.359 The word *joint* is subsumed by *several*—if you're able to go after each obligor separately, you can also go after them all. It follows that nothing is accomplished by using the phrase *joint and several*. And one can improve on the archaic *several* (meaning "separate").

13.360 It follows that although the phrase *joint and several* is a fixture in contracts and is accepted without question by, for example, *Garner's Dictionary of Legal Usage*, at 493, it's a mess. Here's a clearer way to express the concept:

Acme may elect to recover from any one or more Widgetco Entities the full amount of any collective liability of the Widgetco Entities under this agreement, and Acme may bring one or more

separate actions against any one or more Widgetco Entities with respect to any such liability.

13.361 Instead of using *several but not joint*, here's how to convey more clearly that liability is to be shared pro rata among holders of ownership interests and that the claimant may proceed against the holders separately:

Acme may recover from each Shareholder a proportion of any collective liability of the Shareholders under this agreement equal to the proportion of all Shares then outstanding represented by the Shares then owned by that Shareholder. Acme may bring one or more separate actions against any one or more Shareholders with respect to any such liability.

Relevance of Statutes

13.362 Added wrinkle is that, as noted in the *Restatement (Second) of Contracts* § 289, "statutes in a sizable number of jurisdictions provide that joint promises have the effect of creating joint and several duties, and statutes in others create a presumption of joint and several duties either in all cases or where all promisors receive a benefit from the consideration." So those statutes would allow you to capture the concept of *several* without having to articulate any liability, or any obligation, as several, whether by using that word or otherwise.

13.363 Drafters might not be inclined to explore the implications of such statutes. And it can sometimes be helpful to make clear to the parties

what the law provides. So expressing the *several* concept as proposed in 13.361 wouldn't hurt, even if *several* would be read into a contract by statute.

"KNOWLEDGE"

13.364 By making a statement of fact (in other words, a representation; see 3.273) can "qualify" it with respect to knowledge: *To the Seller's Knowledge, the Seller is not in violation of any Environmental Laws*. The effect of such a qualification is that the party making the statement isn't claiming absolute accuracy, but instead is stating that to that party's knowledge the statement is accurate.

13.365 A party will want to include a knowledge qualification in a statement if that party is not in a position to determine whether the statement is accurate, usually because the statement refers to matters that might be hidden (such as environmental contamination) or are under the control of others (such as threatened litigation).

13.366 Which party bears the risk of unknown problems is a function of risk allocation. The party making the statement would likely argue that it would be unfair to insist that it make a statement of fact if it has no way of knowing whether the statement is accurate. By contrast, the other party would likely argue that as between the parties, the party making the statement should bear the risk of the unknown.

13.367 Certain statements of fact—such as statements regarding threatened litigation—almost invariably include a knowledge limitation. Others—such as a company's statement as to its capitalization—never do, because they relate to matters over which the party making the statement has control. In the case of yet others—such as statements as to violations of environmental laws—there is no fixed practice. If including a knowledge qualification in a given statement would not be the standard practice, getting the other party to accept that qualification might require that the party making the statement either have superior bargaining power or be willing to make concessions elsewhere in the contract.

13.368 In phrasing a knowledge qualification, don't refer to *the best of* someone's knowledge. For one thing, it adds nothing, because *to the best of Acme's knowledge* means exactly the same thing as *to Acme's knowledge*. In this context, the word *best* adds nothing more than a rhetorical flourish (see 8.9), and using *the best of* could lead a reader to assume incorrectly that it implies an obligation to investigate (see 13.372) or some sort of heightened level of knowledge.

13.369 Don't use the couplet *knowledge and belief*. It's a meaningless exercise in redundancy (see 1.41) that a disgruntled contract party might seek to invest with meaning.

13.370 Consider using *knowledge* as a defined term. Doing so would allow you to address two

issues that otherwise would be subject to uncertainty: whose knowledge would be relevant and whether those one or more persons are under a duty to investigate.

13.37 If the term is to be used with respect to a single party, you would use the form of autonomous definition in [1]. If it is to be used with respect to more than one party, you would define the term using the form of autonomous definition in [1a], which should be revised appropriately if the parties are all individuals or all legal entities.

[1] "**Acme's Knowledge**" means [*insert level of knowledge; see [3] and its variations*] of [*specify whose knowledge applies; see [2] and its variations*].

[1a] "**Knowledge**" means, with respect to any Person, [*insert level of knowledge; see [3] and its variations*] of that Person (if that Person is an individual) or [*specify whose knowledge applies; see [2] and its variations*] (if that Person is not an individual).

[2] John Doe

[2a] [Acme's] [that Person's] executive officers [(as defined in rule 405 of the Securities Act)]

[2b] [Acme's] [that Person's] directors and executive officers

[2c] [Acme's] [that Person's] directors, officers, and any other persons having supervisory or management responsibilities with respect to [Acme's] [that Person's] operations

[2d] directors and officers of [Acme and any Acme Subsidiary] [that Person and any of its Subsidiaries] and any other person having supervisory or management responsibilities with respect to the operations of [Acme or any Acme Subsidiary] [that Person or any of its Subsidiaries]

[2e] [Acme's] [that Person's] shareholders, directors, officers, and other employees

[2f] the shareholders, directors, officers, and other employees of [Acme and any Acme subsidiary] [that Person and any of its Subsidiaries]

[3] the actual knowledge, without any requirement to investigate,

[3a] the actual knowledge, after inquiry of [Acme's employees] [that Person's employees] [employees of the Acme Plant],

[3b] the actual knowledge, after reasonable investigation,

13.372 If the party making the statement of fact is an entity rather than an individual, one is faced with the issue of whose knowledge would be relevant for purposes of determining the accuracy of a statement containing a knowledge qualification. The party making the statement would want to limit the number of people whose knowledge would be relevant, whereas the other party would want to specify as broad a group as possible. Example [2] and its variations demonstrate some of the possibilities, from limited to broader.

13.373 The reference in [2a] to rule 405 would serve to reduce the likelihood of disagreement as to who is an executive officer, but it should be used in a contract only if the party benefiting from the knowledge qualification is a U.S. public company.

13.374 A company selling a subsidiary or division would face the question of whose knowledge is relevant for purposes of statements regarding the business being sold. Managers of the business being sold would be the most knowledgeable, but the seller could well be concerned that if the managers remain with the business being sold, they might be pressured into determining that they had, in fact,

known that a given statement was inaccurate, or might come to that conclusion themselves in their eagerness to ingratiate themselves with their new employer. Consequently, the seller might try to omit from the definition of *Knowledge* officers involved in the business being sold, something the buyer would resist.

13.375 In addition to the question of whose knowledge is relevant, a definition of *Knowledge* should address whether it means actual knowledge (as [3]) or knowledge after some level of investigation. A more limited alternative to the reasonable-investigation standard stated in [3b] is a standard based on inquiry of a specified group of employees, as in [3a]. Avoid, as being unclear, references to *reasonable knowledge*.

LATINISMS

13.376 Used in contracts that public companies filed on the SEC's EDGAR system in 2012 are contracts between U.S.-based parties that contain one or more of the following words and phrases derived from Latin:

- ab initio
- allocatur
- bona fide
- contra proferentem
- de facto
- de jure
- de minimis

- de novo
- ejusdem generis
- ex gratia
- ex parte
- in personam
- in rem
- inter alia
- ipso facto
- mala fides
- mutatis mutandis (see 13.425)
- nunc pro tunc
- pacta sunt servanda
- parens patriae
- pari passu
- per diem
- prima facie
- pro tanto
- qui tam
- res judicata
- sui generis
- ultra vires

13.37 Latinisms have become so ingrained that they can now be accepted as English—for example, *pro rata*, *status quo*, and *vice versa*. Your contracts would be clearer if you were to dispense with the rest, including those in the above list. Instead, express the intended meaning in standard English.

"LIKELY"

13.378 The word *likely* is used routinely in contracts: *As used herein, the term "Disability" means a physical or mental incapacity or disability that has rendered, or is likely to render, the Executive unable to perform* . . . . But it's a slippery word. In certain contexts one can't avoid using *likely*, but you should be aware of the uncertainties.

13.379 First, consider what *likely* isn't—it isn't vague. Vague words such as *promptly* and *material* require that you assess circumstances from the perspective of a reasonable person (see 7.33). By contrast, *likely* is an expression of the degree of probability that something will occur. As such, likelihood isn't a function of reasonableness.

13.380 It's not clear what *likely* means. Here's what *Garner's Dictionary of Legal Usage*, at 545, says:

> **likely** has different shades of meaning. Most often it indicates a degree of probability greater than five on a scale of one to ten. . . . But it may also refer to a degree of possibility that is less than five on that same scale.

13.381 An indication that *likely* doesn't have a set meaning is how *likely* relates to *probable*, a word that exhibits the same characteristics. Consider the following:

"Although the term 'likely' connotes something more than a mere possibility, it also connotes something less than a probability or reasonable certainty." *State v. Green*, 18 Ohio App. 3d 69, 72, 480 N.E.2d 1128, 1132 (1984).

"Probable and likely are synonyms." *Anderson v. Bell*, 303 S.W.2d 93, 98 (Mo. 1957).

13.382 Two courts can reach different conclusions regarding how *likely* relates to *probable*, that suggests that you can't rely on any court to have a clear idea what one or the other word means. You could get around that by instead referring to a percentage probability: *a physical or mental incapacity or disability that has rendered, or ~~is likely to render~~* [read *has a probability of greater than 50% of rendering*]*, the Executive unable to perform.*

13.383 Even if you assume that it's clear what *likely* means, a further problem is that although referring to a mathematical degree of probability is appropriate when you're rolling dice or playing cards, it's hard to see how it would be relevant for purposes of contract provisions using *likely*. So arguments over likelihood quickly become meaningless once you move from one or other end of the spectrum of probability into the middle. For example, it's hard to see how one could have a meaningful debate over whether an event has a 49% or a 51% chance of occurring.

13.384 don't say *reasonably likely*—nothing is accomplished by adding vagueness to a degree of probability.

"LUMP SUM"

13.385 In construction and some other fields, the term *lump sum* can have a specialized meaning. But *lump-sum payment* is also used generally as a clumsy alternative to *single payment*. In that case, if a contract specifies when a payment is to be made, the benefits of specifying that the payment should be a lump-sum (or single) payment are marginal. Consider the following example:

No later than 60 days after the Company has Sufficient Funds, it shall pay all Deferred Portions to the Executive [*in a single lump-sum payment*], subject to the usual withholding.

13.386 Given that the company could wait 60 days to pay what it owes the executive, it wouldn't benefit the executive to prevent the company from paying the executive in installments over the course of the 60 days, in the unlikely event it wished to do so.

13.387 If a contract specifies the day that a payment is to be made, no purpose would be served by specifying that it should be made in a single payment, unless for some reason you wish to protect against the possibility of the payment being made in installments on that one day:

. . . the Company shall pay the Executive an additional amount equal to 12 times the monthly rate of the Executive's Base Salary on the Date of Termination, which amount the Company shall pay [*in one lump-sum payment*] on the 30th day after the Date of Termination (or the first business day thereafter if the 30th day is not a business day).

"MERELY" AND "MERE"

13.388 The word *merely* has a dismissive quality that makes it unsuited to contract language.

13.389 Depending on the context, the fix for *merely* in contracts might be simply to delete it or to use *just* or *only* instead:

. . . and any advice given by any Purchaser or any of their respective representatives or agents in connection with the Transaction Documents and the transactions contemplated thereby is ~~merely~~ incidental to the Purchasers' purchase of the Securities.

. . . as if those limitations applied to the Participant's entire Vested Interest and not ~~merely~~ [read *only to*] amounts contributed under Code Section 401(k).

13.390 The same applies to the adjective *mere*:

. . . except that the term "Participate In" does not include ~~mere~~ ownership of less than 5% of the stock of a publicly held corporation . . . .

. . . and the Plan constitutes ~~a mere~~ [read *only a*] promise by the Company to make benefit payments in the future.

13.391 Regarding use of *mere* and *merely* in referring to categories of contract language, see 3.3.

MONEY—STATING AMOUNTS OF

13.392 Stating amounts of money in a contract raises a number of issues.

Words and Digits

13.393 For the same reason that they use words and digits in stating numbers generally (see 14.1), it's commonplace for drafters to use words and digits when stating amounts of money: *Acme shall pay Widgetco One Million Dollars ($1,000,000)*. This manual recommends that generally for purposes of contracts you use words for numbers up to ten and digits thereafter (see 14.9). But for stating amounts of money, use only digits: it would be odd in a commercial context—and that includes contracts—to use words for *nine dollars* but digits for *$12*.

13.394 When it comes to stating a big number in a sensitive context—for example, stating in a promissory note the principal amount of the loan—drafters might have a hard time resisting the sense of belt-and-suspenders security that comes with using both words and digits. But you run the risk of inconsistency (see 14.4–5). And if ever there

were a context calling for effective proofreading, this would seem to be it (14.10). That said, using words and digits once or twice in a contract to state an amount of money wouldn't have a meaningful effect on readability. But if you do state amounts of money in words, nothing is gained by using initial capitals.

Decimal Fractions

13.395 *The Chicago Manual of Style*, at 9.21, says that when stating amounts of money you should use zeros after a decimal point only when fractional amounts appear in the same context. In other words, say *$2* rather than *$2.00*, unless the provision in question also refers to, for example, *$3.78* and *$12.93*.

13.396 If you're stating less than a whole unit of currency, put a zero before the decimal point, as in *$0.32*. You could conceivably say instead *32¢*, but it would be a nuisance to have the convention you use depend on whether the amount is less than a dollar.

13.397 Some countries use a comma rather than a decimal point to express fractional amounts. And whereas in the United States and the United Kingdom a comma is used as a thousands separator, as in *1,234,567*, other countries follow other conventions. Pick the conventions you think most appropriate and apply them consistently.

Very Large Amounts

13.398 It's commonplace for drafters to use a mixture of words and digits to express large amounts of money: *$4.4 billion*; *$3 million*. This approach can make amounts of money easier to read, particularly if a provision includes several large amounts. But don't switch to a mixture of words and digits if other numbers in the same context use all digits. And don't go beyond two decimal points to express fractional amounts.

13.399 In the United States, a *billion* is 1,000,000,000 (a thousand millions), but in Germany and many other non-English-speaking regions, a *billion* is a million millions; the U.S. *trillion* equals the German *billion*. Great Britain has been shifting from the German system to the U.S. system. If in an international transaction confusion might arise as to the meaning of *billion*, use only digits to state amounts of one thousand million units or more of the currency in question.

Currencies

13.400 A reference to an amount of money would have to specify the currency. You can accomplish that by using a currency sign or by using the three-letter currency code specified for that currency in ISO 4217, the list established by the International Organization for Standardization. For example, the currency sign for the Euro is *€*; the currency code is *EUR*. And the currency sign for the Norwegian Kroner is *Kr*; the currency code is *NOK*. Which choice is preferable is a matter of custom. Don't use

both a currency sign and a currency code when stating a given amount of money.

13.401 Currency signs are shared by many currencies, and you can make it clear which currency you're referring to by supplementing the currency sign. For example, the dollar sign (*$*) is used for currencies in many countries other than the United States, principally those using currencies denominated in dollars (including Australia, Brunei, and Canada) or pesos (including Argentina, Chile, and Mexico). If a contract between parties from different countries refers to a currency that uses the dollar sign, using a currency code or a suitably modified currency sign, such as *A$* for Australian dollars and *Mex$* for Mexican pesos, would make it clear which currency is being referred to.

13.402 Always put a space between the currency code and the number: *EUR 2,400,000*. If a currency sign consists of one or more letters, put a space between the currency sign (in this case, Swiss francs) and the number: *SFr. 334,583*. But if the currency sign consists of a symbol, don't use a space, even if you add one or more letters in front of the symbol: *C$655,000*.

13.403 In many countries, especially those in the English-speaking world, the practice is to place the currency sign before the amount. In other countries, it's placed after the amount. Pick the convention you think most appropriate and apply it consistently.

Provision Specifying Drafting Conventions

13.404 An alternative way to make it clear what currency is being referred to is to use a provision specifying drafting conventions, such as *"A$" means Australian dollars*. This is one of the few such provisions that does something other than state the obvious (see 15.6).

13.405 You could conceivably use such a provision as an excuse not to supplement a multicurrency sign. You could, for example, in a contract use a simple dollar sign in referring to Australian dollars and say *$ means Australian dollars*. But it would be best to use *A$* every time you state an amount of money in that contract, as that by itself should be enough to inform most readers what currency is being referred to.

"MORAL TURPITUDE"

Background

13.406 *Black's Law Dictionary* defines *moral turpitude* as meaning "Conduct that is contrary to justice, honesty, or morality." It also quotes 50 *Am. Jur. 2d* Libel and Slander § 165, at 454 (1995):

Moral turpitude means, in general, shameful wickedness—so extreme a departure from ordinary standards of honest, good morals, justice, or ethics as to be shocking to the moral sense of the community. It has also been defined as an act of baseness, vileness, or depravity in the private and social duties which one person owes to another, or

to society in general, contrary to the accepted and customary rule of right and duty between people.

13.407 For all its heavy-breathing pomposity, this definition is no more enlightening than the more succinct *Black's Law Dictionary* definition. There's no getting around the fact that the phrase *moral turpitude* is utterly vague.

13.408 Thus explains how in *Marmolejo-Campos v. Gonzales*, 503 F.3d 922 (9th Cir. 2007), the court concluded that driving drunk isn't an act of moral turpitude, but driving drunk without a license is. It also explains why one judge felt the need to offer a lengthy dissenting opinion.

13.409 Despite its vagueness, the phrase *moral turpitude* is a fixture in contracts—such as employment agreements, consulting agreements, and employee benefit plans—where it routinely features as one of the grounds for termination for cause:

> the Executive's admission or conviction of, or plea of nolo contendere to, a felony or of any crime involving *moral turpitude*, fraud, embezzlement, theft or misrepresentation; . . .

13.410 It also serves other functions. For example, in a loan agreement the lender might require the borrower to represent that no person associated with the borrower has been convicted of a crime involving moral turpitude.

13.411 The *Marmolejo-Campos* case suggests that *moral turpitude* is unhelpfully vague. Coming up with an alternative for purposes of termination provisions requires that one consider more generally termination provisions that feature *moral turpitude*. This manual refers to such provisions as "termination-for-crime provisions."

13.412 Termination-for-crime provisions allow a party to terminate if another party has been involved in a crime. But they feature a number of possible elements, each of which can be structured in different ways. Each of those elements is considered below.

What Crime?

13.413 The crime triggering the right to terminate might be expressed in one or more of the following ways:

- *crime* (preferable to the bureaucratic "criminal offense")
- *felony* or the equivalent *crime punishable by death or imprisonment in excess of one year* (includes murder, rape, kidnapping, grand theft, arson, fraud, and other major crimes; but the term *felony* isn't recognized in civil-law jurisdictions, most non-U.S. common-law jurisdictions, and even some U.S. states, for example New Jersey, and in those states where it is recognized, its meaning might vary from state to state)
- *misdemeanor* (more serious misdemeanors include theft, prostitution, public intoxication, simple assault, disorderly conduct, trespass, vandalism; less serious

ones involve only fines and no social stigma and include parking and minor traffic offenses, late payment of fees, and building code violations; the term *misdemeanor* poses the same problem as *felony*)

Involving?

13.414 Sometimes the kind of crime is modified by an adjectival phrase providing further information regarding the nature of the offense. This is where *moral turpitude* comes in, along with a number of other labels that drafters are fond of stringing together:

- moral turpitude
- dishonesty
- deceit
- misrepresentation
- theft
- fraud
- embezzlement

13.415 Alternatively, in an employment or similar agreement one could refer to the crime as being *related to the Employee's employment*.

Other Criteria?

13.416 It can help to tack one or more other criteria on to the kind of crime. Here are three examples:

- a crime for which a fine or other noncustodial penalty is imposed
- a crime that does not relate to driving while intoxicated or driving under the influence

- a crime that does not relate to services performed under the agreement

What Procedural Posture?

13.417 At what point in the criminal process does the right to terminate kick in? Here's the spectrum, from earlier in the crime to later:

- *when Doe commits the crime* (but in advance of any proceedings, it wouldn't be known whether Doe had committed a crime)
- *when Doe is arrested for the crime* (but only in the case of more serious crimes is the suspect arrested)
- *when Doe is indicted for the crime* (but only in the case of more serious crimes is the suspect indicted, and in many jurisdictions indictment is not the only way of charging a suspect)
- *when Doe is charged with the crime* (this would apply to all crimes)
- *when Doe is convicted of the crime or pleads guilty or no contest to the crime* (given the often protracted nature of criminal proceedings when anything other than a minor crime is involved, this standard raises the question whether using it would, from the terminating party's perspective, unduly delay the right to terminate)

Which Jurisdiction?

13.418 If you use terminology that might vary by jurisdiction, you would need to refer to a particular jurisdiction, to avoid any argument about exactly what, for example, *felony* means. For example, you

might say *constituting a felony in the jurisdiction in which the crime is committed*.

Doubling Up?

13.419 A drafter might want to refer to two or more kinds of crime in a termination-for-crime provision. For example, the right to terminate could arise on conviction of a felony or conviction of a crime involving dishonesty.

13.420 One could complicate matters further by referring to a different procedural posture for each crime—for example, conviction for purposes of a felony and indictment for purposes of a felony involving dishonesty or fraud.

Recommendation

13.421 One could conceivably cobble together a truly complicated termination-for-crime provision out of the above parameters. Simplicity is preferable, unless one has good reason to opt for complexity, so here's a reasonable pro-employer termination-for-crime provision to use in an employment agreement (but see 11.68 for an issue regarding how it's worded):

. . . the Employee is charged with a crime that (1) is punishable by a custodial penalty, instead of or in addition to a fine or other noncustodial penalty, or (2) is related to the Employee's employment; . . .

13.422 For the reasons noted above, it would be best to avoid formal labels in referring to the kind of crime. And if the offense doesn't merit jail time, it

shouldn't be of undue concern, unless the conduct relates directly to the employee's job. Furthermore, a company wouldn't want to be compelled to keep someone as an employee until he or she had been convicted or pleaded guilty. It's possible that the charges might be dismissed, but that eventuality could be addressed elsewhere in the contract.

13.423 An employment agreement might also include a broader provision allowing the company to terminate if the employee engages in conduct that the employee knew, or that a reasonable person in the position of the employee would have known, would have or would reasonably be expected to have a material adverse effect on the business or reputation of the company or any of its directors, officers, employees, or affiliates.

13.424 Whatever language you use, dispense with *moral turpitude*.

"MUTATIS MUTANDIS"

13.425 When a drafter incorporates into a contract, by reference, provisions contained in a separate agreement (see 13.295), it's sometimes necessary to adjust those provisions to reflect that, for example, the parties to one contract are different from the parties to the other contract. Such adjustments can be explicit:

The terms of the Master Lease are hereby made part of this agreement, as if they were contained in this agreement, except that (1) each reference to "Lease"

will be deemed a reference to "Sublease" and (2) each reference to "Landlord" and "Tenant" will be deemed a reference to "Sublandlord" and "Subtenant," respectively.

13.426 Sometimes incorporating by reference can require, in addition to any explicit major adjustments, minor adjustments to individual provisions. For example, if a guarantor, a Delaware limited-liability company, is required to make in a guaranty the representations that the borrower, a New York corporation, is making in a credit agreement, the representations regarding organization and authority would have to be adjusted to reflect, at a minimum, the difference in jurisdiction and form of entity. Since it would be time-consuming to note each such adjustment, it's conventional to accomplish this instead in one fell swoop with the Latin phrase *mutatis mutandis*, meaning literally "with those things having been changed that need to be changed":

Each Guarantor hereby makes to the Lender, as if they were contained in this agreement, *mutatis mutandis*, each of the representations made by the Borrower in the Loan Agreement.

13.427 A phrase such as *together with any necessary conforming changes* would convey the same meaning more clearly. Generally, it's best to keep contracts free of Latinisms (see 13.376).

"MUTUAL" AND "MUTUALLY"

13.428 In contracts as in general usage, the words *mutual* and *mutually* are prone to misuse.

13.429 The principal meaning of the adjective *mutual* is "reciprocal" or "directed by each toward the other or others," as in *Their relationship was characterized by mutual mistrust.* When in a contract *mutual* is used to convey this meaning, it often modifies *agreement*, as in "*Product" means any product whose promotion and detailing is assigned to Acme by mutual agreement with Pharmaco.* In this case *mutual* is redundant, as reciprocity is inherent in the notion of agreement.

13.430 Also commonplace are references to *mutual consent*, as in *This agreement may be amended at any time by mutual consent of the parties*. It would be preferable to use *by the mutual exchange of written consents*, but better yet would be simply stating that to be effective, an amendment must be in writing and signed by both parties (see 3.342).

13.431 Another meaning of *mutual* is "pertaining to both parties." One might state in a set of recitals that the parties want to take a given action *for their mutual benefit.* An alternative would be *for the benefit of each of them.* Combining the two, as in *for the mutual benefit of each of them*, would result in redundancy.

13.432 Like *mutual*, the adverb *mutually* can be used in contracts to convey reciprocity: *Merger Sub and the Company shall issue mutually acceptable*

press releases announcing the signing of this agreement.

13.433 Of course, *mutually* is used with the verb *agree*, as in *such other date as the parties mutually agree*. It is also used to modify the adjective *agreeable*, as in *Any public announcement must be in a form mutually agreeable to the Company and Parent*. In both cases, *mutually* is redundant, for the same reason that *mutual* is superfluous in *mutual agreement* (see 13.428).

13.434 *Mutually* is sometimes mistakenly used instead of *jointly*, as in *a nationally recognized independent public accounting firm mutually* [read *jointly*] *selected by the Stockholders' Representatives and Acme*.

"NEGLIGENCE" AND "GROSS NEGLIGENCE"

How the Terms Are Used

13.435 The terms *negligence* and *gross negligence* appear frequently in contracts. They're used in two ways.

13.436 First, provisions featuring gross negligence or featuring both negligence and gross negligence can be used as a sword—as a basis for terminating a contract, as grounds for being indemnified by the other party, or to circumvent a waiver of liability or cap on indemnification benefiting the other party.

13.437 Second, such provisions can be used as a shield—in a provision releasing a party from

liability for its own negligence or for its own negligence and gross negligence.

13.438 Courts in many jurisdictions have held that advance releases of liability in cases of gross negligence are unenforceable as against public policy. See, e.g., *City of Santa Barbara v. Superior Court*, 161 P.3d 1095 (Cal. 2007) (California); *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540 (1992) (New York). Releases of liability that use a negligence standard, as well as the other kinds of provisions, whether featuring just negligence or both negligence and gross negligence, are presumably enforceable.

Confused Terminology

13.439 In general usage, *negligence* means "carelessness." But it's likely that a court interpreting a contract provision that uses the term *negligence* will treat it as referring to the tort of negligence, which is grounded in, to use the *Black's Law Dictionary* definition, "The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."

13.440 Likewise, *negligence* is a tort term of art. Like *negligence*, it's vague, so determining whether a party's conduct has been negligent or grossly negligent necessarily depends on the circumstances. But beyond that, *gross negligence* has no settled meaning.

13.441 For example, in *Sommer*, at 554, the New York Court of Appeals held that gross negligence

must "smack of intentional wrongdoing" and that it is conduct that "evinces a reckless indifference to the rights of others." By contrast, in *City of Santa Barbara*, at 1099, the California Supreme Court, quoting a 1941 case, held that gross negligence "long has been defined in California and other jurisdictions as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'"

13.442 The *Sommer* and *City of Santa Barbara* standards might seem broadly compatible, but in *City of Santa Barbara*, at 1099 n.4, the court went on to say, "By contrast, 'wanton' or 'reckless' misconduct (or 'willful and wanton negligence') describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." Because the *Sommer* standard invokes recklessness, the *Sommer* standard seems to require greater misconduct than does the *City of Santa Barbara* standard. So courts from two states have given a different meaning to the term *gross negligence*.

13.443 Taking into account the caselaw more generally, *gross negligence* "is a nebulous term that is defined in a multitude of ways, depending on the legal context and the jurisdiction." 57A *Am. Jur. 2d* Negligence § 227 (2012). Consistent with the distinction between the *Sommer* and *City of Santa Barbara* definitions, some jurisdictions distinguish

between gross negligence and willful, wanton, or reckless conduct, whereas other jurisdictions treat those terms as being the same or substantially the same. See 57A *Am. Jur. 2d* Negligence § 231, § 232.

13.444 Confusing matters still further is the notion that "the word *wanton* usually denotes a greater degree of culpability than *reckless*." *Garner's Dictionary of Legal Usage*, at 936.

13.445 This chaos is in part the result of attempts by courts to demarcate distinct levels of misconduct on what is a slippery slope of vagueness, with differences measured in degrees rather than absolutes (see 7.38). One gets the sense that courts resort to an affected vocabulary, such as "smack of" (*Sommer*) and "scant" (*City of Santa Barbara*), to help cut through that slipperiness, but to no avail.

13.446 Given this state of affairs, it's not surprising that many jurisdictions, among them Pennsylvania, don't recognize degrees of negligence. "The view taken is that negligence, whatever epithet is given to characterize it, is the failure to exercise the care and skill which the situation demands, and that it is more accurate to call it simply 'negligence' than to attempt expressions of degrees of negligence." 57A *Am. Jur. 2d* Negligence § 219.

13.447 The law of a non-U.S. jurisdiction might recognize negligence and—less likely—gross negligence, or it might use a different analytical framework.

Recommendations

13.448 Given the confusion described above, here are eight recommendations regarding how to express degrees of misconduct in a contract:

13.449 First, the meaning of negligence is relatively consistent across U.S. jurisdictions, so using it in contracts doesn't involve undue uncertainty.

13.450 Second, unless you're in a position to research the tort law of each jurisdiction relevant to contracts that you draft and negotiate, it would be safer not to use the term *gross negligence*, as its meaning changes from jurisdiction to jurisdiction.

13.451 Third, if you want to use a term for misconduct that goes beyond negligence, use *recklessness*, or the adjective *reckless*, or the adverb *recklessly*, instead of *gross negligence* and its variants. Given that assessing misconduct depends entirely on the circumstances and involves differences of degree, it would be pointless to agonize over whether to opt for another standard more or less exacting than *recklessness*. In particular, it's unrealistic to think that for purposes of contracts one could usefully distinguish between *reckless conduct* and *wanton conduct*. It's a safe bet that many contract readers have no idea what *wanton* means and that the remainder would assume, sensibly enough, that *wanton* is an annoying legalism that means pretty much the same thing as *reckless*. But if you use *reckless*, bear in mind that in those jurisdictions that don't recognize degrees of negligence, a negligence standard might apply.

13.452 Third, use *intentional* (and *intentionally*) instead of *willful* (and *willfully*) (see 13.761).

13.453 Fifth, make it clear that whatever one or more labels you use, they relate not to the party's action but to the consequences of the party's action—that makes more sense. It's possible to act intentionally without intending to cause damages. If Fred throws a ball—an intentional act—and unintentionally breaks a window, it would be illogical to accuse him of intentional misconduct, as opposed to acting negligently or recklessly.

13.454 Sixth, adjust to reflect the governing law. If it's the law of a jurisdiction that doesn't recognize concepts used in the United States, don't insist on incorporating those concepts in the contract.

13.455 Seventh, don't try to define *recklessness* or any other form of the word. It means . . . recklessness. Defining it would just clog up the contract with verbiage without adding certainty. *Recklessness* is a vague standard—if you invoke vagueness, you have to accept that it comes with a measure of uncertainty.

13.456 Eighth, consider not using tort-based standards in a contract in connection with performance under that contract. Acme decides that some aspect of its contract with Widgetco no longer makes business sense, so it elects not to perform. Widgetco has a remedy under the contract for that nonperformance—why create in addition a tort-based remedy? In particular, if a cap on

indemnification contains a carve-out for recklessness or intentional misconduct and the indemnification covers Widgetco for Acme's failure to comply with obligations under the contract, the carve-out could end up vitiating the limit on indemnification. Such a carve-out would make more sense in the case of, for example, indemnification of Widgetco for losses relating to Acme's relations with nonparties.

A Sample Provision

13.457 How do these recommendations play out in practice? Here are "before" and "after" versions of a sample provision:

Before

The Processor shall not be liable to any party hereto or any other person for any action or failure to act under or in connection with this Agreement except to the extent such conduct constitutes its own willful misconduct or gross negligence.

After

The Processor will not be liable to any party or nonparty for damages arising from an act or failure to act on its part in connection with its performance under this agreement, except to the extent that as a result of its reckless disregard for the consequences of that act or failure to act, or its intentionally causing those consequences, the Processor causes the party or nonparty to suffer damages.

"NOTICE" AND "PRIOR NOTICE"

13.458 *The Oxford English Dictionary* gives as one definition of *notice* "an intimation by one of the parties to an agreement that it is to terminate at a specified time, *esp.* with reference to quitting a house, lodgings, or employment." Thus you can announce, "I've given notice at work!" and have it be understood as meaning that you told your boss that in ten days (or some other interval) you would be quitting.

13.459 *The Oxford English Dictionary* says that the phrase *to give notice* also simply means to convey information. So *to give notice* can convey two contrasting meanings—in one, information is given before the event in question, whereas in the other information is given afterwards.

13.460 Consequently, the sentence *Acme shall provide Doe with notice of any change of address* is ambiguous. One reading is that if Acme were to change its address and then inform Doe of the new address, it would have complied with the obligation. In other words, *to provide notice* can mean *to notify*. You could make this clear by modifying the verb *provide* with an adverb or adverbial phrase, such as *promptly* or *in no later than ten days*, or by modifying the noun *notice* with the adjective *prompt*.

13.461 If instead you modify the noun *notice* with the adjectival phrase *ten days'*, the natural

reading becomes that Acme is required to inform Doe in advance that it will subsequently be changing its address. In other words, in this context *to provide notice* conveys the meaning of the first *Oxford English Dictionary* definition mentioned above. It wouldn't be reasonable to conclude that Acme would be complying with its obligation if it were to notify Doe of the change of address after it had occurred.

13.462 This being the case, nothing would be served by referring to *ten days' prior* (or *advance*) notice rather than *ten days' notice*. But given the two possible meanings of *to give notice* and the subtleties involved in distinguishing them, it's understandable that for purposes of contracts, drafters should want to tack on *prior* to reinforce the fact that information is to be given before the event in question.

13.463 When considering alternative usages, often you can sidestep debate, and that's the case here. *Notice* is an abstract noun—in other words, a "buried verb" (see 17.7). Replacing buried verbs with verbs results in prose that's more concise, and in this case doing so would allow you to avoid the ambiguity inherent in *to provide notice*.

13.464 Consider the following alternative versions—one using *notice*, the other *notify*—of two sentences conveying the different meanings of *to provide notice*. The versions using *notify* represent an improvement.

1. *Using Buried Verb*

   Acme shall provide Doe with prompt notice of any change of address.

   Using Strong Verb

   Acme shall promptly notify Doe if it changes its address.

2. *Using Buried Verb*

   Acme shall provide Doe with at least ten days' prior notice of any change of address.

   Using Strong Verb

   Acme shall notify Doe at least ten days in advance if Acme changes its address.

"NOTICE"—USING AN APOSTROPHE WITH PERIODS OF TIME

13.465 When referring to someone's giving prior notice (see 13.458), follow the recommended usage and use an apostrophe with the associated period of time, as in *one week's* notice and *five days'* notice.

"NOTWITHSTANDING," "SUBJECT TO," AND "EXCEPT AS PROVIDED IN"

"Notwithstanding"

13.466 In the sentence "Notwithstanding section 3.2, Acme may own 1% or less of a publicly traded company," *notwithstanding* means "in spite of" or "despite" and serves to indicate that although the subject matter of section 3.2 overlaps with that of the quoted sentence, the quoted sentence should be read and interpreted as if section 3.2 did not exist.

13.467 In addition, drafters begin a provision with *notwithstanding anything in this agreement to the contrary* if they want that provision to trump any other provision in the agreement that might overlap with it. *Notwithstanding the foregoing* serves the same function, but only with respect to text that precedes the provision in question.

13.468 There are good reasons not to use *notwithstanding*. For one thing, *notwithstanding* operates remotely on the provisions it trumps; readers could accept at face value a given contract provision, unaware that it is undercut by a *notwithstanding* contained in a different provision.

13.469 Furthermore, although a *notwithstanding* clause that refers to a particular section at least warns readers what is being undercut, one that encompasses the entire agreement leaves to the reader the often awkward task of determining which provisions are affected. The answer might be none: drafters tend to throw in *notwithstanding anything in this agreement to the contrary* to inoculate particularly significant provisions against conflicting provisions, even if there aren't any.

13.470 although *notwithstanding the foregoing* might seem relatively benign, in that the provision that's undercut would seem to be close at hand, *the foregoing* could conceivably refer to the previous sentence, to the entirety of the preceding part of the body of the contract, or to something in between.

"Subject To"

13.471 There's an alternative to *notwithstanding*. Section 4 of a contract requires that Acme pay the purchase price to Jones, whereas section 5 requires that Acme pay $10,000 of the purchase price to a nonparty, Smith, if the closing occurs after a specified date. Instead of prefacing the latter provision with *Notwithstanding section 4*, it would be much clearer to qualify the former provision with *Subject to section 5*. Using *subject to* allows you to signal to the reader, in the context of a given provision, that the provision is undercut by another provision, and the reader doesn't have the burden of spotting a *notwithstanding* elsewhere in the contract. And if you use *subject to*, nothing would be gained by also using *notwithstanding*.

13.472 Even drafters who normally use *subject to* sometimes have use for *notwithstanding*. When you're proposing a change to the other side's draft that would undercut one or more other provisions, using *notwithstanding* rather than *subject to* would allow you to make only one change, instead of adding the undercutting provision and adding a cross-reference to it, using *subject to*, in the one or

more provisions being undercut. That might prove useful, particularly if you're making a last-minute change.

13:47 Language of performance (*Acme hereby grants Pharmaco a license*) and key language of obligation (*the parties shall cause Cyberco to merge into Dynamix Corp.*) is often preceded by *Subject to the terms of this agreement*. This phrase can be superfluous, as the rights and obligations of the parties to a contract are determined by considering the contract as a whole rather than each provision in isolation. If, for example, a party grants an option in one section and states in one or more other sections the exercise price and the exercise period, it doesn't follow that the grant should be made "subject to the terms" of that contract. It would be inconceivable for the party that is granted the option to claim that there is no exercise price or that the option is exercisable indefinitely.

13:474 When using *subject to*, generally it's best to be specific as to which provision is doing the undercutting. But when a key obligation—for example, the obligation to cause Cyberco to merge into Dynamix Corp.—is subject to satisfaction of certain conditions and the right of one or more parties to terminate the agreement in certain circumstances, it's generally simpler to state at the outset that the obligation is *Subject to the terms of this agreement* rather than specify at greater length the sections containing those conditions and termination rights.

“Except as Provided In”

13.475 An alternative to stating that a provision is *subject to* a given section is to say *except as provided in* that section. *Except as provided in* is the narrower of the two phrases: it serves to indicate that the other provision is an exception, whereas if section 8 is subject to section 9, that could mean that section 9 is an exception to what is provided in section 8, but it could also mean that section 9 supplements section 8 in any number of ways. For example, section 9 could impose a condition to a right provided for in section 8. By extension, *except as otherwise provided in this agreement* is narrower than *subject to the terms of this agreement*.

Eliminating Nullified Provisions

13.476 It's evidently common practice in negotiating mergers-and-acquisitions contracts that when you add new language that nullifies language in the previous draft, you retain the nullified language and signal its relationship to the new by means of *subject to* (in the nullified language) or *notwithstanding* (in the new language). Or you tack on provisos (see 13.541). Presumably that's felt to be more diplomatic than proposing to delete language offered by the other side.

13.477 This approach might help you get the deal done, but to leave in nullified language is to invite litigation claiming that the ostensibly nullified language in fact still has some life in it. This was demonstrated in the litigation relating to the abortive

acquisition of United Rentals, Inc., by acquisition vehicles controlled by funds and accounts affiliated with Cerberus Capital Management, L.P., the private-equity buyout firm. See *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007). See Kenneth A. Adams, *Merger Pacts: Contract Drafting, Cerberus Litigation*, New York Law Journal, Feb. 19, 2008.

"NOVATION"

13.478 Is standard for an amendment to a loan agreement to contain a provision stating that entry into the amendment "does not serve to effect a novation" of the obligations under the loan agreement.

13.479 *Novation* is a term of art (see 1.7), and many readers of contracts won't know what it means. Here's how *novation* is defined in *Black's Law Dictionary*: "The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party."

13.480 Instead of saying that an amendment "does not serve to effect a novation," it would be clearer to say that it "will not result in any of the Obligations being replaced." Or if you think that it's important to retain the word *novation*, you could combine the two approaches: "does not serve to effect a novation of the Obligations, in that it will not result in any of the Obligations being replaced."

"ONLY"

13.481 Here's what *Garner's Modern American Usage*, at 592–93, says about *only*:

Only is perhaps the most frequently misplaced of all English words. Its best placement is precisely before the words intended to be limited. The more words separating *only* from its correct position, the more awkward the sentence; and such a separation can lead to ambiguities . . . . Yet the strong tendency in [American English] is to stick *only* right before the verb or verb phrase regardless of the illogic . . . .

13.482 This is the case in drafting. Take the following example (emphasis added):

The Tenant shall *only* move furniture, fixtures, and equipment into and out of the Premises during nonbusiness hours unless Landlord gives approval otherwise.

13.483 So the tenant has a duty only to move furniture, fixtures, and equipment in the specified manner. That's all the tenant is allowed to do—the tenant is precluded from also making breakfast, going to work, taking a shower . . . .

13.484 That's obviously a ludicrously literal reading, but one can imagine contexts in which that sort of reading might be less ludicrous but equally unintended.

13.485 You would be better off moving *only* farther back in the sentence:

The Tenant shall move furniture, fixtures, and equipment into and out of the Premises *only* during nonbusiness hours unless Landlord gives approval otherwise.

13.486 Here's another example:

When a Termination Event has occurred and is continuing, the Seller shall ~~only~~ exercise its rights and remedies under the Purchase Agreement [read *only*] in accordance with the instructions of the Agent.

"ON THE ONE HAND . . . ON THE OTHER HAND"

13.487 The construction *on the one hand . . . on the other hand* serves to bifurcate a list of three or more items. And it does so in two different ways.

To Indicate Which Conjunction Has Scope Over the Other

13.488 When in a string of three nouns, verbs, adjectives, or adverbs the first and second are separated by *and* and the second and third are separated by *or*, or vice versa, the meaning varies depending on which conjunction "has scope over" the other. One way to clarify that ambiguity is to use *on the one hand . . . on the other hand*. That's discussed at 11.78–79.

To Divide a List into Two Categories

13.489 *On the one hand . . . on the other hand* is also used to divide between two categories a list of three or more items using *and* as the only conjunction. In sample [1] below, it's not clear to which category B belongs—debtor or creditor? That's made clear in samples [1a] and [1b]. You could instead use enumeration to remedy the confusion, as in sample [1c], but *on the one hand . . . on the other hand* seems the simpler option.

[1] the relationship between A and B and C is that of debtor and creditor

[1a] *the relationship between A, on the one hand, and B and C, on the other hand, is that of debtor and creditor*

[1b] *the relationship between A and B, on the one hand, and C, on the other hand, is that of debtor and creditor*

[1c] *the relationship between (1) A and B and (2) C is that of debtor and creditor*

Used Unnecessarily

13.490 Far more often than not *on the one hand . . . on the other hand* is used when it's not needed—in other words, it's used even when a list doesn't need to be bifurcated.

13.491 For example, it's sometimes used with a list containing only two items, as in the following

examples. As there's no risk of confusion, it should be omitted.

The relative fault of the indemnifying party ~~on the one hand~~ and the indemnified party ~~on the other hand~~ is to be determined by reference to . . .

Each of Parent~~, on the one hand,~~ and the Stockholders' Representative, ~~on the other hand,~~ shall cooperate with each other in preparing the 2012 Income Statement.

B.492 What if one of the two items is plural? Here are two examples:

The Sellers, *on the one hand*, and the Purchaser, *on the other hand,* are each responsible for paying half of the Transfer Taxes arising out of or in connection with the transactions contemplated by this agreement.

... in such proportion as is appropriate to reflect the relative benefits and the relative fault of the Company, *on the one hand,* and the Placement Agents, *on the other hand,* in connection with the statements or omissions that resulted in those losses, damages, or liabilities.

B.493 In context, *on the one hand . . . on the other hand* is presumably used to indicate that the members of the plural item are acting together. It would be clearer and more economical to say as much (making sure to place the plural item first, to avoid any syntactic ambiguity):

The Sellers (considered collectively) and the Purchaser are each responsible for paying half of the Transfer Taxes arising out of or in connection with the transactions contemplated by this agreement.

... in such proportion as is appropriate to reflect the relative benefits and the relative fault of the Placement Agents (considered collectively) and the Company in connection with the statements or omissions that resulted in those losses, damages, or liabilities.

13.494 *On the one hand . . . on the other hand* is sometimes used with a list of three or more items even though there's no need to bifurcate those items. For example:

~~The Corporate Taxpayer and the Partnerships, on the one hand, and the applicable Limited Partner, on the other hand,~~ [read *The Corporate Taxpayer, the Partnerships, and the applicable Limited Partner*] acknowledge that, as a result of an Exchange, the Corporate Taxpayer's basis in the applicable Original Assets will be increased by the excess, if any, of . . . .

13.495 Similarly, one sometimes sees *on the one hand . . . on the other hand* used to group three or more parties to a transaction, just as drafters used to use *party of the first part . . . party of the second part* (see 2.107). But this practice is unnecessary:

This asset purchase agreement is dated August 6, 2012, and is between ABLE CORPORATION, a Delaware corporation (the "Buyer"), ~~on the one~~

~~hand, and~~ BAKER MERCHANDISING LLC, an Ohio limited liability company (the "Seller"), CHARLIE ENTERTAINMENT, INC., a Florida corporation ("Charlie"), and DAVID DELTA, as trustee of the David Delta Trust (the "Trustee"; together with Charlie, the "Members")~~, on the other hand~~.

13.496 It's preferable not to indicate in the introductory clause who is performing what role—that's what the recitals are for (see 2.77).

PARENTHESES

13.497 In regular prose, parentheses (round brackets, like those enclosing these words) are used to offset text that constitutes an explanation or aside. The limited and stylized prose of contracts isn't the place for explanations and asides, so drafters should have no reason to use parentheses to serve that function. But parentheses represent one way to eliminate one kind of syntactic ambiguity (see 12.15 and 12.54). They're also used with enumeration (see 4.23 and 4.38) and to create a defined term after an integrated definition (see 6.41).

13.498 Also, if you need to express that two different arrangements apply in different circumstances, it may be that the most convenient way to express those different circumstances is by using paired sets of parentheses. (For an example of that, see the proposed language in 11.127.)

"PARTY" AS AN ADJECTIVE

13.499 *Party* is often used in a noun phrase, as in "Acme is *a party* to a confidentiality agreement with Widgetco" and "Acme and Widgetco are *parties* to a confidentiality agreement." Be more concise and use it as an adjective, as in "Acme is *party* to a confidentiality agreement with Widgetco" and "Acme and Widgetco are *party* to a confidentiality agreement."

PERCENTAGES

13.500 Sometimes drafters use *100%* when it would be simpler to use *all* or some other alternative:

The Guarantor proposes to distribute to its shareholders ~~100% of the~~ [*read* all] outstanding shares of the Company's common stock.

. . . a Series A Warrant registered in the name of that Purchaser to purchase up to a number of Ordinary Shares equal to ~~100% of the~~ [read *the number of*] Shares issuable to the Purchaser on the Closing Date.

The XYZ Shareholders own 100 shares of common stock, no par value, ~~being 100% of the presently~~ [read *and those are the only XYZ Shares currently*] issued and outstanding SKM Shares.

. . . the Loans are secured by Cash and Cash Equivalents in an amount not less than ~~100% of~~ the

principal amount of the Loans plus interest to accrue through the Special Arrangement Period . . .

. . . an Issuing Bank will not be required to issue, amend, or increase any Letter of Credit unless it is satisfied that the related exposure will be ~~100%~~ [read *fully*] covered by the Commitments of the non-Defaulting Lenders . . .

13.501 Similarly, simplicity favors using *half* rather than *50%,* as in "*50%* [read *half*] of the shares" and "*50%* [read *half*] of the Company's board of directors."

13.502 It makes sense to use *100%* and *50%* to refer to a numerical value in a provision that includes one or more other percentages: . . . *with a target award-date value of 100% of the Base Salary and a maximum award value of 150% of the Base Salary, subject to . . . .*

13.503 Fractions other than half (for example, *one-quarter*, *one-fifth*) offer no advantage over percentages, as they're more cumbersome. The exception is fractions that would require a recurring decimal to be expressed in percentages, for example *one-third*, *two-sevenths*.

"PERSONAL DELIVERY"

13.504 It's confusing to refer to "personal delivery" in a notices provision in a contract. Does "personal" relate to the person doing the delivering? If so, does it mean that the party giving the notice

has to be the one to deliver it, rather than, say, FedEx? After all, one says, "I delivered it personally," meaning that the speaker was the one who delivered the item in question.

13.505 Does "personal" relate to the recipient? If so, does complying with the provision require that notice be handed to the recipient? What if it's placed before the recipient? What if the recipient is in the next room? And so on.

13.506 The meaning of "deliver it personally" was at issue in the English case *Ener-G Holdings plc v. Hormell* [2012] EWCA Civ 1059 (31 July 2012). The court decided that the best interpretation was that "personally" referred to the recipient, so that complying with the provision required that notice be handed to the recipient.

13.507 To avoid this sort of confusion, don't use in a contract "personal delivery," "deliver . . . personally," or any variant. Instead, provide for delivery to a person at a specified address by specified means (by national transportation company, by registered mail, or otherwise) and specify when notice will be deemed to have been received.

"PREVAILING PARTY"

13.508 A standard piece of boilerplate is a provision stating that the "prevailing party" (or "successful party") in a dispute is entitled to recover costs.

13.509 In the United States, generally attorneys' fees aren't recoverable in a commercial contract dispute unless provided for by statute or contract. So if for purposes of a transaction you want to recover attorneys' fees and other expenses, you should say so in the contract.

13.510 One problem with such provisions is that the meaning of *prevailing party* has "spawned a great deal of litigation." Robert L. Rossi, 1 *Attorneys' Fees* § 6:8 (3d ed. 2012). If the plaintiff voluntarily dismisses its action, has the defendant prevailed? If a party's case has been dismissed for want of jurisdiction, has the other party prevailed? What if both a complaint and a counterclaim have been dismissed? If the plaintiff has recovered on its complaint against the defendant and the defendant has recovered on its counterclaim against the plaintiff, is the prevailing party the one in whose favor a net judgment was entered, or are both parties entitled to recover? Is a decision required, or can you prevail in a settlement or consent decree? Is a money judgment required, or do equitable remedies qualify? And to be the prevailing party in a dispute, do you have to succeed on all issues, or just some? Those are only a few of the uncertainties.

13.511 You should attempt to be specific as to what determines whether a party has prevailed. There are three main ways to do so:

13.512 First, a party is the prevailing party if it secures a judgment or any kind of dismissal. That has the benefit of being clear-cut, but it would allow

a party to recover fees even after failing to prevail on most of its claims.

13.513 Second, a party is the prevailing party if it gets substantially what it had sought. That has fairness in its favor, but given its vagueness, a court would likely have to decide this.

13.514 Third, a party is the prevailing party if it's the net winner, regardless of what it had sought. So if Party B wins one claim out of 20 and recovers $10 and Party B wins its one claim and gets $9, Party A is the net winner. It's not clear whether that's fair.

13.515 Given all the potential issues, and given that determining the prevailing party is such a fact-specific inquiry, the risks of setting rules in advance might outweigh the potential benefits.

13.516 Civil Code § 1717(b)(1) contains a definition of *prevailing party* for purposes of claims under a contract. That definition is mandatory and cannot be altered or avoided by contract. See, e.g., *Exxess Electronixx v. Heger Realty Corp.*, 75 Cal. Rptr.2d 376, 383 (Ct. App. 1998).

"PRODUCT" AND "UNITS OF THE PRODUCT"

13.517 The word *product* is ambiguous—it can mean either a product line or individual samples of a product line. Using the defined term *Product* for the former meaning and referring to *units of the Product* for the latter would eliminate any confusion.

"PROMPTLY" AND "IMMEDIATELY"

13.518 For purposes of obligations and conditions, it's likely that in the minds of many drafters *immediately* requires speedier action than does *promptly*.

13.519 Some caselaw supports that distinction. For example, the District Court for the Southern District of New York has said that *promptly* doesn't mean *immediately*, but rather within a reasonable time. See *Morgan Guaranty Trust Co. of New York v. Bay View Franchise Mortgage Acceptance Co.*, No. 00 CIV. 8613 (SAS), 2002 WL 818082 (S.D.N.Y. Apr. 30, 2002).

13.520 But this distinction disappears when you look more closely at it.

"Promptly"

13.521 The *Oxford English Dictionary* defines *promptly* to mean "readily, quickly, directly, at once, without a moment's delay." And courts have uniformly held that promptness is a function of circumstances. Here are three representative cases:

- *State v. Chesson*, 948 So. 2d 566, 568 (Ala. Civ. App. 2006) (stating that the term "promptly" has been construed to mean within a reasonable time in light of all the circumstances).
- *Doe Fund, Inc. v. Royal Indemnity Co.*, 825 N.Y.S.2d 450, 451 (App. Div. 2006) ("[W]hen an insurance policy requires notice of an occurrence or action be given promptly, that

means within a reasonable time in view of all of the facts and circumstances.").

- *Buck v. Scalf*, No. M2002-00620-COA-R3-CV, 2003 WL 21170328, at *5 (Tenn. Ct. App. May 20, 2003) ("It has generally been held that the terms 'promptly' or 'prompt notice' mean that notice must be given within a reasonable time in view of all the facts and circumstances of the case.").

13.522 current edition of *Black's Law Dictionary* doesn't contain an entry for *promptly*, but the sixth edition, published in 1990, did, saying that the meaning of *promptly* "depends largely on the facts in each case, for what is 'prompt' in one situation may not be considered such under other circumstances or conditions."

13.523 Given that the meaning of *promptly* depends on the circumstances, it follows that saying *as promptly as practicable* [or *possible*] adds nothing other than some unnecessary extra words.

"Immediately"

13.524 *Oxford English Dictionary* gives as the definition of *immediately* "Without any delay or lapse of time; instantly, directly, straightaway; at once." (*Immediately* has other meanings, including "without intermediary," as in *the immediately preceding Business Day*.)

13.525 current edition of *Black's Law Dictionary* says that *immediate* means occurring without delay, and the sixth edition says that *immediately* means "without delay; directly; within

a reasonable time under the circumstances of the case; promptly and with reasonable dispatch."

13.526 Just in terms of dictionary definitions, *immediately* looks very much like *promptly*. And this similarity becomes more pronounced when you look at the caselaw, which indicates that just like *promptly*, *immediately* is subject to a reasonableness standard. Here are some representative cases:

- *Dwoskin v. Rollins, Inc.*, 634 F.2d 285, 294 n.6 (5th Cir. 1981) ("[S]everal Georgia cases arising in a variety of contexts suggest that immediate delivery means performance with reasonable diligence concerning the circumstances.").
- *Continental Savings Ass'n v. U.S. Fidelity and Guaranty Co.*, 762 F.2d 1239, 1243 (5th Cir. 1985) ("Under Texas law, similar phrases, such as 'as soon as practicable' or 'immediately,' require only that notice be given within a reasonable time in light of the circumstances involved.").
- *Briggs Ave LLC v. Insurance Corp. of Hannover*, No. 05 Civ.4212(GEL), 2006 WL 1517606, at *5 n.3 (S.D.N.Y. May 30, 2006) ("In any event, there is little or no functional difference between terms like 'immediately' or 'as soon as practicable'; whatever language a policy uses to limit the time for notice, the touchstone is always the same, reasonableness under the circumstances.").
- *Martinez v. District 1199J National Union of Hospital & Health Care Employees*, 280 F. Supp. 2d 342, 353 (D.N.J. 2003) ("The Court finds that 'immediately prior' means that a reasonable amount of time would pass

between eligibility for health coverage with the Fund and the start of unemployment.").

- *Sunshine Textile Services, Inc. v. American Employers' Insurance Co.*, No. 4:CV-95-0699, 1997 U.S. Dist. LEXIS 22904, at *7 (M.D. Pa. May 12,1997) ("The requirement of notice 'as soon as practicable' or 'immediately' both prescribe notice within a reasonable amount of time under the circumstances after learning of the occurrence, taking into account the exercise of due diligence.").

13.527 In *Morgan Guaranty* case (see 13.519), the court said that *promptly* doesn't mean *immediately*, but rather within a reasonable time. But that was a case construing *promptly*, not *immediately*, so it's of no real value as support for the proposition that *immediately* isn't subject to a reasonableness standard.

13.528 There's plenty of cases use the phrase *immediately or within a reasonable time*, suggesting that *immediately* isn't subject to a reasonableness standard, but those cases, too, don't address the meaning of *immediately*.

The Semantics

13.529 The net effect is that for purposes of contract drafting, *promptly* and *immediately* mean the same thing. The same goes for the adjectives *prompt* and *immediate*.

13.530 In idiomatic usage, *immediately* can mean "instantly"—*I didn't hear what John said, but Mathilde immediately turned and walked away*.

Immediately can also be used when some time would be required—*the U.S. Navy immediately began work on a new aircraft carrier*.

13.531 Like *promptly*, it conveys a sense that some time would be required. *Promptly* can be used to mean "instantly," but only if you're aiming for a slightly droll effect—*I didn't hear what John said, but Mathilde promptly turned and walked away*.

13.532 *Immediately* conveys a slightly broader meaning than *promptly*. But the instantaneous sense of *immediately* works best when you're describing events that have already occurred, particularly simple cause-and-effect scenarios. For purposes of regulating conduct—as in contracts—it's problematic, because business affairs manifestly don't lend themselves to instant responses. You always have to take into account what the circumstances reasonably permit.

13.533 The notion that *immediately* requires speedier action than does *promptly* is reminiscent of the ostensible distinction between *best efforts* and *reasonable efforts* (see 8.7–14). In both cases, an untenable distinction lives on due to the failure of drafters to appreciate how a reasonableness standard serves to limit the reach of the seemingly more onerous standard.

Recommendation

13.534 Because *immediately* seems to promise more than it can deliver, you should omit it from

your contracts for purposes of obligations and conditions. Use *promptly* instead.

13.535 One exception would be if you're seeking to express a real sense of urgency, as in *If the Service Provider detects any unauthorized use of a User's account, the Service Provider shall suspend that account immediately*. But even in such contexts, you have to assume that anyone under an obligation to act immediately isn't required to act instantaneously.

13.536 Don't include both *promptly* and *immediately* in a contract. To do so is to invite a disgruntled party to argue for gradations of meaning where none had been intended. And it would be pointless to indulge in synonyms such as *expeditiously*, *as soon as practicable*, and *forthwith*.

13.537 If future circumstances are predictable enough for you to specify an absolute time limit rather than a vague one, do so—it would allow you to reduce the uncertainty in your contract (see 7.33). Or you could combine a vague and absolute limit—*promptly, but not later than X days after . . . .*

"PROPRIETARY"

13.538 The word *proprietary* is overused in contracts. In particular, it's unhelpful to use *proprietary* in defining the term *Confidential Information*.

13.539 *Black's Law Dictionary* defines proprietary as follows: "1. Of or relating to a proprietor <the licensee's proprietary rights>. 2. Of, relating to, or holding as property <the software designer sought to protect its proprietary data>." So information can be proprietary but not confidential.

13.540 It follows that if *Confidential Information* is defined to mean proprietary information, or is defined to mean information that is proprietary or confidential, information that isn't confidential would, unhelpfully, fall within the scope of the definition. If *Confidential Information* is defined to mean information that is both proprietary *and* confidential, that would exclude information that isn't proprietary but is nevertheless information that a disclosing party might want to keep confidential, for example information that had been disclosed to it by someone else under a confidentiality agreement.

"PROVIDED THAT"

13.541 A traditional component of legal drafting is the proviso, which consists of a provision introduced by *provided that* and set off from the preceding clause by a comma or semicolon. In contracts, provisos are often introduced with a semicolon and *provided, however, that*, with *provided* and *however* underlined for emphasis. In the case of a proviso that immediately follows another proviso, the formula used is *provided further, however, that* or something similar.

13.542 The problems with *provided that* go beyond the archaic trappings of the traditional proviso. In this context, *provided that* is a truncation of the "term of enactment" *it is provided that*. Into the nineteenth century, *provided that* was used to introduce statutory provisions. But *provided* is also a conjunction meaning *if* or *on condition that*—"I'll let you go to the party, provided you take a taxi home." It may be that this everyday use of *provided* dulls modern drafters to the fact that as currently used in contracts, *provided that* essentially continues to serve its original function: it's used to introduce not only conditions to the main clause, but also limitations and exceptions to the main clause, as well as new provisions that can be considered independently of the main clause. In other words, using *provided that* is an imprecise way to signal the relationship between two conjoined contract provisions.

13.543 For an example of how using *provided that* in a contract can lead to dispute, see *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008). This case involved a copyright license that granted users the right to use software, "provided that [the user] insert a prominent notice in each changed file stating how and when [the user] changed that file, and provided that [the user] do at least ONE of the following: . . . ." The defendants didn't take any of the actions specified in the *provided that* language, so the licensor sued. The question was whether that failure meant that the defendants' use of the software fell outside the scope of the license or

whether it represented breach of the license. The lower court held that the *provided that* language didn't limit the license grant. The Federal Circuit disagreed, holding that the *provided that* language stated conditions to effectiveness of the license. The wrong lesson to take from this case is that you should use *provided that* to state a condition. Instead, it would be best to avoid confusion, with the attendant risk of litigation, by steering clear of *provided that*.

13.544 A more precise alternative to *provided that* is always available. Below are sample provisos, one for each of the categories of meaning drafters seek to convey by means of provisos. In each, the clearer alternative to the italicized text incorporating *provided that* is noted in italics in the brackets that immediately follow.

13.545 *Exception.* When issued in accordance with this agreement, the Warrant Shares will be validly issued, fully paid, and nonassessable, and will be free of any *Liens; provided, however, that* [read *Liens, except that*] the Warrant Shares may be subject to restrictions on transfer under state and federal securities laws.

13.546 *Condition.* The Closing must take place at the offices of the Purchaser's counsel promptly after the date of this *agreement; provided, however, that the Closing must occur* [read *agreement, and in any event*] no later than December 1, 2013, at 5:00 p.m. New York time, unless the parties agree to another date.

13.547 *Limitation.* Acme shall reimburse the Consultant all reasonable expenses the Consultant incurs in performing services under this *agreement; provided, however, that the Consultant shall obtain* [read *agreement, on condition that the Consultant obtain*] Acme's written consent before incurring any such expense in excess of $200.

13.548 *Definition.* "Purchase Period" means the ten-day period following the end of each calendar *quarter; provided, however, that the Purchase Period shall include any other periods* [read *quarter and any other periods*] the Committee designates from time to time.

"REASONABLE" AND "REASONABLY"

13.549 Reasonableness is expressed in contracts by means of the adjective *reasonable* and the adverb *reasonably*. How they're used can raise some subtle issues.

13.550 *Black's Law Dictionary* defines *reasonable* as follows: "Fair, proper, or moderate under the circumstances." So determining whether someone has acted reasonably requires an objective inquiry—you consider the circumstances, not the actor's intent.

13.551 The meaning of *reasonable* as it's used in, for example, *a reasonable fee* and *in reasonable detail*. But it conveys a different meaning in, for example, *to the reasonable satisfaction of Acme*, in that *reasonable* doesn't refer

to reasonableness of the satisfaction. Instead, *to the reasonable satisfaction of Acme* means *to the satisfaction of Acme, determined from the perspective of a reasonable person in Acme's position*. It would be clearer to say it that way.

13.552 When *reasonably* modifies a verb, as in *reasonably requests* and *reasonably determines*, the word *reasonably* can be paraphrased as "in a reasonable manner." But when *reasonably* modifies a verb it can be redundant, depending on the verb. For example, *reasonably* is redundant in *Acme shall cooperate reasonably with Widgetco*, as reasonableness is inherent in the notion of parties cooperating.

13.553 When it's used to modify anything other than a verb, *reasonably* is problematic.

13.554 It's redundant when used to modify the adverb *promptly*, in that promptness is determined based on what is reasonable considering the circumstances (see 13.521). The same applies to using *reasonably* to modify other adverbs.

13.555 As regards using *reasonably* to modify adjectives, it's redundant in the phrase *reasonably likely*—reasonableness has nothing to do with an expression of likelihood.

13.556 When *reasonably* is used to modify other adjectives, for example *satisfactory* or *necessary*, the word *reasonably* doesn't refer to reasonableness of the satisfaction, or of the necessity. Instead, as with *reasonable satisfaction* (see 13.551),

reasonably satisfactory means *satisfactory, as determined from the perspective of a reasonable person in Acme's position*. And it would be clearer to say it that way. Courts would likely attribute that meaning to *satisfactory* regardless (see 13.593), but making that explicit would eliminate a potential source of dispute.

REASONABLENESS AND GOOD FAITH

13.557 When should you use a reasonableness standard and when should you use a good-faith standard? And does it make sense to use both in a provision?

Whether to Use a Reasonableness Standard or a Good-Faith Standard

13.558 Generally, it would benefit a contract party to have a reasonableness standard rather than a good-faith standard apply to a counterparty's conduct. A reasonableness standard can be imposed not only by means of the words *reasonable* and *reasonably* but also by words such as *appropriate*.

13.559 A reasonableness standard is objective—what would a reasonable person have done in the circumstances? By contrast, a good-faith standard is subjective—did the party in question think it was acting reasonably, regardless of whether it was when viewed from the perspective of a reasonable person? It wouldn't be in a party's interest to give the other party room to act unreasonably but in good faith. That's why, for

example, it makes sense to refer to *reasonable efforts* rather than *good-faith efforts*. Of course, if your client is the one subject to a given provision, you might prefer a good-faith standard.

13.560 A good-faith standard is the appropriate choice if what a party is doing is taking a position—for example, contesting something (*taxes that are being contested in good faith*), claiming that something happened, or filing a complaint. Using *good faith* serves to confirm that the party's public position matches its actual state of mind.

13.561 Use *good faith* to qualify an obligation to negotiate—you can't be forced to agree to something just because a reasonable person in your position would have done so (see 8.42).

13.562 When you're referring to a party's actual state of mind, *good faith* is redundant. For example, the phrase *good-faith belief* doesn't make sense—if you believe something, necessarily you believe it in good faith. But when a reasonableness standard is used with *believes* and *satisfactory* and other words usually associated with a state of mind, what is being referred to is not the state of mind of a party but the state of mind of a reasonable person in the position of that party (see 13.593–94).

13.563 In jurisdictions that recognize the implied duty of good faith (see 3.169), it wouldn't be necessary to make it explicit that a good-faith standard applies in a given context—it's what would apply by default in the absence of another standard.

But it can be helpful to remind the parties that that's the case, and doing so might eliminate a potential source of dispute.

13.564 The difference between a reasonableness standard and a good-faith standard can be more apparent than real. Often it's impossible to determine what a contract party was thinking in taking an action—either you have no evidence on that score, or the evidence you have is self-serving. So courts often end up deciding whether a party acted in good faith by considering how others have behaved in similar circumstances—in other words, by in effect applying a reasonableness standard. That might be relevant if the other side balks at being subject to a reasonableness standard.

Using Both Standards Together

13.565 What about using both a reasonableness standard and a good-faith standard in one provision? Usually that wouldn't make sense—if a party meets the more exacting reasonableness standard, what would be the point of invoking good faith? It follows that drafters using phrases such as *reasonable good-faith efforts* and *reasonable good-faith judgment* are simply indulging in redundancy.

13.566 In a given context you might want to be sure not just that a party is conducting itself reasonably but also that it's not acting under a pretext. For example, with respect to a party's contesting taxes (see 13.560), one issue is that it's

taking appropriate steps to do so; another is that the process isn't a pretext for creating delay. You could address both concerns by referring to taxes being contested "in good faith by appropriate proceedings."

"REMEDIATE"

13.567 In contracts and elsewhere, it's standard to use the word *remediation* in connection with cleanup or treatment of environmental contamination. It's also standard to use the verb *remediate* to refer to the act of remediation.

13.568 According to *Garner's Modern American Usage*, at 707, "*remediate*, a back-formation from *remediation*, is either a needless variant of *remedy* or a piece of gobbledygook." But in environmental circles, *remediation* has acquired a specialized meaning, and the verb *remediate* evokes that specialized meaning. To insist that drafters instead use the verb *remedy* to convey that meaning is to fight an uphill battle.

13.569 Furthermore, the remedy for environmental contamination could consist of cleanup, a monetary award, a civil or criminal penalty, or injunctive relief. Using *remediate* instead of *remedy* in connection with cleanup or treatment makes it clear which meaning is intended.

"REMIT" AND "REMITTANCE"

13.570 *Black's Law Dictionary* gives as one definition of *remit* "To transmit (as money) <upon receiving the demand letter, she promptly remitted the amount due>." And here's how it defines *remittance*: "1. A sum of money sent to another as payment for goods or services. 2. An instrument (such as a check) used for sending money. 3. The action or process of sending money to another person or place."

13.571 For purposes of conveying these meanings in a contract, *remit* and *remittance* have a fusty air about them. More straightforward are *pay* and *payment*, respectively, as in the following examples:

Upon Substantial Completion of each System, Owner shall *remit to* [read *pay*] Contractor half the amount retained with respect to that System.

. . . an amount as that Lender or the Administrative Agent, as applicable, determines to be the proportion of the refunded amount as will leave it, after that *remittance* [read *payment*], in no better or worse position than it would have been if . . .

13.572 Some contexts might require using instead *transfer* or *refund* (in both cases, the verb or the noun).

13.573 Even if you can replace the abstract noun *remittance* with the verb *pay* (see 17.7), so much the better:

If *legal restrictions prevent the prompt remittance of* [read *If by law Acme is prevented from paying*

promptly] any royalties with respect to any country in the Territory where the Product is sold . . .

"RESPECTIVE" AND "RESPECTIVELY"

13.574 When used in contracts, *respective* and *respectively* are more often than not misused. Such misuse is unlikely to result in any dispute, but it doesn't do the reader any favors.

"Respective"

13.575 *Respective* means "as relates individually to each of two or more persons or things," as in *George and Hannah drove their respective cars home*. It serves to indicate that the components of one group are to be considered separately in pairing them with one or more components of another group.

13.576 Here's an example of *respective* used appropriately in a contract:

"Eligible Party" means a party other than Acme, Widgetco, or any of their *respective* Affiliates.

13.577 It's all too easy to find examples of the extraneous *respective*. Sometimes *in question* would work better:

Each employee's election to participate made in accordance with the provisions of section 4.2 will remain in effect for the one-year period that begins on the first day of the ~~respective~~ Class Year [read *in*

question] and ends on the last day of that Class Year.

13.578 At other times, *respective* is inappropriately used with a construction in the singular:

Each of the Trustee and the Company hereby represents that it has the full right and power and has been duly authorized to enter into this agreement and to perform its ~~respective~~ obligations as contemplated hereunder.

On or before the Effective Date, each of the Private Investors shall deliver to the Escrow Agent certificates representing that Private Investor's ~~respective~~ Escrow Founder Units.

All selling security holders and the Company shall bear the expenses of the underwriter pro rata in proportion to the ~~respective~~ dollar amount of securities each is selling in such offering.

13.579 Sometimes *any* should have been used rather than *the respective*, in that no pairing is involved:

"Release Date" means *the respective dates* [read *any date*] on which the Founder Units, Sponsor Warrants, Co-Investment Units, and Aftermarket Shares are disbursed from escrow in accordance with section 3 of the Securities Escrow Agreement.

13.580 Even when using *respective* is unobjectionable, the prose would be less

cumbersome if one of the groups were made singular:

All capitalized terms that are [read *Each capitalized term*] used but not defined in this SOW *have the respective meanings given to them* [read *has the meaning given to it*] in the Purchase Agreement.

13.581 In some contexts, it can be a close call whether to use *respective*. Consider the following alternatives, the first of which uses *respective*. The second is slightly more concise than the first, and significantly more concise than the third, but if the tenant were an individual and the landlord an entity, the pronoun "its" in the second version wouldn't work, making the first version the best option.

The Tenant and the Landlord shall cause their respective casualty policies to contain a provision allowing the foregoing waiver of claims.

The Tenant and the Landlord shall each cause its casualty policies to contain . . . .

The Tenant shall cause the Tenant's, and the Landlord shall cause the Landlord's, casualty policies to contain . . . .

"Respectively"

13.582 *Respectively* means "in regard to each of two or more, in the order named." It serves to indicate that each item in a list earlier in a sentence is to be paired with its counterpart in a list

that follows and contains an equal number of items, as in *The first and second prizes went to Marie and Frank, respectively*. (The list earlier in the sentence and the list associated with *respectively* should both use *and* rather than *or*.)

13.583 Here are two examples of appropriate use of *respectively* in a contract:

Each Newco1 Director and Newco2 Director will have one vote on all matters requiring the approval or action of the Newco1 Board and the Newco2 Board, *respectively*.

Smith and Jones will be responsible for paying one-third and two-thirds, *respectively*, of any Additional Tax.

13.584 *Respectively* is redundant if there's no preceding list to echo, as in the following examples:

. . . if Tenant fails to provide Landlord with the financial statements or the estoppel certificates within the time periods referenced in sections 23.16 and 23.17~~, respectively~~.

Company and Put Grantor, respectively, represent that each party has been represented by that party's [read *Company and Put Grantor each represents that it has been represented by*] legal counsel with regard to all aspects of this Put Fee Agreement.

The Executive is employed by [read *each of*] XYZ, the Company, and the Bank *in senior executive*

capacities, respectively [read *in a senior executive capacity*].

Owner and Tenant are ~~respectively~~ signing this agreement on the date stated in the introductory clause.

"RIGHTFULLY" AND "RIGHTFUL"

13.585 The word *rightfully* occurs routinely in contracts, most often in one of the standard exceptions to the definition of "confidential information" in a confidentiality agreement: . . . *information that the Licensee rightfully obtains from any person that has the right to transfer or disclose that information*. The word *rightful* is used less often.

13.586 The problem with *rightfully* and *rightful* is that they're imprecise. *Rightful* means "having a just or legally established claim; held by right or just claim." But neither *rightfully* nor *rightful* gives the reader any sense of the basis for the entitlement in question.

13.587 For example, regarding use of *rightfully* in the exclusion from the definition of "confidential information," it's not clear whether *rightfully* means that the recipient must not have received the information in question from someone who is under an obligation of confidentiality not to disclose that information, or whether it means that the recipient must not have somehow broken the law to get that

information, or whether it's meant to convey both of those meanings.

13.588 Consider whether you can replace *rightfully* and *rightful* with a clearer alternative.

13.589 It follows that the same applies to *wrongfully* and *wrongful*.

"SAID" USED AS A POINTING WORD

13.590 It remains commonplace for drafters to use *said* instead of one of the "pointing words" *this*, *that*, *these*, and *those*. An example: *If the Executive contests in good faith whether he was properly terminated for "Cause," the Executive and the Company shall immediately refer said* [read *that*] *dispute to arbitration in accordance with section 15*. This usage is one of the hallmarks of legalese, and it contributes nothing to drafting other than an annoyingly legalistic tone.

13.591 This use of *said* is related to misuse of *such* (see 13.635). In the following extract, the drafter could have used *said* instead of *such,* and vice versa, but it would have been best to use *that* instead: *if for a period of 12 consecutive months a majority of the board of Borrower or any Guarantor is no longer composed of individuals who were members of said* [read *that*] *board on the first day of such* [read *that*] *period.*

"SAME" USED AS A PRONOUN

13.592 The use of *same* as a pronoun is to pontificate. Often one can simply use instead a more conventional pronoun—*it*, *its*, *them*, *they*, *their*—or repeat the noun in question, perhaps with a suitable "pointing word" (see 13.590). At other times more extensive revisions are required. Some examples follow; in each, the recommended alternative to the italicized text incorporating *same* is noted in brackets.

The Company shall furnish to the Lender promptly after *the same* [read *they*] become publicly available copies of all periodic and other reports, proxy statements, and other materials filed by the Company with the Securities and Exchange Commission.

The Company shall pay its Indebtedness and other obligations, including Tax liabilities, before *the same* [read *they*] become delinquent or in default.

With respect to any Loans made by it under this agreement, each Agent in its individual capacity and not as Agent will have the same rights and powers as any other Lender and may exercise *the same* [read *those rights and powers*] as though it were not an Agent.

Any notice given under this agreement that is delivered by mail will be deemed received *upon the depositing of the same in the U.S. mail* [read *when it is deposited in the U.S. mail*].

"SATISFACTORY"

13.593 If you say that something has to be *satisfactory to Acme*, the standard might be an objective one, in that it would be met if a reasonable person in Acme's position would be satisfied. Alternatively, it could mean that Acme actually has to be satisfied, subject only to the implied duty of good faith—the standard is a subjective one. The result is ambiguity. Courts prefer the former meaning; see 2 *Corbin on Contracts*, at § 5.33; 13 *Williston on Contracts*, at § 38:22.

13.594 Saying instead *reasonably satisfactory to Acme* is a succinct way of making it clear to the parties, and to any court, that the former meaning is intended. To make it clear that the latter meaning is intended, drafters customarily say *satisfactory to Acme at its discretion* (or some variation; see 3.172). But strictly speaking, that doesn't go to the meaning of *satisfactory*. The following formula is wordier but explicit: *satisfactory to Acme, with Acme's satisfaction in this instance being a function of whether Acme is actually satisfied (subject to any implied duty of good faith), rather than whether a reasonable person in Acme's position would be satisfied*. It's hard to imagine any counterparty accepting such a standard.

13.595 The adverbial-clause equivalent of *satisfactory to Acme* is *to Acme's satisfaction* (see 13.551).

"SHAREHOLDER" OR "STOCKHOLDER"

13.596 Many lawyers think that it's necessary to use *stockholder* rather than *shareholder*—in contracts and elsewhere—if the corporation in question was formed under Delaware law. Insisting on this distinction would seem odd, in that *stockholder* and *shareholder* are synonyms meaning, of course, a holder of shares of stock of a corporation.

13.597 Presumably no one is under any illusion that which term you use in a contract could affect a party's rights. More likely, the distinction derives from wanting to show good manners by conforming to local custom. But in this case, local custom is far from clear-cut, as both terms are used in the Delaware General Corporation Law and in Delaware caselaw. And treatises on Delaware corporate law use the terms interchangeably. So for all purposes, including contract drafting, you may with a clear conscience use either *stockholder* or *shareholder* when referring to a holder of shares of stock of a Delaware corporation.

"SHAREHOLDERS AGREEMENT"

13.598 What should you call an agreement between shareholders? Each of the three following alternatives is defensible:

- *shareholders' agreement* (plural plus apostrophe)

- *shareholders agreement* (plural without the apostrophe)
- *shareholder agreement* (singular, no apostrophe-*s*)

13.599 (Obviously the same alternatives apply if you use the word *stockholder* instead of *shareholder*; see 13.596.)

13.600 *Shareholders' agreement*, conveying the meaning "agreement of the shareholders," is perhaps the most traditional option. It would be unobjectionable but for the apostrophe—because an apostrophe in a contract title is a rarity, it's always at risk of being dropped.

13.601 In *shareholders agreement*, the word *shareholders* is an attributive noun, answering the question "What kind of?" as opposed to "Whose is it?" *Shareholders agreement* is analogous to *carpenters union* and *homeowners association*.

13.602 Or for *shareholder agreement*, it's analogous to *shareholder meeting*, which is a standard alternative to *shareholders' meeting*.

"SIGNATORY"

13.603 The word *signatory* is ambiguous. *Black's Law Dictionary* defines signatory as "A person or entity that signs a document, personally or through an agent, and thereby becomes a party to an agreement." But it's also used to mean someone

who physically signs a contract, whether as a party or on behalf of a party.

13.604 To avoid reader miscues, use instead *party* to convey the former meaning and *person signing this agreement* or *person signing this agreement for Acme* to convey the latter meaning. Using instead *person signing this agreement on behalf of Acme* should be unobjectionable, but some might think that refers to an agent, rather than an Acme officer, signing on behalf of Acme.

13.605 That said, when it's used in a signature block (see 5.29), it's clear that *signatory* refers to the person signing.

"SOLE" AND "EXCLUSIVE"

"Sole" and "Exclusive" in Licensing

13.606 In licensing circles, it appears generally accepted that there's a distinction between an *exclusive* license and a *sole* license. In an exclusive license, only the licensee has the right to make use of the intellectual property. By contrast, in a sole license, the licensor agrees not to grant any additional licenses but retains the right to make use of the intellectual property. See *Drafting License Agreements* § 1.02 (Michael A. Epstein and Frank L. Politano eds., 4th ed. 2012); Mark Anderson & Victor Warner, *A–Z Guide to Boilerplate and Commercial Clauses* 286–87 (3d ed. 2012) (regarding English law).

13.607 A sole license could also be understood to mean not that the licensor retains the right to make use of the intellectual property, but that prior licenses granted are preserved. Roger M. Milgrim, *Milgrim on Licensing* § 15.33 (2012).

13.608 You could use the terms *exclusive license* and *sole license* in contracts, but you can't count on either term to convey clearly the intended meaning—they're terms of art (see 1.7). The potential for confusion is aggravated by (1) the inconsistency among commentators regarding the meaning of *sole license* and (2) prevalence of the phrase *sole and exclusive*, which serves to muddy the notion of distinct meanings for *sole* and *exclusive* (see 13.611).

13.609 It follows that it would be prudent to be more explicit. You could do so by using *exclusive* or *sole* as a defined term. See Mark Anderson & Victor Warner, *A–Z Guide to Boilerplate and Commercial Clauses* 287, 291 (3d ed. 2012). Or you could express the intended meaning in the granting language. See Roger M. Milgrim, *Milgrim on Licensing* § 15.33 (2012) (stating that to express the concept of a sole license, "The terminology typically employed by the draftsman is 'exclusive license,' subject, however, to an express reservation of the continued right to use").

13.610 Using in a contract the phrase *sole and exclusive license*, with the two mutually incompatible terms combined, is a sign of confusion on the part of the drafter.

“Sole and Exclusive”

13.611 Drafters can always do better than use the phrase *sole and exclusive*, with its inherent redundancy.

13.612 Instead of *sole and exclusive remedy*, you could say *sole remedy* or *only remedy*. For purposes of a forum-selection provision, say *exclusive jurisdiction* rather than *sole and exclusive jurisdiction*. Or more significant surgery might be required: Instead of saying that all interests in something are *the sole and exclusive property* of Acme, say that Acme *owns* all those interests. And saying that Widgetco may do something *at its sole and exclusive option* raises issues similar to those raised by *at its sole discretion* (see 3.168) and *from time to time* (see 3.199).

13.613 For granting a license, the problem with *sole and exclusive* goes beyond redundancy (see 13.606).

“SOLICIT”

13.614 No-solicit provisions occur routinely in confidentiality agreements. But the word *solicit*, meaning “to entice,” can be used awkwardly in no-solicit provisions.

13.615 Here’s one way it’s used: *The Recipient shall not hire or solicit any of the Disclosing Party’s employees.* But that raises the question, solicit them for what? Usually referring to soliciting without

specifying a purpose suggests prostitution, or going door to door for contributions. Obviously, that's not the meaning intended for purposes of no-solicit provisions.

13.616 This explains use of the phrase *solicit to employ*. But usually when *solicit* is followed by a verb, the verb pertains to an activity to be undertaken by the person being solicited—*I solicited him to be our sponsor*. So *solicit to employ* is awkward.

13.617 To optimal clarity, you would have to say something like *The Recipient shall not solicit employees of the Disclosing Party to accept employment with the Recipient*. That's wordy. This manual recommends instead *solicit to be hired*. It too is rather awkward, but at least it's concise and is consistent with how *solicit* is usually used.

"SPECIFIC"

13.618 When it occurs in contracts (apart from its use in the phrase *specific performance*), more often than not the word *specific* serves no purpose. The drafter would have done well to omit *specific* from each of the following examples:

The written decision must (1) state *specific* reasons for such decision, (2) provide *specific* reference to the *specific* Plan provisions on which the decision is based, . . .

If any one or more provisions of this section is for any reason held invalid or unenforceable, it is the *specific* intent of the parties that those provisions will be modified to the minimum extent necessary to make them or their application valid and enforceable.

The Company and the Purchasers acknowledge that irreparable damage would occur if any of the provisions of this agreement or the other Transaction Documents are not performed in accordance with their *specific* terms or are otherwise breached.

No such employees shall admit any person (Tenant or otherwise) to any office without *specific* instructions from Landlord.

13.619 In the following examples it would have been better to replace *specific* with a different word:

. . . but the Company may provide such indemnification or advancement of Expenses in *specific* [read *individual*] cases if the Company's board of directors finds it to be appropriate; . . .

. . . other than those representations that expressly relate solely to a *specific* [read *specified*] earlier date, . . .

13.620 So if you're tempted to use *specific*, try omitting it. If that doesn't work, check whether a different word would be more suitable.

"SUBSTANTIAL" AND "SUBSTANTIALLY"

13.621 The words *substantial* and *substantially* indicate an order of magnitude:

If Holdings declines the Offer, the Seller may transfer the Offer Interests on *substantially* the same or more favorable (as to the Seller) terms as were in the Offer Notice at a price not less than the Offer Price.

13.622 How big does something have to be before it is substantial or can be said to do something substantially? More than 50% of its maximum potential magnitude? More than 70%? 90%? It's not clear.

13.623 These words are vague, but the problem goes beyond that—they're also imprecise. Better alternatives might be *material* and *materially*, if they're purged of their ambiguity (see 9.3).

"SUCH AS"

13.624 *Such as* is ambiguous—it might be unclear whether the clause it introduces serves to reduce the scope of the class represented by the preceding noun. This can result in contract disputes.

13.625 Consider the following sentence:

Richard collects books about painters such as Botticelli and Donatello.

13.626 Given the general nature of the class in question (*painters*) and the narrowness of the items in the *such as* phrase (two Italian painters of the

early Renaissance), the reasonable reader would assume that Richard doesn't collect books about all painters but instead collects books about painters comparable to those listed. In other words, the *such as* phrase reduces the scope of the noun painters—it's acting like a restrictive clause. (For more about restrictive and nonrestrictive clauses, see 12.41–43.)

13.627 The alternative would be for the nouns in the *such as* phrase simply to be examples of the class represented by the preceding noun. That would result in the *such as* phrase acting like a nonrestrictive clause. With respect to the sample sentence above, that could be accomplished either by narrowing the class represented by the preceding noun (see the first example below) or by including a broader range of nouns in the *such as* phrase (see the second example below):

Richard collects books about Renaissance painters, such as Botticelli and Donatello.

Richard collects books about painters, such as Botticelli, Gustav Klimt, J.M.W. Turner, and Andy Warhol.

13.628 Placing a comma before the *such as* phrase, as in the two preceding examples, would make the *such as* phrase nonrestrictive.

13.629 Nonrestrictive use of a *such as* phrase makes sense only if the meaning or scope of the class represented by the preceding noun might otherwise be unclear to the reader. That's why the

last of the above examples is rather odd—the class represented by the noun *painters* is so vast as to make the examples provided unnecessary.

13.630 A bigger problem is that a reader might be uncertain whether a given *such as* phrase is intended to be restrictive or nonrestrictive. For example, it might have been intended that the *such as* phrase in the second of the three above examples be restrictive—maybe the meaning sought to be conveyed is not that Richard collects books about all Renaissance painters but instead that he collects books about Italian painters of the early Renaissance. It would be rash to rely on a comma to ensure that a given *such as* phrase is read as being nonrestrictive.

13.631 *Lamar Manufacturing Co. v. Bradley Corp.*, 280 F. App'x 951 (Fed. Cir. 2008), provides an example of a contract dispute caused by confusion regarding a *such as* phrase. The contract in question provided that a specified patent royalty rate would apply "[i]f a Licensed Unit is invoiced or shipped in combination in another product such as an emergency shower or eyewash." The question before the court was whether the *such as* phrase reduced the scope of the noun in question, "product"—in other words, whether the *such as* phrase was restrictive or nonrestrictive. The court reversed the lower court, holding that the *such as* phrase was restrictive—that the royalty rate in question didn't apply to all products but only to

products similar to those included in the *such as* phrase.

13.632 Given the general nature of the preceding noun ("products"), the narrowness of the nouns included in the *such as* phrase, and the absence of a comma before *such as*, the court's holding was a reasonable one—the language at issue resembles the first of the three examples above.

13.633 The contract language was sufficiently confusing that not only did it give rise to protracted litigation, it also prompted a dissent on the part of one judge of the U.S. Court of Appeals for the Federal Circuit, who was of the view that the *such as* phrase was nonrestrictive.

13.634 To avoid the potential for confusion, don't use *such as*. Instead, be precise in describing the class in question. If there's any risk of uncertainty as to the boundaries of the class, resolve that uncertainty using *including* in the manner recommended in 13.279–84.

"SUCH" USED AS A POINTING WORD

13.635 It is appropriate to use *such* in conjunction with a noun phrase echoing an antecedent noun phrase if *such* conveys the meaning "of this kind." In this context, *such* is often prefaced by *any* or *no*, as in "The Escrow Agent shall give written notice of any *such* deposit to the Purchaser and the Sellers" and "No *such* default or breach now exists."

3.636 Drafters often use *such* instead of the "pointing words" *this*, *that*, *these*, and *those.* This usage goes against the principle that in drafting you shouldn't use one word to convey different meanings (see 1.64), and it also alienates nonlawyers. Below are some examples of this usage, with the recommended alternatives to *such* noted in brackets.

"Affiliate" means, with respect to any Person, any other Person controlling, controlled by, or under common control with *such* [read *that*] Person.

Widgetco shall complete its review within ten days. If Widgetco does not within *such* [read *that*] ten-day period notify the Licensee, in writing, of its disapproval and the reasons for *such* [read *its*] disapproval, the Licensee may publish the Licensed Work.

Acme has purchased all shares of Widgetco common stock held by the Widgetco stockholders listed on Exhibit A and has received from each of *such* [read *those*] stockholders a certificate representing its shares of Widgetco common stock.

3.637 Sometimes the pointing word *that* is preceded by the *that* of a *that*-clause. If *that that* seems awkward, you can replace the pointing word *that* with *the*, as there would be no risk of confusion:

The Manager will not be liable to the Company or to any Member for any loss or damage sustained by the Company or any Member except to the extent *that*

that [read *that the*] loss or damage is the result of the Manager's gross negligence, willful misconduct, or breach of this agreement.

"SURVIVAL"

13.638 The concept of "survival" crops up in contracts in three ways, and in each of those contexts it's either unnecessary or inferior to an alternative approach. Each of these three contexts is discussed below.

Survival of Claims

13.639 Sometimes an agreement will specify that any claims that arise before an agreement terminates will survive termination. The wording of such provisions varies; here's an example from a supply agreement:

17. **Survival of Claims**. Termination of this agreement will not relieve either party of any claims against it that arise under this agreement before the agreement is terminated.

13.640 Such provisions state the obvious—terminating a contract because of breach doesn't preclude the injured party from filing a claim for damages. See, e.g., 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 8.15 (3d ed. 2012) ("If the injured party chooses to terminate the contract, it is said to treat the breach as total. The injured party's claim for damages for total breach takes the

place of its remaining substantive rights under the contract.").

13.641 Stating settled law in a contract can be helpful, in that the parties won't necessarily know what the law is. But the fact that claims survive termination is such a basic notion that stating it in a contract seems excessive.

Survival of Provisions

13.642 The default rule is that a party's rights and obligations under a contract last only as long as the contract. That's why it's unnecessary to tack onto all contract rights and obligations the phrase *during the term of this agreement* (see 13.177).

13.643 But what if you want a right or obligation—such as Acme's obligation to keep certain information confidential or not to compete—to continue after the agreement terminates? One way drafters accomplish this is by stating separately that the provision in question will survive termination of the agreement. But it's clearer and simpler to build duration into the right or obligation in question, for example by saying *during the term of this agreement and for five years thereafter* (see 13.178).

13.644 It's standard not to state the duration of the boilerplate provisions that would come into play if one party sues the other after the agreement has been terminated. These include provisions relating to jurisdiction, governing law, and notices. But sometimes you'll see a catchall such as this: *The*

provisions of this General Provisions Article will survive termination or expiration of this agreement. It's not necessary to say that boilerplate survives termination—if a party is able to bring a claim after the agreement terminates, then the rules governing how a claim is to be handled would necessarily apply to that claim.

Survival of Representations

13.645 Invariably, the principal language of obligation used in indemnification provisions (such as *The Seller shall indemnify the Buyer Indemnitees against all Indemnifiable Losses arising out of* . . .) doesn't specify a time frame for that obligation. As such, it's an exception to the notion, described in 13.643, that you should be explicit if you want an obligation to continue after an agreement terminates.

13.646 You can do without a time frame in this context because the issue of when you can bring a claim for indemnification should be addressed elsewhere in indemnification provisions. Usually, an agreement will speak in terms of how long the indemnifying party's representations (in other words, statements of fact; see 3.273) survive. It's commonplace for most representations in a contract to survive for a limited time (often one year), whereas others survive until the applicable statutes of limitations expire and still others survive indefinitely.

13.647 Although it's standard to refer in this manner to survival of representations, it's unhelpful

to do so. For one thing, you should resort to such legal jargon in a contract only if no clearer alternative presents itself. And furthermore, referring to survival of representations addresses only one of the potential bases of a claim for indemnification—for example, it doesn't serve to put time limits on when you can bring a claim for indemnification for breach by the indemnifying party of any of its obligations. That's why it's preferable instead to address this topic directly, and more broadly, in a section entitled "Time Limitations."

"TERMINATION" AND "EXPIRATION"

What to Use in Termination Provisions

13.648 Some might take issue with the following provision: *This agreement terminates on August 23, 2014*. They might argue that termination entails one or more parties' ending a contract sooner than it otherwise would have ended, and that in this case the correct word to use is *expires*.

13.649 It's certainly easy to find contract language suggesting that expiration (*expiry* in British English) isn't a form of termination. For example: *All such charges and expenses shall be promptly settled between the parties at the Closing or upon termination or expiration of further proceedings under this agreement*. If expiration is a form of termination, logic would require omitting "or expiration."

13.650 Just because drafters are partial to a distinction between *termination* and *expiration* (and between the verbs *terminate* and *expire*) doesn't mean that a distinction is necessary, or even helpful.

13.651 One can readily find in legal reference works instances of *termination* used to refer to any means by which a contract comes to an end. Consider, for example, the following, which is from 17A *Am. Jur. 2d.* Contracts § 524 (2012) (footnotes omitted): "A contract may be discharged by performance in accordance with its terms; in fact, this is the normal termination of every contract. A contract may also be terminated by the expiration of the time during which it is to remain operative." In this passage, expiration is considered a form of termination rather than something distinct from termination.

13.652 This understanding of the relationship between termination and expiration can be found outside the realm of contracts. For example, the heading of 4 *N.Y. Jur. 2d* Appellate Review § 650 (2012) is "Expiration or other termination of order appealed from." Again, expiration is just one form of termination. The definitions of *termination* and *terminate* in *Black's Law Dictionary* are consistent with termination including expiration. *Termination* is defined as "The act of ending something" and "The end of something in time or existence." In other words, termination is both something you do and something that can simply happen. To the same effect, *terminate* is defined as meaning "To put an

end to; to bring to an end" and "To end; to conclude."

13.653 Furthermore, using *terminates* in termination provisions instead of *expires* is unobjectionable, in that there's no possible confusion as to the meaning of *This agreement terminates on August 23, 2015*.

13.654 Why not use *expires* in termination provisions instead of *terminates*? Because not only would it be unnecessary to do so, it would also lumber you with having to use elsewhere in the contract more ponderous constructions, such as *When this agreement expires or is terminated* [or *otherwise terminates*] rather than just *When this agreement terminates*. If you don't do so, the result can be confusion leading to a dispute. See *Hamden v. Total Car Franchising Corp.*, No. 7:12-CV-00003, 2012 WL 3255598 (W.D. Va. Aug. 7, 2012). The same can happen if in one contract you don't track the references to "expiration" and "termination" in another contract. See, e.g., *Holtzman Interests 23, L.L.C. v. FFC Sugarloaf, L.L.C.*, No. 298430, 2012 WL 468257 (Mich. Ct. App. Feb. 14, 2012).

13.655 Don't use *terminates and expires*, as in *This agreement will terminate and expire upon cessation of commercial operation of the Plant*. It exhibits either inconsistency or redundancy, depending on the meaning attributed to *terminates*.

Referring to Termination Provisions

13.656 If you use *terminates* to refer to any means by which a contract comes to an end, you have to be careful how you refer to the termination provisions.

13.657 If you refer in a contract to *termination of this agreement* and the contract uses the verb *terminate* in referring to both the end of the term and a party bringing the contract to an end, a reasonable reader would conclude that you're referring to any form of termination. But if the term of a contract is stated using the noun *term*, as in *The term of this agreement is three years from the date of this agreement*, the fact that the contract doesn't use the verb *terminate* in stating the term would give a disgruntled contract party room to argue that end of the term represents expiration of the contract rather than termination. So if the contract doesn't use the verb *terminate* in stating the term, refer explicitly to both the end of the term and the parties bringing the contract to an end if you intend the provision to encompass both kinds of termination; also referring to any relevant sections of the contract would be clearer still. Being explicit in that manner would be beneficial even if the contract does use the verb *terminate* to express the end of the term—the reader wouldn't have to check the terminology used in the termination provisions to understand what *termination* means.

13.658 If you say *if this agreement terminates*, that could be understood as applying only to termination by operation of the contract without party action. If

that's what you intend, make that clear by referring to the one or more sections that provide for termination without party action.

13.659 If you say *if this agreement is terminated*, that could be understood as applying only to termination by one or more parties. If that's what you intend, it would be clearer to use the active voice (*if either party terminates this agreement*) rather than the passive voice with missing *by*-agent (see 3.11). The same meaning would be conveyed by *termination of this agreement by either party*. Also referring to any relevant sections would be clearer still.

"TERMINATION FOR CONVENIENCE"

The Implications of "Termination for Convenience"

13.660 The phrase *termination for convenience* occurs in different types of agreements that provide for on-going performance. Here's an example from a services agreement:

6.2 **Termination by PhoneCo for Convenience**. Commencing one year after the Effective Date, PhoneCo may terminate for convenience this agreement, the Services performed at any Site, and any one or more Statements of Work by giving at least 90 days' prior written notice to the Provider.

13.661 *Termination for convenience* would seem to be a euphemism for termination for any reason at all. The phrase originates in government contracts

and refers to the government's right to terminate a contract without breaching the contract, on condition that the decision to terminate isn't an abuse of discretion and wasn't made in bad faith. But the phrase has come into more general use, perhaps because it sounds less threatening than *termination for any reason* and rolls off the tongue more readily.

13.662 You can see this in the way some drafters use it as a section heading but lay out the harsh reality in the body of the section:

7.1 **Termination for Convenience**. Either party may terminate this agreement, for any reason or for no reason, upon not less than 45 days' prior written notice to the other party delivered in accordance with section 11.1 stating that party's intention to terminate this agreement.

13.663 Acme might want to terminate its agreement with Widgetco for any number of reasons. Maybe it found it could get better terms elsewhere. Maybe it decided to stop selling widgets. Maybe it became embroiled in litigation with Widgetco. *Convenience* seems a pallid word to capture all those reasons.

13.664 More to the point, an imaginative (or desperate) litigator might argue that Acme could terminate for convenience only if its agreement with Widgetco imposed some sort of burden, and that the prospect of a better deal elsewhere wasn't a sufficient reason.

13.665 So, *termination for convenience* is problematic. For what it's worth, an informal survey of contracts filed on the SEC's EDGAR system suggests that contracts using the phrase *termination* [or *terminate*] *for any reason* outnumber by a wide margin those that use the phrase *termination* [or *terminate*] *for convenience*.

Alternative Language

13.666 The following provision demonstrates the full range of language you could use instead of *termination for convenience*:

Acme may terminate this agreement [at any time] [for any reason] [or for no reason] by giving the Vendor at least 30 days' prior notice.

13.667 What about the first two bracketed elements? If you say that Acme may terminate at any time, that carries with it the implication that Acme may terminate for any reason. If you say that Acme may terminate for any reason, that carries with it the implication that Acme may terminate at any time. Is the implication strong enough that you can use one of these two elements and not the other? What about dispensing with both of them?

13.668 I would be best to use *for any reason*, as that's the most important concept. The associated implication that Acme may terminate whenever it wants is sufficiently strong to allow one to dispense with *at any time*. In language of discretion, a party should be free to take the action in question whenever it wishes, absent any indication to the

contrary, so generally *at any time* should be redundant; see 3.197. And dispensing with both elements would be rash, even though one could readily make the argument that if a provision doesn't impose any limitations on reasons for termination, one wouldn't need any reason. Three extra words is a small price to pay for being categorical.

13.669 If you're drafting an agreement that provides for termination for cause, instead of *termination for any reason* you could use *termination without cause*, in the interest of symmetry.

13.670 You shouldn't have any qualms about eliminating *or for no reason* (see 13.203). Businesses act rationally or irrationally, prudently or imprudently, competently or incompetently. What they don't do is act entirely at random.

13.671 For a section heading, if *Termination for Any Reason* seems too stark, you could try *Unrestricted Termination*. Alternatively, you could avoid trumpeting the issue in a section heading by instead grouping termination provisions according to who has the right to terminate—for example, by using the section headings *Buyer Termination*, *Seller Termination*, and *Buyer or Seller Termination*.

"TERMS AND CONDITIONS"

13.672 The phrase *terms and conditions* is a fixture in commercial contracts. Sometimes *exceptions* is

tacked on the end. But a condition is a kind of term; so is an exception. It would be more concise just to say *terms*.

"THAT CERTAIN"

13.673 Using *that certain* when referring to an agreement is an archaism. Use *a* (or *an*) instead: *Acme and Big Bancorp are party to that certain* [read *a*] *credit agreement dated August 12, 2012*.

"THE EARLIER [OR LATER, GREATER, OR LESSER] OF X AND Y"

13.674 It's commonplace for a contract to provide for selection of the earlier or later, or greater or lesser, of two alternatives. (When three or more items are involved, you should refer to the earliest or latest, or greatest or least, of those alternatives.) One example: *Acme shall retain any records of the Business transferred to Acme under this agreement until the later of (1) expiration of the applicable tax statute of limitations, including any extensions, and (2) the seventh anniversary of the Closing Date.* A second example: *"Aggregate Net Proceeds" means the greater of (1) any Aggregate Gross Proceeds minus that portion of the aggregate Capital Contributions attributable to the Axion Internet Shares to which those Aggregate Gross Proceeds relate and (2) $150,000*.

13.675 In the preceding examples, the conjunction used is *and.* Many drafters would use *or*,

presumably because when you select one item from a group, *or* is usually the appropriate conjunction to use, as in *You may select A, B, or C.* But the better choice is *and*, in that one is selecting one item from a group of two or more. Using *or* would require that one select, say, the greater of each item considered individually, which wouldn't make sense.

13.676 If you use *or* appropriately in the preceding examples, you would need to rephrase them using *whichever is*. The first example so rephrased: *Acme shall retain any business records of the Business transferred to Acme under this agreement until (1) expiration of the applicable tax statute of limitations, including any extensions, or (2) the seventh anniversary of the Closing Date, whichever is later*. Because it places at the end of the sentence the basis for selecting between the items being compared, the formula *whichever is* is best reserved for when the description of those items is relatively succinct.

"THEREFOR"

13.677 Unless using a *here-* or *there-* word affords economy, it's best to be explicit as to what's being referred to (see 13.260). But in the case of *therefor*, you can simply delete the word if it's clear from the context what's being referred to:

A Participant required to sell any Depositary Receipts in accordance with this section 6(b) will be entitled to receive in exchange ~~therefor~~ the purchase

price per Depositary Receipt received by the Majority Institutional Investors with respect to their Depositary Receipts in that transaction . . . .

13.678 If you elect to use *therefor*, don't be surprised if people attempt to change it to *therefore*.

"THIRD PARTY"

13.679 Parties entering into a contract were once divided into classes, or "parts." Generally the owner or seller was referred to as *the party of the first part* and the buyer was referred to as *the party of the second part.* This cumbersome and confusing usage has become a rarity (see 2.107–08).

13.680 More common is a usage that it gave rise to—using the term *third party* in a contract to denote any person or entity that is not a party to that contract. It would be for the best if this usage, too, were dropped: because the word *party* is now used as a general term for one who has entered into a contract (see 2.102), it's anomalous to use that word as part of a term meaning just the opposite. Also, the designation *third* makes no particular sense, given that contracts often have more than two parties.

13.681 *Person* (defined to mean an individual or an entity) is a suitable alternative to *third party* when there's no need to exclude the parties to the contract from the scope of a provision: *"Lien" means, in the case of securities, any purchase option, call, or similar right of a third party* [read *any Person*] *with respect to those securities.*

13.682 You can use *any Person other than a party* when you need an alternative to *third party* that excludes parties: *Confidential Information does not include any information that . . . was subsequently lawfully disclosed to the receiving party by a third party* [read *by a Person other than a party, on condition that that Person was*] *not under a duty to keep that information confidential.* Even simpler would be *nonparty*.

13.683 *Third party* is sometimes used as a defined term or as part of a defined term such as *Third-Party Claims.* A clearer alternative would be *Nonparty.*

13.684 But you can't dispense entirely with the term *third party* for purposes of contract drafting, given that it features in terms of art such as *third-party beneficiary* and in legislation.

"THROUGHOUT THE UNIVERSE"

13.685 The phrase *throughout the universe* is used in rights-granting language:

> Client shall have the sole and exclusive right *throughout the universe* in perpetuity to use and exploit all or any part of the Properties and all or any part of any material contained therein or prepared therefor, whether or not used therein, in any format or version, by any means and in any media, whether now known or hereafter developed.

13.686 Whoever's being granted rights has no prospect of using them in space (in satellites or

otherwise), *worldwide* would be a more sober alternative.

"TIME IS OF THE ESSENCE"

13.687 A feature of contract language is the phrase *of the essence*. According to *Black's Law Dictionary*, it means "so important that if the requirement is not met, the promisor will be held to have breached the contract and a rescission by the promisee will be justified."

13.688 It's used in provisions such as the following: *Tenant's surrender of the Surrender Premises on the Surrender Date is of the essence*. But mostly it's used in the phrase *time is of the essence*.

13.689 The meaning attributed to *time is of the essence* in *Garner's Dictionary of Legal Usage*, at 895, reflects the conventional wisdom among practitioners: "When a contractual stipulation relating to the time of performance is 'of the essence' of a contract, a party's failure to meet that stipulation automatically justifies the other party's rescinding the contract—no matter how trivial the failure."

13.690 Drafters use the phrase because courts tend to hold that late performance isn't grounds for termination unless the purpose of the contract or the circumstances surrounding it indicate that the parties intended for that to be the case. See *Am. Jur. 2d*.

Contracts § 471. But for various reasons, *time is of the essence* isn't up to the task.

13.691 First, the phrase is generally used in a provision stating—the exact wording varies—that *Time is of the essence of this agreement*. This formula is too general: "A contract may contain many promises for sundry performances, varying in amount and importance. A general provision that 'time is of the essence' should not apply to all of the promises for performance." 8 *Corbin on Contracts*, at § 37.3.

13.692 Second, even if it happens to be clear what performance the phrase applies to, the phrase is silent as to the consequences of untimely performance.

13.693 Third, you see *time is of the essence* provisions even in contracts that use liquidated-damages provisions and express termination provisions to specify the consequences of delay. As 8 *Corbin on Contracts*, at § 37.3, says, "The provision 'time is of the essence' may be inserted in a contract without any realization of its significance. Other terms contained in the agreement, interpreted in the light of the conduct of the parties, may show that the provision has no legal effect."

13.694 Fourth, although termination for any tardiness may make sense in some contexts, in other contexts—for example, in a construction project—a missed deadline might occur after substantial

performance, and allowing the other party to terminate could result in unjust enrichment. A common-law judge might or might not be troubled by that unfairness, but it would likely create problems in civil-law jurisdictions, which frown on rescinding a contract based on trivial nonperformance.

13.695 So it's unsurprising that courts have proved willing to ignore *time is of the essence* provisions on the grounds that you can't assume that the parties to a contract understood and agreed on the ostensible meaning of the phrase.

13.696 For example, the *Restatement (Second) of Contracts* § 242, comment d. (1981), says that "stock phrases such as 'time is of the essence'" do not necessarily have the effect of making failure to timely perform grounds for discharge, although such phrases "are to be considered along with other circumstances in determining the effect of delay."

13.697 To make it clearer that a deadline is important and what the consequences are of failing to meet the deadline, it would be best to address the issue explicitly. Assume that you represent the buyer in an acquisition and the draft acquisition agreement specifies that either party can terminate if the transaction hasn't closed by a specified date—the "drop-dead date." You want to make sure that a court wouldn't grant the seller any leeway if the buyer terminates because the transaction hasn't closed by the drop-dead date and the seller sues, claiming that a missing consent in fact materialized

a day later and that the buyer should have been willing to close. A clearer alternative to saying that time is of the essence with respect to the drop-dead-date provision would be to include the following:

The parties acknowledge that due to [describe time constraints on the parties], if a party wishes to terminate this contract in accordance with section X [the drop-dead-date provision], that party will not be required to give the other party any time beyond the Drop-Dead Date to allow that party to satisfy any condition or perform any obligation under this agreement.

"TOGETHER WITH" AND "AS WELL AS"

13.698 Outside of its use in "boosting" defined terms (see 6.55), the phrase *together with* can sometimes be replaced with a single word. That word might be *and*:

"Hotel" means the Site *together with* [read *and*] the Buildings.

13.699 In other contexts, it's *with*:

The Advisor shall send the Report to the Stockholders ~~together~~ with an explanation of . . . .

13.700 Or it might be *plus*:

If the Advisor is found not to be entitled to indemnification, the Advisor shall repay the

Company the advanced funds *together with* [read *plus*] interest].

13.701 The same range of fixes can be applied to *as well as*. Economy in contract drafting resides in small adjustments as well as large.

"TO THE EXTENT PERMITTED BY LAW"

13.702 If conduct contemplated in a contract might, depending on the circumstances, result in a party's breaking the law, make that clear by using the phrase *to the extent permitted by law*, as in *To the extent permitted by law, Acme* [*shall*] [*may*] *incinerate the Excess Materials*. If Acme were to break the law, including that phrase would make it difficult for Acme to argue that its unlawful activity doesn't provide Widgetco with grounds for terminating the contract or bringing against Acme a claim for damages under the contract. It would also signal to nonparties, particularly government agencies, that the parties were aware that Acme's conduct was subject to legal restrictions.

13.703 The phrase serves a different function in language of performance. Consider the following example: *To the extent permitted by law, each party hereby waives its right to a trial by jury*. It has been recommended that you use *to the extent permitted by law* in this context because "there are instances when jury trial waivers are not enforceable as a matter of law. This clause would preserve the effectiveness of the jury trial waiver as between the

parties in instances where the law does not prohibit waiver." *Negotiating and Drafting Contract Boilerplate* 155 (Tina L. Stark ed., 2003). But if the governing law doesn't prohibit waiver, you would have no need for *to the extent permitted by law*. And if it does prohibit waiver, the phrase would be equally irrelevant. Instead, in this context *to the extent permitted by law* simply serves to tell the parties that depending on the law of the forum in any dispute, the waiver might or might not be enforceable.

13.704 phrase is used with the intent that it signal to a court that the parties are willing to have an unenforceable provision modified to the extent necessary to make it enforceable, it would be clearer and more standard to use a severability provision to convey that meaning.

TRADEMARKS—REFERENCES TO

13.705 Sometimes in commercial agreements, each reference to a registered trademark is stated in all capital letters, with the registration symbol "®" appended, as in *PLAXICOL*®. But using all capitals and the registration symbol at every turn distracts readers and doesn't help protect trademark rights. To make your contracts more readable, drop the registration symbol. And in trademark license agreements or other agreements relating to rights in a trademark, use all capitals when referring to that trademark by name. But if a trademark simply

serves to identify particular goods or services, use initial capitals.

13.706 If your client has strict rules about how its trademarks are to be referred to, you'll need to follow those rules, even to the detriment of readability. But judicious use of defined terms might allow you to minimize the effect on readability.

13.707 The remainder of this section explains what underlies these recommendations.

All Capitals or Initial Capitals?

13.708 Treatises on trademark law recommend that when using a trademark you distinguish it from the surrounding text so that the public will recognize it as a trademark. In this regard, Anne LaLonde & Jerome Gilson, 1 *Gilson on Trademarks* § 2.02 (2012), states as part of a "Checklist for Preventing Loss of Distinctiveness" that "the mark owner should use a distinctive type face, quotation marks, solid capital letters or, at the very least, capitalization of the first letter." In the same vein, Siegrun D. Kane, *Kane on Trademark Law* § 5:2.1 (2012) says that to distinguish trademarks from ordinary descriptive or generic terms, they should be set off from surrounding text, and that this can be accomplished, among other ways, by using all caps or initial caps.

13.709 In recommending, those treatises don't distinguish between types of use, but it makes sense to do so. When considering how trademarks should be shown in contract text, bear in mind that any

public dissemination of commercial agreements is purely incidental. Compared with text on pill bottles, in promotional materials, or in advertising, contract text couldn't reasonably be considered a potential source of loss of distinctiveness. Consequently, what typographic convention you use in a contract to refer to a trademark wouldn't jeopardize rights in that trademark. As a matter of trademark law, nothing is gained by stating in all capitals contract references to a trademark.

13.7.10 That doesn't mean that it's always pointless to use all capitals in contract references to trademarks. In trademark license agreements and other agreements relating to trademark rights, trademarks are referred to purely in their capacity as trademarks. By contrast, other kinds of contracts refer to trademarks in their capacity as labels for particular goods or services. For example, in an agreement providing for purchase of vials of Tamiflu vaccine, the trademark "Tamiflu" simply serves to identify the vaccine—the fact that it's a trademark is entirely incidental.

13.7.11 In trademark license agreements and other agreements relating to trademark rights, the extra emphasis provided by all capitals helps distinguish references to trademarks as trademarks from the descriptive function of trademark references in other kinds of agreements. And when a trademark reference doesn't relate to rights in that trademark, nothing is gained by using all capitals, so

you can give it the initial capital befitting a proper noun.

Registration Symbol or No Registration Symbol?

13.712 The owner of a registered trademark doesn't have to use with its trademark the registration symbol "®" or some other statutory notice (such as the words "Registered in U.S. Patent and Trademark Office") to be entitled to protect that trademark from unauthorized use. But to recover damages and profits in a suit for infringement under the Lanham Act, a trademark owner must be able to show either that it had used the registration symbol or other statutory notice or that the defendant had actual notice that the owner had registered the mark. (See 15 U.S.C. 1111.) And using a statutory notice is another way to protect against loss of distinctiveness.

13.713 Consequently, Anne Lalonde & Jerome Gilson, 1 *Gilson on Trademarks* § 2.02 (2012), states, in the checklist mentioned in 13.708, that "the trademark owner should indicate the legal status of the mark wherever it appears." Other authorities acknowledge, however, that doing so can drive a reader batty. For example, the International Trademark Association says, "Generally, it is not necessary to mark every occurrence of a trademark in an advertisement or other promotional materials but, at a minimum, this identification should occur at least once in each piece of printed matter, either the first time the mark is used or with the most prominent use of the mark."

13.714 If trademark protection were the only concern, drafters could, for two reasons, drop from their contracts registration symbols and other statutory notices.

13.715 First, as mentioned in 13.709, commercial agreements aren't disseminated publicly, so there's no risk of loss of distinctiveness.

13.716 Second, it's unlikely that a contract party would need to rely on its use of statutory notice in a contract to be entitled to recovery under the Lanham Act. Any trademark license agreement or other agreement relating to trademark rights would state explicitly that the one or more trademarks in question are indeed trademarks, so appending a statutory notice to each trademark reference would be redundant. And with respect to other kinds of agreements, if Acme enters into a contract with a drug company to buy quantities of a drug, Acme couldn't rationally argue that because the registration symbol isn't appended to references to the drug in the contract, it didn't know that the drug's name was a registered trademark. A court should find that Acme had actual notice, given that the registration symbol had been prominently displayed in all public materials relating to the drug.

13.717 If a trademark owner were concerned about unauthorized use of its trademarks by a party to one of its contracts, it should address that explicitly in the contract instead of relying on appending statutory notice to references to its trademarks.

13.718 Given these considerations, it's not surprising that the registration symbol is rarely used in contracts.

Relationship to Trademark Guidelines

13.719 It's commonplace for company trademark guidelines to mandate that all capitals and the registration symbol be used in every reference to one of the company's trademarks. Such rules couldn't coexist with this manual's recommendation that in contract references to trademarks you use initial capitals and drop the registration symbol.

13.720 One way around this, short of making the trademark guidelines less rigid, would be to use a defined term instead of repeatedly using all capitals and a registration symbol in referring to a given trademark. In a trademark license agreement, you might use the defined term *the Licensed Mark*; in a commercial agreement, you might use the defined term *the Product*.

"UNLESS AND UNTIL"

13.721 *Unless and until* is an expression that weakens the expectation (conveyed by *until* alone) that the condition in the clause will be realized. In everyday English, you use *unless and until* if you expect or hope that the condition will be satisfied (as suggested by *until*) but want to signal to the reader or listener, by means of *unless*, that it might not be.

13.722 This sort of rhetorical nuance is useful in speech or in narrative or persuasive writing, but not in the more rigid world of contract drafting—use instead *unless* by itself.

"UNLESS THE CONTEXT OTHERWISE REQUIRES"

13.723 The phrase *unless the context otherwise requires* is used in provisions such as the following:

Unless the context otherwise requires, capitalized terms used in this agreement have the following meanings.

Unless the context otherwise requires, references to the "Company" will be deemed to refer to the Company and its Subsidiaries.

Each of the representations of the Loan Parties contained in this agreement (and all corresponding definitions) are made after giving effect to the Transactions, *unless the context otherwise requires*.

13.724 It would be best to eliminate *unless the context otherwise requires*, as it adds uncertainty that a litigator might be able to take advantage of. If in a contract you want to deviate from some across-the-board convention, be specific about it.

"UNLESS THE PARTIES AGREE OTHERWISE"

13.725 Generally, the phrase *unless the parties agree otherwise* is redundant. As a matter of

contract law, the parties could agree to waive, amend, or delete any provision in a contract, regardless of whether that contract says that they may. But it would be appropriate to use *unless the parties agree otherwise* if a party thinks that it would facilitate negotiation of a given provision if everyone were reminded that down the road the parties might agree on a different arrangement.

"VERY"

13.726 The word *very* occurs infrequently in contracts. That's not surprising, since for contract purposes *very* isn't a meaningful indication of magnitude—the reader has no way of knowing where *very* falls on the spectrum from nothing to everything. The same applies to *extremely*.

VIRGULE, ALSO KNOWN AS THE FORWARD SLASH

13.727 Here's what *Garner's Modern American Usage* has to say about the virgule, also known as the forward slash:

Some writers use [the virgule] to mean "per" <50 words/minute>. Others use it to mean "or" <and/or> or "and" <every employee/independent contractor must complete form XJ42A>. Still others use it to indicate a vague disjunction, in which it's not quite an or <the novel/novella distinction>. . . . In all these uses, there's almost always a better choice than the virgule. Use it as a last resort.

13.728 The virgule isn't conducive to clarity—don't use it in contracts other than to state a fraction. (See 11.73 regarding *and/or*.)

"WARRANT," "WARRANT CERTIFICATE," AND "WARRANT AGREEMENT"

13.729 *Warrant* is an instrument granting the holder a long-term option to buy shares at a fixed price. (See 13.732–47 regarding the unrelated verb *to warrant* and noun *warranty*.)

13.730 A warrant is an intangible right, but it's evidenced by a document. Many drafters don't distinguish the two, in that they refer to *exercise of this warrant* (that is, the intangible right) and *surrender of this warrant* (in other words, the document evidencing that right). It would be clearer to observe the distinction.

13.731 What you call the piece of paper depends on who signs it. If it's signed by the issuer and the holder, call it a warrant agreement; if it's signed by the issuer only, call it a warrant certificate. Often you'll have a warrant agreement that provides for issuance of warrant certificates.

"WARRANTY" AND THE VERB "WARRANT"

Background

13.732 As explained in 3.273–304, it's pointless and confusing to use the phrase *represents and warrants* (and *representations and warranties*) in a

contract. But in sales contracts it's standard to use *warrants* (and the noun *warranty*) on its own, without *represents* (and *representation*). But clearer and more concise choices are available.

Definition of "Warranty" and "To Warrant"

Warranty is a term of art. Under common law, an express warranty is a seller's affirmation of fact to the buyer, as an inducement to sale, regarding the quality or quantity of goods, title, or restrictive covenants to real property. See Howard O. Hunter, *Modern Law of Contracts* § 9.5 (2012).

Similarly, section 2-303 of the Uniform Commercial Code says, "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." So under the UCC, a statement of fact can be a warranty (as is the case under common law) but so too can an obligation.

As for the verb *warrant*, *Black's Law Dictionary* simply says that it means "to promise or guarantee."

Using the Verb "Warrant" to Introduce a Statement of Fact

Considering definitions in isolation isn't helpful. Instead, to understand the role of the verb *warrant*, one needs to consider it in context.

13.737 In contracts, one function of *warrants* is to introduce statements of fact, either present facts (*The Vendor warrants that the Software conforms to the Specifications*) or future facts (*The Vendor warrants that during the six months following the date of this agreement the Software will conform to the Specifications*).

13.738 Given that a statement doesn't need to be described as a warranty to be a warranty (see 3.283–84), it follows that one doesn't need to use *warrants* with a statement of fact in order for that statement to be a warranty. Consequently, with respect to a statement of fact the sole function of *warrants* is the same as the function of *states* or *represents* (see 3.299–302)—to identify who is making the statement.

13.739 This manual recommends using *states* instead of *represents* to introduce a statement of fact (see 3.299). Consistency would seem to favor using *states* instead of *warrants*, too, when introducing a statement of fact. But before considering that, one must first address another issue relating to the kinds of statement of fact that are introduced using *warrants*.

13.740 More specifically, anyone making a statement of future facts couldn't be aware of those facts, because those facts wouldn't yet exist. Instead, a statement of future facts serves to set a benchmark against which warranty obligations will be measured. That's why statements of future facts introduced by *warrants* would logically be followed,

although not necessarily immediately, by a statement of the remedy that applies if the statement of fact is inaccurate. It would be more logical, and more efficient, to combine the statement of fact and remedy into a single sentence, turning the statement of future facts into a conditional clause and the remedy into the matrix clause (see 3.250).

3.741 Here's an example:

Statement of Fact Followed by Remedy

The Vendor warrants that during the six months following the date of this agreement the Equipment will conform to the Specifications. In the event of breach of the foregoing warranty, the Vendor shall modify or replace the Equipment.

Conditional Clause and Matrix Clause

If during the six months following the date of this agreement the Equipment fails to conform to the Specifications, the Vendor shall modify or replace the Equipment.

3.742 By contrast, statements of present facts (for example, *the Equipment is in good working order*) don't share the illogic of statements of future facts, so you could retain them. If you do, in the interest of consistency it would be best to introduce them using the verb that you use to introduce other statements of fact, whether *states* or, if expediency requires it, *represents*. But with respect to statements of present fact, too, it would be more efficient to combine statement of fact and remedy into a single sentence,

as in *If no later than 15 days from the date of this agreement the Buyer notifies the Seller that the Equipment is not in good working order, then . . . .* Doing so would eliminate any need for the verb *warrant*.

Don't Use the Verb "Warrant" to Introduce an Obligation

13.743 Contracts *warrants* is used to introduce not only statements of fact but also obligations (see 13.734), as in *Acme warrants that it shall perform routine maintenance on the Hardware once every quarter*.

13.744 Whereas in the case of statements of fact *states* (or *represents*) serves to identify who is making the statement, it should be clear from language of obligation who has the obligation (see 3.46), so tacking *warrants* on the front doesn't accomplish anything. And the question of whether an obligation is a warranty depends on the nature of the obligation and not on whether it's introduced by the verb *to warrant*. So in the interest of concision and avoiding confusion, don't use *warrants* to introduce an obligation. Say instead—using the example in 13.743—*Acme shall perform routine maintenance on the Hardware once every quarter*.

Using the Word "Warranty"

13.745 The noun *warranty* can be used to refer to provisions in an agreement (as in *The warranties in this section 5 will not apply if . . .*) and provisions absent from an agreement (as in *Acme makes no*

warranties, express or implied). And even if you don't use *warrants* in a provision, it would be appropriate to give it the heading *Warranty* or *Warranties* if that's what the section consists of.

13.746 Whether a provision constitutes a warranty depends on its content, not on whether you've called it a warranty (see 3.283–84). So although you may think all the warranties in a contract are to be found in the section with the heading *Warranties*, a court could hold that a statement of fact or obligation located elsewhere in the contract constitutes a warranty supporting an action for breach of warranty, even though the contract doesn't refer to it as a warranty.

13.747 Similarly, even if a contract refers to a provision as a warranty, a court could hold that it's a representation supporting an action for misrepresentation.

WHETHER SINGULAR MEANS PLURAL

13.748 One type of failure to address an issue is uncertainty regarding whether a reference in the singular also applies to the plural. (It bears some resemblance to ambiguity of the part versus the whole; see chapter 11.)

13.749 This type of uncertainty isn't a function of ambiguity, because only one meaning is conveyed. Instead, the uncertainty derives from not knowing whether the drafter omitted the plural so as to exclude the plural from the scope of the provision or

because the drafter hadn't spotted the issue or thought it unduly pedantic to include the plural.

12.75 One example of this uncertainty was featured in *Coral Production Corp. v. Central Resources, Inc.*, 273 Neb. 379 (2007). The contract provision at issue stated that a preferential right to purchase certain oil and gas assets wouldn't apply if "substantially all of the assets and/or stock of the selling party is sold to a non-affiliated third party." The party seeking to invoke the preferential right contended that sale of the oil and gas assets didn't fall within that exception because the assets had been sold to more than one nonaffiliated person. The court found in favor of the party that had sold the assets, holding that the exception applied to sale to more than one person.

12.76 Similarly, *ION Geophysical Corp. v. Fletcher International, Ltd.*, No. CIV.A. 5050-VCP, 2010 WL 4378400 (Del. Ch. Nov. 5, 2010), concerned whether a party to a stock purchase agreement could issue more than one notice under a procedure that would allow that party, under certain circumstances, to increase the total number of common shares into which it could convert preferred shares. The provision in question used "notice" in the singular. After analyzing, none too convincingly, use of "notice" with the definite article *the* and the indefinite article *a*, the court held that the provision was unambiguous—the parties had intended that more than one notice could be issued.

13.752 What the courts held in these disputes is less relevant than how the disputes could have been avoided. Whenever you're drafting a provision that refers to a thing or an unnamed person, consider whether you want that provision to apply (1) regardless of the number of things or persons, (2) only with respect to one thing or person, or (3) only with respect to more than one thing or person. More often than not, the first meaning is the one you'll want to convey. In that case, make it explicit. Whoever drafted the language at issue in *Coral Production* could have accomplished that by using the phrase *one or more*, as in "one or more non-affiliated persons." By contrast, to fix the language at issue in *ION Geophysical* the drafter would have had to add another sentence.

13.753 Use the phrase *one or more* rather than the formula *X or Xs*—say *one or more widgets* instead of *the widget or widgets*.

13.754 Don't rely on a provision specifying drafting conventions to ensure that another provision in a contract applies regardless of the number of things or persons. For one thing, such provisions specifying drafting conventions are clumsy (see 15.20). Furthermore, you can't assume that a provision specifying drafting conventions would be enough to prevent a fight over singular versus plural, For example, the contract at issue in *Coral Production* featured just such a provision specifying drafting conventions.

The Role of "Any"

13.755 Consider the following:

if Acme files a complaint with a government body

if Acme files a complaint with any government body

13.756 You might think that using *any* in the second example would ensure that the provision couldn't be read as applying only if Acme files a complaint with a single government body, as opposed to two or more government bodies. (If you think it unlikely that anyone would argue for the narrower interpretation, consider *Coral Production*.)

13.757 But *any* can't be counted on to accomplish that, as it could be taken to mean that the provision applies to any one member of the class in question (see 11.85). But that's the meaning conveyed by the indefinite article *a*, so using instead *any* serves only, in some contexts, a minor rhetorical function.

13.758 If you want to convey the broader meaning, use *one or more*:

if Acme files a complaint with one or more government bodies

A Balanced Approach

13.759 You should go out of your way to make it clear that every provision that's phrased as applying to a single item also applies to more than one of that item, but the result would be ponderous prose. Compare the following two versions of the same provision, the first of which is worded so as to apply

to single items and the second of which is worded so as to apply to one or more items:

Acme shall not disclose to a Representative any information if doing so would cause Acme to breach a duty to another Person to keep that information confidential or would cause Acme to violate a law or an order of a Government Body.

Acme shall not disclose to one or more Representatives any information if doing so would cause Acme to breach a duty to one or more other Persons to keep that information confidential or would cause Acme to violate one or more laws or orders of one or more Government Bodies.

13.760 The second version is sufficiently ponderous as to suggest that it's not feasible to make it explicit in each case that a provision that applies to one item also applies to more than one of that item. Instead, the more reader-friendly approach would be to use *one or more* intermittently, presumably in those contexts that pose a greater risk of dispute.

"WILLFUL" AND "WILLFULLY"

13.761 As usually used in contracts, the word *willful*, as in *willful misconduct*, is not only vague but also ambiguous. It means "intentional," but drafters usually don't make it clear whether the focus is on the party's action or on the consequences of the party's action—it's possible to act intentionally without intending to cause damages

(see 13.453). For a case that involved this ambiguity, see *Johnson & Johnson v. Guidant Corp.*, 525 F. Supp. 2d 336, 349–51 (S.D.N.Y. 2007).

13.762 Instead of *willful* or *willfully*, use *intentional* or *intentionally* (they're clearer words) and specify that the party's intent pertains to the consequences of its action (see 13.457 for an example of a provision that does that), unless given the context it makes more sense to have the party's intent pertain to its taking that action.

"WITHOUT LIMITING THE GENERALITY OF THE FOREGOING"

13.763 Drafters use the phrase *without limiting the generality of the foregoing* to introduce one or more examples of a concept described in the immediately preceding language. But you should almost always be able to express the relationship between two blocks of text in less ponderous a manner.

13.764 One problem is that it's not necessarily clear what *the foregoing* refers to. (*Notwithstanding the foregoing* suffers from the same problem; see 13.470.) But the main problem with this phrase is that it's so ponderous.

13.765 A simple alternative would be *including*, which serves the same function (see 13.264). Not only is it shorter, it also allows you to express the same meaning in one sentence rather than two,

thereby allowing you to eliminate further surplusage:

Acme shall not make any claim or take any action adverse to Bolin GPL's ownership of or interest in *the Bolin Marks. Without limiting the generality of the foregoing, Lone Star shall not attempt to register* [read *the Bolin Marks, including registering*] any Bolin Mark or any mark confusingly similar thereto in any jurisdiction.

13.766 It would be redundant to use both *without limiting the generality of the foregoing* and *including*:

If an Event of Default occurs, Mortgagee, in addition to any other rights, will have all rights granted a secured party on default under the Uniform Commercial Code, including ~~without limiting the generality of the foregoing~~ the right to take possession of the Collateral or any part thereof and to take such other measures as Mortgagee deems necessary to preserve the Collateral.

13.767 Another alternative would be to place the examples at the front and modify the general concept so that it becomes a catchall at the end:

Before

Each Credit Party is now and has always been in compliance with all Environmental and Safety Requirements. *Without limiting the generality of the foregoing*, each Credit Party has obtained and complied with, and is in compliance with, all

permits, licenses and other authorizations required under Environmental and Safety Requirements for occupation of its facilities and operation of its business.

After

Each Credit Party (1) has obtained and complied with, and is in compliance with, all permits, licenses and other authorizations required under Environmental and Safety Requirements for occupation of its facilities and operation of its business and (2) is in compliance with all other Environmental and Safety Requirements.

13.768 You can keep the general concept and the examples in separate sentences if you use *includes* (or *include*):

Before

The General Partner shall manage the business and affairs of the Partnership. *Without limiting the generality of the foregoing*, the General Partner shall do the following:

After

The General Partner shall manage the business and affairs of the Partnership. The General Partner's duties include the following:

13.769 Sometimes what follows *without limiting the generality of the foregoing* is in fact not an example of what precedes it. In such cases, you should simply eliminate the phrase:

Each Note Purchaser and its advisors, if any, have been afforded the opportunity to ask questions of the Company and have received complete and satisfactory answers to any such inquiries. ~~Without limiting the generality of the foregoing, each~~ [read *Each*] Note Purchaser has also had the opportunity to obtain and to review the Company SEC Documents.

13.7. If the general concept and the examples are sufficiently unwieldy, perhaps your best bet would be to use *without limiting the generality of the foregoing*. But the odds are against that being the case.

CHAPTER 14

NUMBERS AND FORMULAS

WORDS OR DIGITS

14.1 Many drafters use both words and digits when stating a number, placing the digits in parentheses: *six (6)*; *five thousand dollars ($5,000)*; *eighteen percent (18%)*; and so forth. This practice may have arisen because drafters noted that numbers expressed in digits are easier to read than numbers expressed in words but are more vulnerable to typographic errors than are numbers expressed in words. In theory, combining both usages affords the immediacy of digits while providing insurance against a transposed or missing decimal point or one or more extra, missing, or incorrect digits. This insurance was rendered more effective by the arbitrary principle of interpretation that a number expressed in words controls in the case of conflict.

14.2 The words-and-digits approach has doubtless saved the occasional contract party (and its lawyer) from the adverse consequences of a missing decimal point or other error involving digits, or would have done had it been used. But that benefit comes at a prohibitive cost.

14.3 For one thing, it's tedious for the reader to encounter, at every turn, numbers expressed in both words and digits. And this belt-and-suspenders approach is faintly ludicrous when applied to all numbers throughout a contract, even though lower numbers are less susceptible than are higher numbers to a significant typographical error that goes undetected. For use of words and digits in, for example, *three (3) members of the board of directors* to be of any benefit, those drafting and reviewing the contract would have to be oblivious.

14.4 Furthermore, using both words and digits violates a cardinal rule of drafting—that you shouldn't say the same thing twice in a contract, as it introduces a potential source of inconsistency (see 1.62). Even if when you first state a words-and-digits number the words and digits are consistent, they might become inconsistent in the course of revising a draft. It's easy to see how that can happen—digits are more eye-catching than words, so in a moment of inattention you might find yourself changing the digits but not the words.

14.5 And because it's more likely that any inconsistency is due to a drafter's changing digits and forgetting to change the words, rather than vice versa, the odds are better than even that any instance of application of the rule that words govern will result in the court's opting for a meaning that is contrary to what the drafter had intended.

14.6 Less significant but still an annoyance is that using words and digits interferes with using a

hyphen when a number is part of a phrasal adjective. Normally you would say *successive five-year periods*. If you use words and digits, retaining the hyphen would look decidedly odd: *successive five (5)-year periods*. The better choice would be to dispense with the hyphen, as in *successive five (5) year periods*, but that would still be less than ideal.

14.7 In the same vein, when the words-and-digits approach is used in a block of text that includes integrated enumerated clauses, that can result in the reader mistakenly thinking, if only for a moment, that a single-digit in parentheses serves to enumerate an enumerated clause.

14.8 Aside from serving to neutralize digit errors, another ostensible benefit to using words and digits is that digits can be hard to read in a fax, or a fax of a fax, or fifth-generation photocopy. That's not a compelling reason to inflict an annoying and potentially pernicious usage on all contracts. And with faxing heading toward obsolescence and with increased e-mailing of scanned copies, it will only become less compelling over time.

14.9 So for all those reasons, a better approach would be to drop the words-and-digits approach. (It would be harmless, although pointless, to retain it for big numbers, such as the amount owed under a promissory note.) Instead, spell out whole numbers one through ten and use digits for 11 onward. This approach applies to ordinal numbers (*seventh*, *22nd*) as well as cardinal numbers. There are some exceptions: use digits for whole numbers below 11

in lists of numbers; when numbers occur frequently in the text; in percentages; and in statements of amounts of money (see 13.392) and times of day. And use words for numbers 11 and over that occur at the beginning of sentences. But which system you use is less important than ensuring that you don't distract the reader by being inconsistent.

14.10 A better way to avoid digit errors? Proofreading.

FORMULAS

14.11 Often contracts need to include provisions that address how to calculate, post-signing, a given quantum, such as an interest rate, the number of surplus shares an investor may purchase, or the amount by which the exercise price of an option should be adjusted. Formulas can be expressed in ordinary contract prose or by means of mathematical equations.

Using Prose

SIMPLE FORMULAS

14.12 At their simplest, contract formulas involve only one kind of calculation, as in *Acme shall pay Roe an amount equal to X* [*plus*] [*minus*] [*multiplied by*] [*divided by*] *Y*. (Don't use a comma before *plus*, *minus*, *multiplied by*, or *divided by*. And when calculating an amount of money, insert the phrase *an amount equal to* before the calculation to reflect that money is fungible.) With such simple formulas,

concision favors omitting any extra phrases referring to the end product of calculation, as in *an amount equal to the sum of X plus Y* and *an amount equal to ~~the excess of X over~~* [insert *X minus*] *Y*. Such phrases have their uses in other contexts (see 14.18, 14.20, and 14.26).

14.13 A quantum can also be expressed as a percentage of a given amount, as in *an amount equal to 5% of the Overdue Amount*.

SPECIFYING THE ORDER OF OPERATIONS

14.14 In the case of formulas involving only addition or only multiplication, you don't have to be concerned about the order in which to perform the operations. For example, the result of the calculation 2 + 3 + 4 isn't affected by the order in which the numbers are added. This isn't the case when, for example, a formula combines addition and multiplication. The calculation 2 × 3 + 4 gives two different results, 10 or 14, depending on which operation you perform first. (The uncertainty that can result when there is confusion as to the order of operations is a specialized form of ambiguity and is analogous to the "squinting modifier"; see 12.16.)

14.15 In mathematics, the convention is that you first do all operations that lie inside parentheses, then do all multiplication and division, and finally do all addition and subtraction. So if in the calculation 2 × 3 + 4 the addition is to be performed first, it would be expressed as 2 × (3 + 4). If the multiplication is to be performed first, the

calculation could, according to mathematical convention, be left as is, but if the calculation were to be performed by someone unfamiliar with mathematical convention—by a lawyer, for example—it would be advisable to use parentheses in this calculation, too: (2 × 3) + 4.

14.16 The order of operations also affects the result of a formula that includes both addition and subtraction. For example, if in the calculation 10 − 4 + 2 the addition is to be performed first, it should be expressed as 10 − (4 + 2), with 4 as the result. If the subtraction is to be performed first, a convention to the effect that you proceed from left to right in performing additions and subtractions would allow you to do without parentheses. But you can't count on that convention being universally recognized, so the calculation should be expressed as (10 − 4) + 2, with 8 as the result.

14.17 When a mathematical formula is written in words, you can't use parentheses to specify the order of operations. Instead, two other mechanisms are available, and to avoid any chance of confusion, one or the other should be used whenever priority is to be given one or more operations.

14.18 One mechanism is use of the word *result* to isolate an operation from the rest of the formula. Usually, this is done by using the phrase *the result of* before the operation in question, as in the following example (the three values that constitute the variables in the formula are shaded):

After the Close of the Distribution, the number of shares of Parent Common Stock subject to a Nonconvertible Parent Option will equal the number of shares of Parent Common Stock that immediately before the Distribution Date are subject to that Nonconvertible Parent Option multiplied by ***the result of*** the Parent Stock Value divided by the Parent Opening Stock Value.

14.19 The phrase *the result of* serves to indicate that it is the result of the operation that follows the phrase (rather than either variable in that operation) that is to be factored into the rest of the formula. But *the result of* doesn't serve to indicate the nature of the following operation; that's conveyed by using *X* [*plus*] [*minus*] [*multiplied by*] [*divided by*] *Y*. (Don't use *and* to indicate addition.) Since it's open-ended, the phrase *the result of* serves to eliminate ambiguity only if the operation that it relates to occurs at the end of a formula.

14.20 Instead of *the result of*, drafters often use *the* [*sum*] [*difference*] [*product*] [*quotient*] *of* in the case of calculation by addition, subtraction, multiplication, and division, respectively. Because each of these terms conveys the operation being performed, it's standard to refer to, for example, *the quotient of X and Y*. But you can't count on readers knowing what these terms mean (other than *sum*), so you would instead need to refer to, for example, *the quotient of X divided by Y* or *the quotient obtained by dividing X by Y*. Since it would be tautological to do so, the phrase *the result of* represents a better

alternative: it's simple and it applies to all calculations. On occasion, however, it's necessary to use one of the other phrases, so as to avoid repetition (see 14.26–27).

14.21 There are yet further ways of expressing subtraction, but they should be avoided whatever the context. The phrase *the amount by which A exceeds B* is wordy; the phrase *the excess of A over B* could be confusing, since *A over B* could also be used to express a fraction; and *the difference between A and B* could also be confusing, since the difference between 5 and 7 could conceivably be either 2 or −2.

14.22 Another way that the word *result* can be used to isolate an operation from the rest of the formula is by (1) placing at the front of the formula the operation that's to be isolated, (2) referring thereafter to the result of that operation, and (3) using in the formula the present participle form of the verb of calculation. The following formula represents the formula in 14.18 as revised to reflect this approach (again, the values that constitute the variables in the formula are shaded):

After the Close of the Distribution, the number of shares of Parent Common Stock subject to a Nonconvertible Parent Option will be determined by dividing the Parent Stock Value by the Parent Opening Stock Value and multiplying ***the result*** by the number of shares of Parent Common Stock that immediately before the Distribution Date are subject to that Nonconvertible Parent Option.

14.23 A second way to avoid ambiguity is to use enumeration, as in the following variation on the example in 14.18:

After the Close of the Distribution, the number of shares of Parent Common Stock subject to a Nonconvertible Parent Option will equal (1) the number of shares of Parent Common Stock that immediately before the Distribution Date are subject to that Nonconvertible Parent Option multiplied by (2) the Parent Stock Value divided by the Parent Opening Stock Value.

14.24 Enumeration in effect serves to place parentheses around each enumerated clause.

WHEN A FORMULA CONTAINS THREE OR MORE SEQUENTIAL OPERATIONS

14.25 In mathematical equations, you can have parentheses within parentheses—the result of one calculation features in a second calculation, the result of which features in a third calculation, and so on. The equivalent is found in contract formulas expressed in prose. The added complexity means that uncertainty as to which operations come first is best addressed by using enumeration, as described in 14.23.

14.26 In this context, the phrase *the result of* is inadequate for purposes of making clear which operation comes first, but it nevertheless comes in handy. Consider the following example:

"Eurodollar Rate" means, with respect to a Eurodollar Advance for the relevant Interest Period, (1) *the result of* (A) the Eurodollar Base Rate applicable to that Interest Period divided by (B) one minus the Reserve Requirement (expressed as a decimal) applicable to that Interest Period plus (2) the Applicable Margin.

4.27 In this example, the phrase *the result of* doesn't serve to clarify the order of operations—that's accomplished by enumeration. But it does serve a different function. This formula features, in effect, parentheses within parentheses, with the enumeration *(1)* and *(A)* serving as the equivalent of two opening parentheses. In algebraic equations featuring parentheses within parentheses, the two opening or closing parentheses are located immediately next to each other. But inserting the phrase *the result of* between the enumerations makes it clearer to the reader how the elements of the formula relate to each other; it's best not to place enumerations next to each other without intervening text (see 4.44).

4.28 Here's an example of a formula that features, in effect, two sets of double parentheses within a further set of parentheses:

If there are any outstanding Closing Date Liabilities (other than the Identified Debt) or any outstanding Purchaser Claims at the time that the Seller wishes to transfer any Shares, the Seller may transfer only that number of Shares equal to (1) ***the result of*** (A) ***the product of*** (i) the aggregate number of Shares

held by the Seller multiplied by (ii) the Stipulated Value minus (B) ***the sum of*** (i) the aggregate dollar amount of the outstanding Closing Date Liabilities (other than the Identified Debt) plus (ii) the aggregate dollar amount of the Purchaser Claims divided by (2) the Stipulated Value.

14.29 Emphasized in bold are three instances of a filler phrase used to keep apart enumerations. Since using *the result of* three times would have made for confusion, two alternative phrases were also used, despite the tautology (see 14.20).

AN INSTANCE OF FORMULA AMBIGUITY

14.30 The English case *Chartbrook Limited v. Persimmon Homes Limited and others* [2009] UKHL 38 provides an example of formula ambiguity leading to dispute.

14.31 The following language was at issue:

23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value less the Costs and Incentives.

14.32 It could be interpreted in two different ways:

Meaning 1

An amount equal to (1) 23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value minus (2) the Costs and Incentives.

Meaning 2

An amount equal to 23.4% of the result of (1) the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value minus (2) the Costs and Incentives.

14.33 "Costs and Incentives" was a label for a single value. If it had meant "Costs plus Incentives," that would have added to the mix an additional operation and additional alternative meanings.)

14.34 The House of Lords held that the first meaning was the appropriate one. If the drafter had used enumeration to express that meaning unambiguously, the parties would have been spared three levels of court review.

FRACTIONS

14.35 A standard component of formulas, including contract formulas, is fractions. They are used when a pro-rata quantum is being calculated. The following sentence is a representative example of language used to express fractions in prose:

Each Investor who elects to purchase Nonpurchased Units may purchase a number of Nonpurchased Units calculated by multiplying the number of Nonpurchased Units by a fraction, the numerator of which is the maximum number of Units that Electing Investor has agreed to purchase under this agreement and the denominator of which is the maximum number of Units that all Electing

Investors have agreed to purchase under this agreement.

14.36 A fraction could always be expressed more succinctly as the value of the numerator divided by the value of the denominator, but expressing a calculation as a fraction serves as a helpful signal that a number is being prorated. If a number is not being prorated, a fraction should not be used as an alternative to dividing one number by the other.

"EXPRESSED AS A PERCENTAGE"

14.37 Often a drafter will want to express the result of a calculation as a percentage. For example, it would be more comprehensible to speak in terms of a lender having an Aggregate Exposure Percentage of 22.45% rather than, say, an Aggregate Exposure Factor of 0.2245.

14.38 When a formula includes a fraction, the result can be converted to a percentage by referring, in the formula, to *a fraction, expressed as a percentage, the numerator of which* . . . . One can also express as a percentage the result of a division calculation: *"Offeree Percentage" means, as to each offeree, the result, expressed as a percentage, of the total number of Common Stock Equivalents held by that offeree divided by the total number of Common Stock Equivalents.*

14.39 When specifying that a number is to be expressed as a percentage, drafters sometimes use a ratio: *"Aggregate Exposure Percentage" means, with respect to any Lender at any time, the ratio,*

expressed as a percentage, of that Lender's Aggregate Exposure at that time to the Aggregate Exposure of all Lenders at that time. It's simpler to use instead a division calculation.

14.40 Converting a number to a percentage requires that you multiply it by 100, and drafters sometimes state as much in a formula: *The Sale Percentage applicable to each Stockholder equals the result, multiplied by 100, of the aggregate number of Shares of the Majority Group proposed to be transferred in that Sale divided by the aggregate number of Shares held by the Majority Group.* But you don't need to be that specific, because "expressed as a percentage" is clear enough.

ROUNDING

14.41 When a contract contains a formula, it's generally a good idea to provide for rounding of the result.

14.42 What increment you use depends on what's being rounded; convention may play a part. Shares of stock are usually rounded to the nearest whole share; bank interest rates, by contrast, are often rounded to the nearest 1/100th of 1%. Rounding can also be expressed in terms of decimal places; lending documents routinely contain formulas that require calculation to up to nine decimal places.

14.43 You should also specify whether amounts are to be rounded up to the nearest increment, rounded down to the nearest increment, or rounded up or down, whichever increment is nearest. Again,

convention may play a part. For example, lenders tend to round interest rates up. Although there exists a convention that decimal numbers are rounded up or down, whichever is nearest, you can't count on that convention being recognized.

14.44 An issue relating to rounding up or down, whichever increment is nearest, is how to round an amount that's exactly halfway between increments. For example, if one is rounding up or down to the nearest cent, does one round $1.245 to $1.24 or $1.25? The convention in mathematics is to round up, but if you want to avoid confusion on the subject, specify how such amounts are to be treated.

14.45 The issue of rounding can be addressed within a formula, for example by referring to *the result,* [*rounded up to the nearest whole share*] [*rounded down to the nearest cent*] [*rounded up or down, whichever is nearer, to three decimal places*]*, of X multiplied by Y*. But if a contract contains a number of formulas, it may be efficient to address rounding in a separate provision: *All calculations in* [*this agreement*] [*this section 2.4*] *are to the nearest cent (with $.005 being rounded upward) and to the nearest one-tenth of a share (with .05 of a share being rounded upward)*.

14.46 Rounding can result in awkwardness when a fixed number or quantity is being allocated pro rata among a group. For example, a shareholders agreement might provide that the shares of a selling shareholder are to be allocated pro rata among those of the remaining shareholders who wish to purchase.

If, when implementing this provision, you round up the shares allocated to each remaining shareholder, you risk having the remaining shareholders agree to buy more shares than are actually being sold; if you round down, you risk having shares left over; if you round up or down, whichever is nearest, you risk one or the other outcome. The best course is to round down; when the time comes to allocate shares, the purchasing shareholders would presumably be willing to have the numbers adjusted to include any selling shareholder's leftover shares.

TABULATION

14.47 With a view to making it easier to read, you could tabulate the enumerated clauses included in a formula. (Regarding tabulating enumerated clauses, see 4.34.) But if a formula is sufficiently complex that it would benefit from tabulation, it's likely that it would benefit even more from being expressed as a mathematical equation (see 14.48).

Using Mathematical Equations

14.48 The more complex a formula is, the more likely it is that expressing it as a mathematical equation rather than in words would make it clearer.

14.49 For example, the formula in 14.28 would be easier to understand if expressed as the following mathematical equation:

If there are any outstanding Closing Date Liabilities (other than the Identified Debt) or any outstanding Purchaser Claims when the Seller wishes to transfer

any Shares, the Seller may transfer a number of Shares no greater than the number of Shares calculated according to the following formula:

$$X = \frac{(SS - SV) - (CDL + PC)}{SV}$$

For purposes of this formula, the following applies:

X = the number of shares that the Seller may transfer

SS = the aggregate number of Shares held by the Seller

SV = the Stipulated Value

CDL = the aggregate dollar amount of the outstanding Closing Date Liabilities, other than the Identified Debt

PC = the aggregate dollar amount of the Purchaser Claims

14.50 You should have no need to use the percent sign in mathematical equations, and doing so could result in confusion: 3 ÷ 4% could conceivably mean either 75% (with the percent sign conveying "expressed as a percentage") or 0.75%. If you want a given result to be expressed as a percentage (see 14.37), state as much in the prose preamble to the equation.

14.51 If a mathematical equation is particularly complicated, it can be helpful to include in a schedule, for purposes of illustration, a sample set of calculations.

CONSECUTIVE RANGES OF NUMBERS

Distinguishing Between "Stepped Rates" and "Shifting Flat Rates"

14.52 When in a contract a quantity is determined by reference to another quantity—as when a royalty or commission is based on sales of widgets—the relationship can often be expressed by a simple formula. For example, a royalty can be expressed as a stated percentage of annual gross revenue from sale of widgets, or it can instead be expressed as a per-widget amount.

14.53 The parties might want a different formula to apply as the quantity being referred to changes. For example, Acme and Widgetco might want to provide that the royalty rate that Acme pays to Widgetco on sales of widgets will increase as the number of widgets that Acme sells increases. Specifically, they agree to the following royalty schedule, with the royalties based on a percentage of annual gross revenue from sale of widgets, the percentage increasing as revenue increases.

Annual Gross Revenue	***Royalty***
Not over $1 million	5%

Over $1 million but not over $2 million	6%
Over $2 million but not over $3 million	7%
Over $3 million but not over $4 million	8%
Over $4 million but not over $5 million	9%
Over $5 million	10%

14.54 this schedule is ambiguous. If the annual gross revenue is $3.4 million, it's not clear from this schedule whether the 8% rate is applied to all gross revenue (this manual refers to such a rate as a "shifting flat rate") or only revenue over $3 million, with the lower rates being applied to the increments of revenue under $3 million (this manual refers to such a combined rate as a "stepped rate").

14.55 There are three ways to express the schedule in 14.53 as a stepped rate. One way would be as follows: *5% of the first million dollars of annual gross revenue; 6% of the next million dollars; 7% of the next million dollars; 8% of the next million dollars; 9% of the next million dollars; and 10% thereafter*. (This is the method used to express the "Lehman formula" used in calculating compensation for investment banking services.) Alternatively, a single range could be expressed as

follows: *When the annual gross revenue from sale of widgets exceeds $1 million, the royalty rate on the next $1 million will be 6%.*

14.56 The second way to express a stepped rate would be to use instead the table below. This is perhaps the clearest alternative. (This method is used by the Internal Revenue Service to explain tax schedules.)

Annual Gross Revenue	***Royalty***
Not over $1 million	5% of the total amount
Over $1 million but not over $2 million	$5,000 plus 6% of the amount over $1 million
Over $2 million but not over $3 million	$11,000 plus 7% of the amount over $2 million
Over $3 million but not over $4 million	$18,000 plus 8% of the amount over $3 million
Over $4 million but not over $5 million	$26,000 plus 9% of the amount over $4 million

Over $5 million	$35,000 plus 10% of the amount over $5 million

14.57 A third way to express a stepped rate would be to so state in the preamble to the table: *The royalty percentage stated next to a given range of annual gross revenue will be used to calculate only royalties to be paid on revenue falling within that range*.

14.58 Conversely a given percentage does apply to all gross revenue—in other words, if the rate is a shifting flat rate—one way to make that clear would be to state as much in the preamble to the table: *The percentage stated next to the range of annual gross revenue within which falls the annual gross revenue for a given year will be used to calculate all royalties to be paid on that revenue as opposed to just royalties to be paid on revenue falling within the stated range.* It would not be clear enough to state, for example, that royalties are based on the "incremental rates" stated in the table.

14.59 A second and simpler way to express a shifting flat rate would be to add *of total gross annual revenue* after each percentage figure in the second column.

Gaps and Overlaps

14.60 When expressing consecutive ranges of numbers as described in 14.53, drafters sometimes

create overlap. For example, if royalties are keyed to the number of widgets sold, if two of the ranges are "1–10 widgets" and "10–20 widgets," and if ten widgets are sold, it would not be clear which royalty rate applies. To avoid overlap, the two ranges should have been expressed as "1–10 widgets" and "11–20 widgets." If the contract provides for a shifting flat rate (see 14.54), more would be at stake than if it had provided for a stepped rate. In the former case, the rate to be applied to all widget sales would be at issue; in the latter case, the question would be the royalty rate that applies to the sale of the tenth widget.

14.61 Overlap can also occur when creating consecutive ranges of numbers that can be expressed to decimal places, such as dollar amounts, as in "from $1,000 to $2,000" and "from $2,000 to $3,000." You could fix this overlap in one of two ways. You could revise the ranges so that one ends just before the other begins, as in "from $1,000.01 to $2,000" and "from $2,000.01 to $3,000." (Depending on the unit making up the ranges, it might be necessary to express to several decimal places one of the two numbers in a range.) Or you could use wording similar to that used in the tables in 14.53 and 14.56: "over $1,000 but not over $2,000" and "over $2,000 but not over $3,000." This would seem the simpler, and therefore better, alternative.

14.62 Revising the ranges to read "from $1,000 to $1,999" and "from $2,000 to $2,999" would create a

different problem, namely a gap between two ranges, leaving unclear the range into which $1,999.01, $1,999.99, and any amount in between would fall. But such a gap is appropriate when the unit involved is such that one cannot speak in terms of less than a whole unit; for example, because it does not make sense to speak of half a widget, there is no gap between the ranges in the last sentence of 14.60.

14.63 When consecutive ranges consist of dates rather than amounts, take care to avoid gaps and overlap due to the ambiguity inherent in many prepositions used in expressing dates (see 10.9).

CHAPTER 15

PROVISIONS SPECIFYING DRAFTING CONVENTIONS

15.1 A common feature of longer contracts is a section that contains provisions specifying how certain contract usages are to be interpreted. (Such sections are usually given the heading *Construction* or *Interpretation*; a less common but clearer heading would be *Drafting Conventions*.) Most such provisions are analogous to the definition of a defined term (see 6.2): they specify the meaning to be given a certain word or phrase, thereby ensuring that it's interpreted consistently and sparing the drafter from having to express that meaning each time that word or phrase is used.

15.2 This chapter contains tidied-up versions of some of the more common of these provisions and assesses how useful they are. None of them is essential; some are moderately useful; some would be redundant if the drafter were to adopt the usages recommended in this manual; and some are downright pernicious.

15.3 Often a provision of this sort begins "Unless otherwise specified" or "Unless the context otherwise requires." The latter formulation is

problematic, in that it undercuts significantly the certainty that this sort of provision is intended to afford (see 13.723).

PROVISIONS THAT MIGHT BE MODERATELY USEFUL

15.4 *references to a time of day are references to the time in* [*location*]. This provision would spare the drafter having to specify, after each reference to a time of day, which location or time zone would be used to determine when that time of day had come. This would be an issue only in a contract between parties based in different time zones or in a contract providing for business to be conducted across time zones (see 10.37). This provision would be of use only in contracts containing more than a couple of references to the time of day.

15.5 *If any date specified in this agreement as the only day, or the last day, for taking action falls on a day that is not a Business Day, then that action may be taken on the next Business Day*. This provision aims to avoid having a party's ability to act on a given day undercut because that day isn't a business day. It would be redundant in a contract that measures all periods of time in business days (see 10.52).

15.6 *"Dollars" and "$" mean United States dollars*. This definition might prove useful in a contract between parties from different countries

that contains sufficient references to dollar amounts as to make it a nuisance to continually refer to *United States dollars*, *US$*, or *USD*. Definitions referring to other currencies might likewise prove useful. You would need to define the word *dollars* only if you were to use both words and digits to express a dollar amount (see 13.393). You could conceivably tack on to this definition *and any equivalent unit in currency of the United States of America as is legal tender for payment of public and private debts*. That language would prove of use only if the United States were to revalue the dollar or opt for a new currency, so it would seem appropriate only in those contexts where you wish to address even remote risks. But additional language of this sort would be appropriate in the case of a currency that presents a greater likelihood of major change.

PROVISIONS THAT SHOULD BE REDUNDANT

15.7 *The headings in this agreement are provided for convenience only and do not affect its meaning*. This specifies that the meaning to be given a heading is no meaning; it does so to neutralize any inconsistency between the heading given a contract provision and the substance of that provision (see 4.17). But it's unlikely that a court, in the context of a contract between ostensibly sophisticated parties represented by counsel, would accept the argument of one of the parties that it was misled by a heading. Conversely, if there were a disparity in bargaining

power between the parties, a court might not allow a party to use this sort of provision to escape the consequences of having used a misleading heading.

15.8 *reference to an agreement means that agreement as amended, subject to any restrictions on amendment contained in that agreement*. This provision spares drafters having to add *as amended* after each reference to a contract. But given that adding *as amended* is unnecessary (see 13.33), this provision should be unnecessary too.

15.9 *reference to a statute or regulation means that statute or regulation as amended and any corresponding provisions of successor statutes and regulations*. This provision is analogous to the provision in 15.8, and with respect to amendment it's equally unnecessary. And the reference to successor statutes and regulations seems an overly general way of encompassing what could represent a significant change.

15.10 *words "party" and "parties" refer only to a named party to this agreement*. This provision aims to preclude a court from concluding, in connection with a contract provision specifying that no rights or remedies are being conferred on anyone other than the parties, that the term *parties* includes persons other than the signatories. But there's a more economical way to address that concern (see 2.105).

15.11 *pronoun used in referring generally to any member of a class of persons, or persons and*

things, applies to each member of that class, whether of the masculine, feminine, or neuter gender. This would allow a drafter to use gender-specific language in a contract without running the risk of a court's holding that, for example, use of only masculine pronouns in that contract excludes corporations from the scope of certain provisions. But this risk would seem negligible. And avoiding gender-specific language is more about keeping up with the times and not distracting the reader than it is about avoiding liability (see 17.10).

15.12 *words "hereof," "herein," "hereunder," and "hereby" refer to this agreement as a whole and not to any particular provision of this agreement*. Use of *here-* and *there-* words can result in confusion. (For an example, see 7.17.) But for this provision to work, the drafter would have to use *here-* and *there-* words only to serve the purpose stated in this provision. Rather than attempting to resolve ambiguity preemptively, a simpler and clearer fix would be not to use *here-* and *there-* words, except where they offer real concision (see 13.260).

15.13 *definitions in this agreement apply equally to both singular and plural forms of the terms defined*. This is intended to ensure that, for example, the definition of *Employee* applies to any reference to *Employees*, or that the definition of *Consents* applies to a reference to *any Consent*. But this would manifestly be the case even in the

absence of this provision. (For the same reason, defining terms in the singular and plural just adds clutter; see 6.5.)

15.14 *For purposes of computing periods of time from a specified date to a later specified date, the word "from" means "from and including" and the words "to" and "until" each mean "to but excluding."* This provision is fine as far as it goes, but it addresses only a small part of the ambiguity inherent in references to time (see chapter 10). A provision resolving all sources of that ambiguity would be impractical—it would have to be a couple of pages long. Instead of addressing a small part of the problem, you would do better to purge each reference of any ambiguity. That would require that you become familiar with the various ways that references to time can be ambiguous.

15.15 *References in this agreement to articles, sections, exhibits, and schedules are references to articles, sections, exhibits, and schedules of this agreement*. This provision states the obvious (see 4.92 and 5.96).

PROVISIONS TO AVOID

15.16 *The words "including," "includes," and "include" are to be read as if they were followed by the phrase "without limitation."* A drafter would use this to avoid adding *without limitation* or a variant after each use of *including* and *includes*. But given that such additions are of uncertain value

(13.270–13.278), and that they would be of no value if you were to use *including* and *includes* in a disciplined manner (see 13.279–84), this provision is unhelpful.

15.17 *The word "or" is disjunctive; the word "and" is conjunctive*; also *The word "or" is not exclusive*. Given the subtle ways in which the ambiguity associated with *and* and *or* manifests itself (see chapter 11), these two provisions grossly oversimplify. For one thing, consider how, with respect to *or*, they take opposite approaches.

15.18 *The word "will" is to be construed as having the same meaning as the word "shall."* This provision represents a hopeless attempt to resolve confusion over use of *will* and *shall* (see 3.46–77).

15.19 *The word "shall" is used to express a mandatory duty; the word "may" is used to express discretion*. This provision is unnecessary, as it's rare for a court to hold that in the context of a contract (as opposed to legislation) *shall* is anything other than mandatory (see 3.47). And those drafters who indulge at all in the traditional overuse of *shall* shouldn't use this provision, since it couldn't be applied to their drafting.

15.20 *The singular form of nouns and pronouns includes the plural, and vice versa*. Presumably what this provision is groping at is the notion that any reference to *a widget* should be construed to mean *one or more widgets*. If that's the meaning you wish

to convey, then say *one or more widgets* rather than relying on this overbroad provision.

15.21 *Reference to any Person is to be construed to include that Person's successors and assigns*. It's commonplace for contracts to contain provisions specifying whether the parties may assign their rights and delegate their obligations under the contract and addressing the effect of assignment and delegation. Those provisions would render this one redundant, except with respect to nonparties, and it would be difficult to justify including this provision solely because it covers nonparties. If Dynaco's agreement with Acquisitive makes it a condition to closing that Dynaco obtain the consent of Widgetco, and before closing Widgetco is acquired by Conglomerate, Acquisitive would have a hard time convincing a court that because the condition specified that the consent was to come from Widgetco, a consent supplied by Conglomerate did not satisfy the condition.

CHAPTER 16

TYPOGRAPHY

16.1 Word-processing software has given drafters many options for making a contract more readable or, conversely, impenetrable. Here are some points to consider.

FONTS

The Usual Suspects

16.2 When it comes to choosing a font for contracts, drafters are very conservative. Most contracts use one of a handful of fonts.

16.3 In recent decades, the overwhelming majority of contracts have used one of two fonts, namely 12-point Times New Roman, a serif font, and 10-point Arial, a sans serif font. (For an explanation of "serif" and "sans serif," see 16.16.) Companies in technical fields used the latter; everyone else used the former. Both are shown in sample 11.

16.4 Despite its enduring popularity, Times New Roman is not a favorite of typography professionals. It was designed for use in newspapers, so it has

comparatively narrow characters. It works well in the short lines of newspaper columns, but in longer lines, compared with other fonts, Times New Roman can seem crowded and harder to read. *The Complete Manual of Typography*, at 70, says, "Times is probably used inappropriately more than any other typeface today."

16.5 Beyond that, Times New Roman suffers from overexposure. *Typography for Lawyers*, at 110, says, "When Times New Roman appears in a book, document, or advertisement, it connotes apathy. . . . Times New Roman is not a font choice so much as the absence of a font choice, like the blackness of deep space is not a color." It goes on to say, "If you have a choice about using Times New Roman, please stop. Use something else."

16.6 Arial too is not a popular choice in the typography community. *Typography for Lawyers*, at 84, says, "As a system font, Arial has achieved ubiquity akin to Times New Roman. And like Times New Roman, Arial is permanently associated with the work of people who will never care about typography."

16.7 Another traditional choice has been the system font Courier New (see sample 11). It's based on Courier, a typewriter font. Like Courier, it's a monospaced font, meaning that its characters are all the same width. (Fonts whose characters have unique widths are termed proportional fonts, and they include the vast majority of fonts in general use for word processing.) The uniform width and fine

line of its characters made Courier suitable for use in typewriters, but these attributes lost their utility with the advent of word processing. Courier New has largely fallen by the wayside, at least as a font used for contracts.

SAMPLE 11 ■ POPULAR TYPEFACES

Calibri 11pt

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

Cambria 11pt

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

Times New Roman 12pt

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

Arial 10pt

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Courier New 11pt

```
    3.7 Financial Statements. Vector has previously
delivered to Holdings the audited consolidated
balance sheet of Vector as of December 31, 2012 (the
"Balance Sheet"), and the related consolidated audited
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notes thereto) and on that basis present fairly the
financial position and the results of operations and
cash flow of Vector at and as of December 31, 2012,
and for the period referred to in those financial
statements.
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16.8 other fonts have joined the ranks of obvious fonts to choose from. In 2007, Microsoft introduced Calibri and Cambria. Calibri, a sans serif font, is the default font for body text in Office 2010, and Cambria, a serif font, is the default font for headings. The Word 2010 default font for body text is 11-point Calibri. Both Calibri and Cambria were designed for screen reading; the loss of design details makes them less compelling in printed form. Calibri has been quite well received in the typography community, Cambria somewhat less so. In its classification of system fonts, *Typography for Lawyers* put Calibri under "The B list: OK in limited

doses" and Cambria under "The C list: Questionable." Both are shown in sample 11.

The author of this manual was pleased to abandon Times New Roman in favor of Calibri. That's why the indented extracts of contract text included throughout this manual are in Calibri, as are the samples and the redrafted version of the appendix 1 contract. With its rounded ends and variation in line width, Calibri could prove palatable to both those who have used Arial and those who have used Times New Roman.

Constraints on Choice

Drafters could be more adventurous in their choice of font. But understanding the options requires considering the constraints that come with sharing electronic documents.

If you pick a font that isn't recognized by someone else's computer, it will be displayed in some fallback font. That would interfere with, for example, exchanging signature pages. It might also interfere with negotiations, as the line breaks and page breaks in the recipient's version would likely be different from those in the sender's version.

You could try to get around that by distributing only PDF files, but that's generally frowned upon by contracts professionals.

So your best bet is to use system fonts—those already installed on your computer—as opposed to professional fonts that you buy online

and install. It's likely that those you send a document to will have them on their computer. You can't be sure of perfect visual fidelity, but that shouldn't be an issue for purposes of exchanging drafts of contracts.

6.14 But there are system fonts on Mac computers, system fonts on computers running Windows, and fonts installed with MS Office. If you want a font that works across all systems, your choice would be limited to a few fonts, including Times New Roman, Arial, Courier New, Georgia, and Verdana.

6.15 But for purposes of exchanging drafts with law firms and company law departments, it's safe to assume that they have Microsoft Office installed on their computers. That would give you more fonts to choose from. Included would be Calibri and Cambria, but you could explore others. For example, included in the fonts that *Typography for Lawyers* lists under "The A list: Generally Tolerable" are ten Word 2010 system fonts suitable for body text. If design considerations are important to you, you could experiment with system fonts without jeopardizing cross-system compatibility.

Serif and Sans Serif

6.16 Serifs are finishing flourishes at the ends of a character's main strokes. One way to categorize fonts is to distinguish those with serifs from those without, which are referred to as sans serif fonts.

16.17 It has long been assumed that serif fonts are easier to read than sans serif fonts. But studies have cast doubt on this assumption. In considering this issue, *The Complete Manual of Typography*, at 68, says, "Bad typesetting and bad typeface design aside, the fact seems to be that the most readable typefaces are the ones you're accustomed to reading." That's why the author of this manual has no qualms about using Calibri, a sans serif font.

JUSTIFICATION

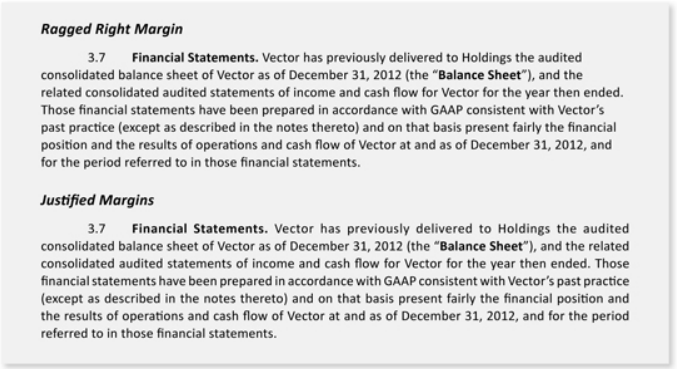
16.18 Justification is the process of fitting text into the width of a column of type. You have a choice between "justified" margins and "ragged-right" margins (also known as "flush-left" margins). With justified margins, the margins are vertical on both left and right. With ragged-right margins, all lines begin flush with the left-hand margin but are allowed to end short of the right-hand margin, creating an irregular margin along the right side of the text column. (For an example of each, see sample 12.)

16.19 Most printed text, whether in books, magazines, or newspapers, uses justified margins. But using justified margins in word-processed documents, including contracts, makes them harder to read. According to typographers, that's because subtle word-spacing, letter-spacing, and hyphenation algorithms are needed to make justified text easy to read, and those in word-processing software aren't

up to the task. Word-processed documents shouldn't have justified margins.

16.20 Those who favor using justified margins in word-processed documents will tell you that it looks "professional." But it's a phony professionalism, in that it comes at the expense of readability, which should be the first priority of any kind of typesetting, including word processing.

SAMPLE 12 ■ JUSTIFICATION



Ragged Right Margin

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

Justified Margins

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

EMPHASIS

16.21 You can choose to make certain words, phrases, or paragraphs of a contract particularly conspicuous, and you can do so by using italics, bold, capital letters, underlining, or bold italics, or by putting a box around the text (see sample 13).

Emphasizing Names and Article Headings

16.22 Use all capital letters to emphasize the names of the parties in the introductory clause;

article headings; and the names of the parties in the signature blocks. Because the eye cannot easily differentiate characters that are all of a uniform size, capitalized text is harder to read—don't use it for continuous body text (see 16.32).

SAMPLE 13 ■ EMPHASIS

No Emphasis

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

All Capitals

3.7 **FINANCIAL STATEMENTS**. VECTOR HAS PREVIOUSLY DELIVERED TO HOLDINGS THE AUDITED CONSOLIDATED BALANCE SHEET OF VECTOR AS OF DECEMBER 31, 2012 (THE "**BALANCE SHEET**"), AND THE RELATED CONSOLIDATED AUDITED STATEMENTS OF INCOME AND CASH FLOW FOR VECTOR FOR THE YEAR THEN ENDED. THOSE FINANCIAL STATEMENTS HAVE BEEN PREPARED IN ACCORDANCE WITH GAAP CONSISTENT WITH VECTOR'S PAST PRACTICE (EXCEPT AS DESCRIBED IN THE NOTES THERETO) AND ON THAT BASIS PRESENT FAIRLY THE FINANCIAL POSITION AND THE RESULTS OF OPERATIONS AND CASH FLOW OF VECTOR AT AND AS OF DECEMBER 31, 2012, AND FOR THE PERIOD REFERRED TO IN THOSE FINANCIAL STATEMENTS.

Underlining

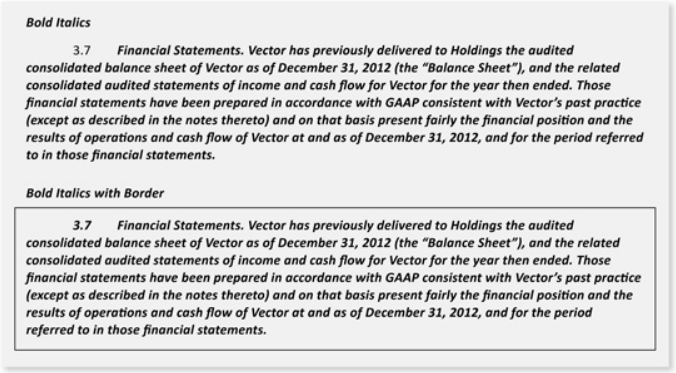
3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the **"Balance Sheet"**), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

Italics

3.7 ***Financial Statements.*** *Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.*

Bold

3.7 **Financial Statements. Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "Balance Sheet"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.**



Emphasizing Section Headings and Defined Terms

6.23 Emphasize in bold all section headings (see 4.15) and each defined term when it is being defined (see 6.22, 6.44)—doing so helps readers find their way around a document.

6.24 Don't use underlining for this type of emphasis. Underlining is a typewriter convention created to approximate common typographic effects that couldn't be achieved with a typewriter. Typographers don't like it. *The Complete Manual of Typography*, at 85, notes that in word-processing software underlining is too close to the baseline, causing it to overlap descending letters—the effect is "not pretty, and you should avoid using it." *Typography for Lawyers*, at 78, says, "In a printed document, don't underline. Ever. It's ugly and makes text harder to read."

What Not to Emphasize

6.25 Don't emphasize cross-references and references to attachments—doing so doesn't help

the reader. It might make it easier for the drafter to check cross-references and keep track of attachments, but drafter convenience shouldn't be at the expense of distracting the reader. And using Word's "find and replace" function is quicker and more reliable.

Emphasizing Provisions

WHAT TO EMPHASIZE

16.26 Unless a statute or caselaw requires it, or unless you're seeking to counterbalance a substantial disparity of bargaining power or sophistication between the parties, don't emphasize any part of the provisions themselves. It's appropriate to assume that sophisticated parties, or at least their lawyers, will read the entire contract and be able to assess the various provisions for themselves. And flagging a provision as particularly important necessarily involves downplaying the significance of others—an uncertain proposition, given that contract disputes routinely arise from ostensibly mundane aspects of a transaction.

16.27 Some statutes specify that certain statements must be in all capitals. See, e.g., Arizona Revised Statutes § 12-1366(A)(1). Others in effect do so by stating in all capitals text that has to be included in a contract. See, e.g., Florida Statutes § 718.202(3); Oregon Revised Statutes § 93.040.

16.28 Other statutes say that certain statements must be "conspicuous." For example, section 2-316(2) of the Uniform Commercial Code (UCC)

states that a disclaimer of the implied warranty of merchantability must be "conspicuous." And in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509-11 (Tex. 1993), the Texas Supreme Court held that the UCC's standard for conspicuousness applies to a contract provision indemnifying a party for that party's own negligence.

16.29 Section 1-201(10) of the UCC says that "conspicuous" means "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it," and includes examples of the attributes of conspicuous terms.

16.30 But a provision doesn't necessarily have to be emphasized to be conspicuous. The court in *American General Finance, Inc. v. Bassett (In re Bassett)*, 285 F.3d 882, 887 (9th Cir. 2002), used the UCC's definition of "conspicuous" to construe a Bankruptcy Code requirement that a contract contain a "clear and conspicuous" statement. The court held that although the statement wasn't emphasized in the contract in question, it was conspicuous—it was the first sentence of a contract that took up less than one side of a page and no aspect of formatting or appearance of the statement made it less visible or difficult to read.

16.31 In response to caselaw, many drafters emphasize waivers of jury trial. But the caselaw addressing whether waivers of jury trial need to be emphasized is inconsistent. In New York, for example, a waiver of jury trial may be printed in the

same size type as the rest of the contract, whereas courts in some other jurisdictions, in holding a waiver of jury trial to be enforceable, have noted that the waiver of jury trial was in bold or in all capitals. Unless you're able to do the necessary research, the cautious approach would be to make waivers of jury trial conspicuous regardless of the law governing the contract.

HOW TO EMPHASIZE IT

16.32 Many drafters use all capitals to emphasize an entire provision, but that's counterproductive—the reader is likely to skim over text in all capitals, as it's a chore to read (see 16.22). The prevalence of all capitals is a relic from typewriter days—the only easy way to emphasize text on a typewriter was to use all capitals. And depending on the context, text in all capitals might not even be conspicuous. As the court in *American General Finance, Inc.*, 285 F.3d at 886, noted, "Lawyers who think their caps lock keys are instant 'make conspicuous' buttons are deluded." See also *Broberg v. Guardian Life Insurance Co. of America*, 171 Cal. App. 4th 912, 922 (2009) (holding that disclaimers "buried in a sea of same-sized, capitalized print" might not be conspicuous). So unless a statute requires it (see 16.27), don't use all capitals to emphasize a provision.

16.33 emphasized in bold italics would be much easier to read. It's likely that text in bold italics would be conspicuous for purposes of the UCC, in that section 1-201(10) of the UCC specifies

that "language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."

16.34 You could also, or instead, place a border around a provision—section 1-201(10) of the UCC says that a term is conspicuous if it's "set off from surrounding text of the same size by symbols or other marks that call attention to the language."

16.35 When a contract states the legend that's to be placed on stock certificates, the legend is invariably stated in all capitals. Use regular text instead, both in the contract and on the stock certificates. If you want to make the legend more conspicuous, put a border around it, use bold italics for all or part of it, or do both.

16.36 Because the distinction between regular text and text in italics is too subtle, don't use italics for emphasis, except perhaps in amendments (see 18.20).

RHETORICAL EMPHASIS THROUGH TYPOGRAPHY

16.37 Don't emphasize selected words in a provision for rhetorical emphasis—as a way of saying "and we really mean it!" (For more on rhetorical emphasis, see 1.60.) Note the emphasized *not* in the following example:

The Licensor shall NOT indemnify, defend or hold the Licensee harmless from and against any loss, cost, damage, liability, or expense (including reasonable legal fees) suffered or incurred by the

Licensee in connection with any claim by any Person of infringement of any patent, copyright, or other intellectual property with respect to the Licensed Products.

FONT SIZE

16.38 The choice of font size, expressed in "points," depends in part on what typeface you use. For purposes of contracts, drafters rarely depart from the standard choices—12 point for Times New Roman and 10 point for Arial—unless they opt for a two-column format (see 4.61).

16.39 You might think that using a larger font size makes text easier to read. Judges seem to think so—the Federal Rules of Appellate Procedure require that documents using proportional typefaces (see 16.7) be in 14-point or larger type. But most typographers would regard that as too large. And use of 14-point type would spread a contract over significantly more pages.

16.40 Of the progressively larger Calibri point sizes on display in sample 14, this manual recommends that you use 11-point Calibri for contract drafting. The fact that it's the Office 2010 and Word 2010 default for body text suggests that in terms of size, that's a safe choice.

CHARACTERS PER LINE

16.41 Some commentators recommend that the number of characters per line not exceed 70; others cite a considerably lower number. *Typography for Lawyers*, at 142, recommends a line length of 45 to 90 characters.

16.42 The more characters there are per line, the greater the risk that the reader will get lost in midline or in moving from one line to the next. A line of 11-point Calibri on letter-size paper with one-inch margins (the default page setup) contains between 85 and 95 characters. That's at the high end of, or in excess of, the recommended limits, although if you use ragged-right justification (see 16.18), the character count would be lower for those lines that don't reach the right margin.

SAMPLE 14 ■ FONT SIZE

Calibri 10pt

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

Calibri 11pt

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

Calibri 12pt

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

Calibri 13pt

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

16.43 If you would like to reduce the number of characters per line, the simplest way to do so would be to increase the left and right margins to 1.5 to 2 inches. *Typography for Lawyers*, at 142, recommends that you do so, saying that "for proportional fonts, one-inch margins are too small." But keeping your blocks of text short (see 4.56) mitigates the high character count's adverse effect on readability. The author of this manual hasn't felt the need to increase his margins.

LINE SPACING

16.44 The norm is to use single-spaced lines for contracts. Typewriters allowed for single-spacing or double-spacing, but word-processing software allows you to adjust line spacing in much smaller increments. Single-spaced text can be dense and hard to read, so you might want to try adding extra space. *Typography for Lawyers*, at 139–40, recommends line spacing that's between 120% and 145% of the point size. With an 11-point font, that means roughly 13 to 16 points of line spacing. One of the options for setting line space in Word is "Multiple." *Typography for Lawyers* recommends that you use a "Multiple" value of 1.03 to 1.24. Sample 15 shows three different line-spacing settings.

SPACE AFTER PUNCTUATION

16.45 Use only one space, rather than two, after punctuation, whether it separates two sentences (periods, question marks, exclamation marks) or parts of a sentence (colons).

16.46 This is standard advice. For example, *The Chicago Manual of Style* 2.9 says, "Like most publishers, Chicago advises leaving a single character space, not two spaces, between sentences and after colons used within a sentence."

SAMPLE 15 ■ LINE SPACING

Single Spacing

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

Multiple Value of 1.2

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

Line-and-a-Half Spacing

3.7 **Financial Statements.** Vector has previously delivered to Holdings the audited consolidated balance sheet of Vector as of December 31, 2012 (the "**Balance Sheet**"), and the related consolidated audited statements of income and cash flow for Vector for the year then ended. Those financial statements have been prepared in accordance with GAAP consistent with Vector's past practice (except as described in the notes thereto) and on that basis present fairly the financial position and the results of operations and cash flow of Vector at and as of December 31, 2012, and for the period referred to in those financial statements.

16.47 The use of two spaces after punctuation is associated with typewriters. Typographers differ in explaining how this practice arose, but they agree on the solution. *The Complete Manual of Typography*, at 80, says, "The typewriter tradition of separating sentences with two word spaces after a period has no place in typesetting." And Robert Bringhurst, *The Elements of Typographic Style* 28 (3d ed. 2004), says, "Your typing as well as your typesetting will benefit from unlearning this quaint Victorian habit."

16.48 Nevertheless, most lawyers remain wedded to two spaces. It would be a mistake to assume that this is the result of a reasoned decision. Instead, you can attribute it to the inertia that has resulted in

lawyers perpetuating any number of other deficient drafting usages.

16.49 There's no evidence that using two spaces makes text easier to read, so the only conceivable defense of the practice is that it's harmless. But it creates "rivers" of white space. It's inefficient, requiring an extra keystroke for every sentence. And it results in documents containing instances of three spaces or one space after a period and two spaces in the middle of a sentence.

16.50 There's no credible reason to keep using two spaces after punctuation. As *Typography for Lawyers*, at 44, notes, use of one space "has the support of typography authorities and professional practice"; use of two spaces does not.

"CURLY" AND "STRAIGHT" QUOTATION MARKS AND APOSTROPHES

16.51 "Curly" and "straight" quotation marks and apostrophes are of interest not so much from a typography perspective but because of what they can tell you about how a contract was drafted.

16.52 In most typefaces, curly quotation marks (also known as "curved" or "smart" quotation marks) look, to a greater or lesser extent, like small figures six and nine with the enclosed portions filled in. Straight quotation marks (also known as "dumb" quotation marks) point straight down. You can have double and single quotation marks, and single quotation marks do double duty as apostrophes.

16.53 Straight quotation marks were introduced on typewriters to reduce the number of keys on the keyboard, and they were retained for computer keyboards and character sets. But curly quotation marks are preferred in formal writing, so Microsoft Word provides an option under "AutoFormat As You Type" that allows you to replace straight quotation marks with curly quotation marks.

16.54 This option is set by default, so unless you deselect it, as you type quotation marks and apostrophes they will automatically be changed from straight to curly. But if you import into a document—from another Word document, the SEC's EDGAR system, or elsewhere—blocks of text containing straight quotation marks, those straight quotation marks will remain straight unless you change them. The converse can apply: if the "AutoFormat As You Type" option isn't selected, you can introduce curly quotation marks into a document in which you've typed straight quotation marks.

16.55 What's the significance of having both straight and curly quotation marks in a draft contract? It's messy typographically, but that's the least of it. When you send a contract to the other side for their review, you would like them to get the impression that you prepared it using contracts that have formed the basis for many transactions. But mixing straight and curly quotation marks is a hallmark of the sloppy copy-and-paste job. A savvy

reviewer will pick up on that and will know to look for other, potentially more significant problems.

16:56 Make all your quotation marks curly, given that curly quotation marks are preferred for formal writing. If when you type quotation marks straight quotation marks appear, you need to select the Word option that automatically turns your straight quotation marks into curly quotation marks as you type them. If your quotation marks are already curly, you know that this option has already been selected.

16:57 to change to curly all instances of double straight quotation marks, use Word's "Find and Replace" function, typing a double quotation mark in both the "Find what" and "Replace with" boxes. Use the same process for single quotation marks.

FIRST-LINE INDENTS

16:58 way to signal the start of a new paragraph is to indent the first line. Another way is to put space between paragraphs. Typography professionals recommend that you not use both techniques. For example, *Typography for Lawyers*, at 136–37, says, "First-line indents and space between paragraphs have the same relationship as belts and suspenders. You only need one to get the job done. Using both is a mistake. If you use a first-line indent on a paragraph don't use space between. And vice versa."

16.59 Contracts invariably use space between paragraphs. Given that reading contracts often involves flipping from provision to provision, that space seems indispensable. Furthermore, the logic behind the *MSCD* enumeration scheme (see 4.53) requires first-line indents for sections (see 4.13) and subsections (see 4.26). The result is that the *MSCD* enumeration scheme uses both space between paragraphs and first-line indents. In this case, the need for a logical layout trumps typography considerations.

16.60 In the samples in this manual and in the redrafted version of the appendix 1 contract, paragraphs without enumeration—the introductory clause, the recitals, the lead-in, the concluding clause, and autonomous definitions—all use first-line indents. Given the lack of enumeration, one could dispense with the first-line indents, but they've been retained for reasons of consistency between enumerated paragraphs and paragraphs without enumeration. Given that for contract drafters document design is generally a low priority, the notion of switching from first-line indenting for enumerated paragraphs to doing without for paragraphs without enumeration seems too fussy.

DESIGN EMBELLISHMENTS

16.61 Most drafters, and most law firms and law departments, have a conservative, no-frills approach to document design—they're unlikely to have any

interest in adjusting line spacing and margins or experimenting with different fonts.

16.62 One can go well beyond that by adding further design elements: Different typefaces for headings. Different point sizes for headings. Color for headings. A horizontal line at the top of each section.

16.63 Law firms in Commonwealth countries are partial to adding such design elements to their contracts. This manual leaves it to readers to determine whether they wish to follow suit.

16.64 It might be that design embellishments are less a function of ease of reading than of selling—catching and keeping a reader's attention in a time of short attention spans and endless distractions. Contracts aren't discretionary reading, so that selling function is less relevant. But it's not necessarily absent—for example, a company in a design business might want the document design of its contracts to be consistent with its image.

16.65 Any organization that wants to implement a sophisticated document design for its contracts should consider making it mandatory that drafters apply the design by using a numbering utility such as Payne Consulting Group's Numbering Assistant (see 4.54). Using a more improvised approach isn't promising, in terms of the potential for erratic results and time wasted fiddling with the design elements.

CHAPTER 17

DRAFTING AS WRITING

17.1 Contract prose may be limited and stylized, but clear and effective drafting nevertheless requires an understanding of general principles of good writing. This chapter considers those that are most relevant.

DON'T MAKE SENTENCES TOO LONG

17.2 In general, long sentences are harder to read than shorter ones. Although contract sentences will usually be longer—often much longer—than the 20 to 25 words recommended for general legal writing, you should whittle down those sentences that are unnecessarily long.

17.3 A sentence is too long if it strings together clauses that could stand on their own as separate sentences, or if it incorporates one or more unwieldy exceptions, qualifications, or conditions. If you can break such a sentence down into its constituent components and express, clearly and economically, how the components relate to each other, the sentence will be more readable.

Before Below is a 143-word sentence; below that is the same sentence, restructured as three sentences (149 words total). Although it's a few words longer, the "after" version takes much less of a toll on the reader than the "before" version. The first shaded portion in the "before" version constitutes the first sentence of the "after" version. The second shaded portion in the "before" version is an awkwardly positioned, passive-voice nonrestrictive clause; it forms the basis for the active-voice third sentence of the "after" version. The unshaded portion of the "before" version constitutes, with the addition of a brief introductory clause, the second sentence of the "after" version; it, like the first shaded portion, describes a consequence of default, but it can be turned into a separate sentence.

Before If a Default described in section 8(f) occurs with respect to the Borrower, the Lenders' obligation to make Loans and the LC Issuer's obligation to issue Facility LCs will automatically terminate and the Obligations will immediately become due without any election or action on the part of the Administrative Agent, the LC Issuer, or any Lender and the Borrower will become unconditionally obligated, without any further notice or act, to pay to the Administrative Agent an amount in immediately available funds, which funds must be held in the Facility LC Collateral Account, equal to the difference of (1) the LC Obligations then outstanding minus (2) the amount then on deposit in the Facility LC Collateral Account that is free and

clear of all rights and claims of third parties and has not been applied against the Obligations (that difference, the "Collateral Shortfall Amount").

After If a Default described in section 8(f) occurs with respect to the Borrower, the Lenders' obligation to make Loans and the LC Issuer's obligation to issue Facility LCs will terminate and the Obligations will immediately become due without any election or action on the part of the Administrative Agent, the LC Issuer, or any Lender. Upon any such Default, the Borrower will become unconditionally obligated, without any further notice or act, to pay to the Administrative Agent an amount in immediately available funds equal to the difference of (1) the LC Obligations then outstanding minus (2) the amount then on deposit in the Facility LC Collateral Account that is free and clear of all rights and claims of third parties and has not been applied against the Obligations (that difference, the "Collateral Shortfall Amount"). The Administrative Agent shall hold the Collateral Shortfall Amount in the Facility LC Collateral Account.

17.5 It's standard practice to present lists—such as lists of items to be delivered at closing or lists of events of default—in long sentences made up of enumerated clauses. Tabulating the enumerated clauses breaks such sentences down into manageable portions.

KEEP SUBJECT, VERB, AND OBJECT CLOSE TOGETHER

17.6 A sentence is easier to understand if the subject, the verb, and the object (if any) are close together. Drafters often create unnecessary gaps between subject and verb or between verb and object. In the first example below, the gap is between the subject and the verb; in the second, it's between the verb and the object. Sometimes fixing this requires turning the intervening words into a separate sentence; at other times, as in the examples below, they can be shunted to the beginning or end of the sentence. (In the examples below, shading denotes the offending text and shows where it was moved.)

Gap	***No GAP***
Acme shall not without the prior written consent of Excelsior, which Excelsior shall not unreasonably withhold, transfer the Shares to any Person.	Acme shall not transfer the Shares to any Person without the prior written consent of Excelsior, which Excelsior shall not unreasonably withhold.

Acme shall deliver to Widgetco, no later than 15 days after each Quarterly Period, unless the Gross Revenue for that Quarterly Period is less than $1,000,000, a stock certificate representing those shares of Acme common stock that Acme is required to issue with respect to that Quarterly Period.	No later than 15 days after each Quarterly Period, unless the Gross Revenue for that Quarterly Period is less than $1,000,000, Acme shall deliver to Widgetco a stock certificate representing those shares of Acme common stock that Acme is required to issue with respect to that Quarterly Period.

DON'T BURY VERBS

Like other writers, contract drafters are prone to using abstract nouns at the expense of verbs; this practice has been described as "burying" the verb. See *Garner's Modern American Usage*, at 120. Whenever possible, use instead "strong" verbs. The first five examples in the table below show two versions of sample language, one version using an abstract noun, the other using a verb. Adjectives can also act as buried verbs; in the sixth and seventh examples in the table below, an adjective is replaced with a verb. (The adjective in the seventh example makes that example a passive-type policy; see

3.244.) This manual uses the label "buried verb" loosely—it might be that the best alternative to an abstract noun is an adjective, as in the eighth example in the table below.

17.8 Using buried verbs is a reliable way to deaden contract prose and clutter it with prepositions and "weak" verbs, including *is* (see the fourth example in the table below) and *has* (see the eighth example). Using buried verbs also allows you to drop the *by*-agent (see 3.11), thereby obscuring who the actor is, as in the first example in the table below. The effect is comparable to use of the passive voice (see 3.12). That can force the reader to work harder and can create confusion.

	Uses Abstract Noun (or Adjective)	***Uses Verb (or Adjective)***
1.	Immediately following issuance of the Notes, . . .	Immediately after Acme issues the Notes, . . .
2.	. . . all expenses the Bank incurs in connection with establishment and maintenance of	. . . all expenses the Bank incurs in establishing and maintaining the

	the Deposit Account.	Deposit Account.
3.	Upon the failure of Smith to timely make the payment of the Purchase Price, . . .	If Smith fails to timely pay the Purchase Price, . . .
4.	If there is a merger or consolidation of Acme . . .	If Acme merges or consolidates . . .
5.	Jones shall promptly give notice to the other parties . . .	Jones shall promptly notify the other parties . . .
6.	If this section is violative of any law or public policy . . .	If this section violates any law or public policy . . .
7.	The Warrants are not redeemable by Acme.	Acme shall not redeem the Warrants.

8.	. . . for which the Redeemed Member has liability.	. . . for which the Redeemed Member is liable.

3.9 Because buried verbs allow you to drop the actor, they sometimes serve a purpose, just as use of the passive voice sometimes does (see 3.13). If a number of different parties might exercise a particular option, you could use the wordy *When any one or more Optionholders exercises the Option* to introduce the obligations triggered by exercising the option, but a better choice would be *Upon exercise of the Option*.

AVOID GENDER-SPECIFIC LANGUAGE

3.10 When a contract provision refers to a group of persons that includes, or might sometime during the life of the contract include, one or more women in addition to one or more men, it's best that you not use exclusively the masculine pronouns *he*, *his*, and *him* when referring generally to a member of that group. For one thing, such gender-specific language might offend, distract, or mislead some readers—drafters can no longer assume that readers consider male pronouns to include persons of both genders when the reference is general. And gender-specific language simply seems old-fashioned now.

17.11 In addition, using only gender-specific pronouns when referring generically to a member of a group is jarring when the group includes one or more entities.

17.12 When you're dealing with a template or any other contract that's likely to be used as a model, gender-specific language would be a concern even if it happened to be appropriate for the transaction at hand: it would be a nuisance if, each time the contract were revised for a new transaction, the drafter might have to change the pronouns.

17.13 In contracts, you can use three ways to avoid using gender-specific language: instead of using only a masculine pronoun, (1) use a plural pronoun and make conforming changes elsewhere, (2) repeat the noun, or (3) use a feminine or neuter pronoun, or both, in addition to a masculine pronoun. Which solution works best depends on the context.

Gender-specific version	Each Stockholder must surrender his stock certificates . . . .
Gender-neutral version using plural noun	The Stockholders must surrender

	their stock certificates . . . .
Gender-neutral version that repeats noun	Each Stockholder must surrender that Stockholder's stock certificate . . . .
Gender-neutral version that uses both masculine and feminine pronouns, or masculine, singular, and neuter pronouns	Each Stockholder must surrender [his or her] [his, her, or its] stock certificates . . . .

DON'T USE LAWYERISMS

Unit 14 finds in contracts the sort of circumlocutions and overly formal words and phrases that have come to characterize legal writing generally. Some examples are listed below; using instead the suggested alternatives (in the *Improvement* column) would make a contract easier to read.

Lawyerism	*Improvement*
at the time at which	when
during such time as	while, during
in lieu of	instead of
in order to/for	to/for
in the event that/of	if
is binding upon	binds
is unable to	cannot
per annum	per year, a year, annually
prior to	before

pursuant to	under, in accordance with, as authorized by
set forth in	stated in, in
subsequent to	after
under the provisions of	under
until such time as	until

OTHER WORDY PHRASES

You also find in contracts wordy phrases that are in general usage; here are some of them.

"To the Extent That"

The phrase *to the extent that* is appropriate when the degree to which a provision applies depends on some variable: *This agreement is governed by the laws of the state of New York, except to the extent that the federal securities laws apply*. But the phrase is often used even when satisfying a condition results in the provision being applied to its fullest, rather than incrementally; in such contexts, *if* would be more appropriate. One example: "*To the extent that* [read *If*] any document

is required to be filed or any certification is required to be made with respect to the Issuer or the Notes under the Sarbanes-Oxley Act, the Seller shall prepare and execute that document or certification." Another example: "*To the extent that* [read *If*] the Company has not paid the Investor's fees and expenses, the Investor may deduct from the Advance the amount of any unpaid fees and expenses."

"The Fact That"

17.17 You can almost always improve on constructions containing the wordy phrase *the fact that*. One example: "Executive acknowledges that Acme's Confidential Information would be valuable to the Company's competitors *by virtue of the fact that* [read *because*] it is not generally known to the public or in the industry." Another example: *The fact that there may be no Loans outstanding* [read *Whether any Loans are outstanding*] at any given time will not affect the continuing validity of this agreement."

17.18 And the phrases *notwithstanding the fact that* and *regardless of the fact that* can always be replaced by *although*, *even though*, or *even if*. An example: "Doe will be entitled to receive the stock dividend on the shares of Common Stock acquired upon that Option exercise, *notwithstanding the fact that* [read *even though*] those shares were not outstanding on the record date for the stock dividend."

“There Is” and “There Are”

17.19 Whenever you start a clause or sentence with *there* or *it* followed by a form of the verb “to be”—*there is*, *there are*, *it is*—you are lumbering the front end of the clause or sentence with a fake subject and a weak verb. Instead, find the real subject and the real verb and use them to start the sentence or clause; sometimes this requires significant restructuring. Below are three sentences beginning with *there is*, along with a proposed alternative for each.

“There Is”	***No “There Is”***
If there is a conflict or inconsistency between this agreement and any other Loan Document, the terms of this agreement will control.	If this agreement conflicts with or is not consistent with any other Loan Document, the terms of this agreement will control.
There is no fact that is known to any Seller or that reasonably should be known to any of them that has not been disclosed to the	Each Seller has disclosed to the Agent in writing all facts that that Seller knows or reasonably should know that

Agent in writing with respect to the transactions contemplated by this agreement and that could reasonably be expected to result in a Material Adverse Change.	relate to the transactions contemplated by this agreement and could reasonably be expected to result in a Material Adverse Change.
There is no ongoing audit or examination or, to the knowledge of the Borrower, other investigation by any Governmental Authority of the tax liability of the Borrower and its Restricted Subsidiaries.	No Governmental Authority is currently auditing, examining, or, to the knowledge of the Borrower, otherwise investigating the tax liability of the Borrower and its Restricted Subsidiaries.

USE POSSESSIVES

Tip 20 One simple way of making contract prose less wooden is to use possessives, as in the following examples:

No Possessive	*Possessive*
the board of directors of Acme	Acme's board of directors
the shares held by Smith	Smith's shares
the obligation of the Lender to make Loans under this agreement	the Lender's obligation to make Loans under this agreement

DON'T OVERUSE INITIAL CAPITALS

17.21 Contract drafters tend to overuse initial capitals. Use of initial capitals in references to agreements is one example (see 2.18), and use of initial capitals in stating amounts of money is another (see 13.395). Discussed below are some additional examples. Those who overuse initial capitals presumably think that if something is important, it's best to give it initial capitals. This overuse is essentially trivial, but not without cost: initial capitals make a document less easy to read, and as it is, the typical contract is not wanting for initial capitals used appropriately. So it's best to be parsimonious in using initial capitals. This manual

follows the guidelines in *The Chicago Manual of Style*.

17.22 Drafters generally refer to *the Board of Directors* of a corporation, but it's a generic term that warrants using lowercase letters. And drafters invariably use initial capitals when referring to officer titles (*The certificate must be signed by the President of Acme*), but you should only do so when the title is followed by a name (*President James Roe*), which is never the case in contracts. The same applies to other titles, such as *director* and *secretary of state*.

17.23 Initial capitals are often used in references to a company's organizational documents (*Acme's Restated Certificate of Incorporation and Bylaws*). But you're referring not to the title of a work but to a category of document—use lowercase letters.

17.24 Words denoting political divisions are capitalized when they follow a name and are used as an accepted part of the name. When they precede the name, such terms are usually capitalized in names of countries but lowercased in entities below the national level—hence *New York State* but *the state of New York*. Drafters tend to capitalize *state* whatever the context.

17.25 Many drafters also use initial capitals when referring to a company's capital stock (*the Common Stock, par value $0.01 per share, of Widgetco*); use lowercase letters instead.

1.26 The recommended practice in general English usage is to use lowercase letters when referring to parts of a work. For the most part this is the practice in legislative drafting. Contract drafters should fall in line and use lowercase letters for article and section cross-references (*Acme's obligations under section 12.4*) and for references to exhibits, schedules, and other attachments (*an employment agreement in the form attached as exhibit C*) (see 4.99 and 5.71).

THE EXTRANEOUS "THE"

1.27 Drafters often place an extraneous *the* in front of some abstract nouns; the result is ponderous prose. In the examples below, which come from a credit agreement, each extraneous *the* is shown in strikethrough italics.

upon ~~*the*~~ satisfaction of the conditions stated in section 4.2

with respect to ~~*the*~~ execution and delivery of Borrowing Notices

for ~~*the*~~ purposes of calculating Consolidated EBITDA for any period of four consecutive fiscal quarters

any agreement to provide financial assurance with respect to the financial condition of, or ~~*the*~~ payment of the obligations of, that other Person

net of amounts required to be applied to ~~the~~ repayment of Indebtedness secured by a Lien

damages suffered by the Borrower or that Lender to the extent caused by ~~the~~ willful misconduct or gross negligence of the LC Issuer

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DON'T USE "(S)"

17.28 Some drafters tack *(s)* onto the singular form of a noun when they wish to convey that a situation might involve one or more than one of the item in question. It's a very awkward usage; use instead *one or more* (see 13.752):

Parent shall cause to be filed a registration statement(s) [read one or more registration statements] on Form S-3

upon the surrender of *the certificate(s)* [read *one or more certificates*] previously representing those shares

---

CONTRACTIONS

17.29 It's generally accepted among commentators on English usage that contractions—including *it's*, *that's*, *isn't*, *won't*—are suitable in all but the most formal kinds of writing. (That's why this manual uses contractions.) Contractions help you achieve a more natural, conversational rhythm. But that doesn't mean that they're suitable for business contracts.

The prose of business contracts is like computer code—it's devoid of tone or rhythm, unless it's poorly done, in which case it can be pompous. So the idea of using contractions in business contracts is at odds with the very nature of contract prose.

PUNCTUATION

The law has a long tradition of disdaining punctuation. See *Garner's Dictionary of Legal Usage*, at 730. That view has all but disappeared, but don't be surprised if you come across something along the following lines, most likely in a contract drafted by an English lawyer: "Punctuation and headings used in this Agreement are for the purpose of easy reference or reading only and shall not affect its interpretation."

CHAPTER 18

AMENDMENTS

18.1 It is commonplace for the parties to a contract to want to amend—that is, make changes to—the contract to fix errors, to address circumstances that hadn't been contemplated in the original negotiations, or to change the deal terms.

18.2 Amending a contract is accomplished by a new writing, which can be in the form of a regular contract or a letter agreement. This chapter considers usages relating to effecting an amendment by means of a regular contract.

AMENDING, OR AMENDING AND RESTATING

18.3 Parties who wish to make changes to a contract can either amend it or amend and restate it. To amend a contract, the parties enter into a new contract that contains only the changes being made to the original contract. To amend and restate a contract, the parties enter into a new contract that consists of the original contract revised to incorporate any amendments that the parties had made since it was signed and any further

amendments that the parties wish to make. In theory, the parties could simply restate a contract, in other words incorporate in a new contract, without making any further changes, all amendments that had previously been made to that contract, but that's done rarely, if at all.

18.4 When only a few discrete changes are being made, it usually makes sense simply to amend a contract rather than requiring that lawyers and clients add to their files another copy of the entire contract, slightly revised. By contrast, amending and restating a contract is likely to be the more efficient option when the parties wish to make extensive changes or when the proposed changes come on the heels of a number of amendments, making it awkward to keep track of the changes.

TITLE

18.5 When a contract amends, or amends and restates, another contract, it's conventional to state as much in the title, and the title should also refer to the type of agreement involved: *AMENDED AND RESTATED MERGER AGREEMENT*. It's helpful to number each amendment to a contract, or at least the second amendment onward: *AMENDMENT NO. 4 TO CREDIT AGREEMENT*. As with titles generally (see 2.2), don't include party names, as doing so makes the title unwieldy. (Regarding use of *allonge* instead of *amendment* in titles, see 13.7)

INTRODUCTORY CLAUSE AND RECITALS

18.6 The introductory clause to an amendment or a restated and amended contract should follow this manual's recommendations for introductory clauses generally (see 2.13–114). In particular, you don't need to refer to the contract that's being amended, or restated and amended, as the case may be. Instead, the recitals should refer to that contract and, if feasible, state briefly why the parties wish to amend it or amend and restate it. Also, don't create in an amendment the defined term *this Amendment* (see 2.110).

THE LEAD-IN

18.7 The lead-in to an amendment should be the same as that for any other contract (see 2.145–67), with the exception that if only one simple change is being made, it could conceivably be wrapped into the lead-in: *The parties therefore amend the Employment Agreement by deleting section 13 in its entirety.* The lead-in would then constitute the entire body of the contract, with the concluding clause following. But if you wish to add general provisions addressing matters such as the law governing the contract—and most drafters would—this approach wouldn't work.

18.8 The lead-in to an amended and restated contract should look like this: *The parties therefore*

amend and restate the [*contract being amended*] *to read in its entirety as follows: . . . .*

LANGUAGE OF PERFORMANCE

18.9 The language used to state an amendment is an example of language of performance. (Regarding language of performance, see 3.19.) Consequently, it's preferable to have the parties state that the contract or provision, as the case may be, *is hereby amended*, as opposed to *is amended* or *is amended as of the date hereof* (see 3.20). It would be appropriate to use the passive voice, as there wouldn't be any question who's doing the amending (see 3.13).

DISTINGUISHING BETWEEN AMENDING AND SUPPLEMENTING

18.10 An amendment serves to change the original agreement; a supplement simply adds to it. Acme and Doe are party to an employment agreement that provides for Acme to pay Doe an annual salary. Subsequently Acme and Doe enter into another agreement in which Acme agrees to pay Doe an annual bonus. One might term the second agreement an amendment of the employment agreement, but it doesn't serve to amend the employment agreement unless it states that the new provisions are being added to the employment agreement. If the provisions in the second agreement are freestanding, the second agreement is best

considered as supplementing the employment agreement. If that's the case, call it a supplement rather than use the fusty Latinism *addendum*.

ADDING, DELETING, AND REPLACING LANGUAGE

18.11 In an amendment, the parties can add or delete language or replace existing language with new language. How this process is handled is a function of whether entire provisions are involved.

Change Affecting Part of a Provision

18.12 When a change involves adding, deleting, or replacing less than an entire section or subsection (a word or two, a phrase, a sentence, or an enumerated clause), the distinction between amending, on the one hand, and amending and restating, on the other hand, can be applied, albeit on a smaller scale: the drafter generally has a choice between specifying only the exact change being made or restating the entire provision.

18.13 Assume, for example, that an agreement contains the following definition: *"Termination Date" means 11:00 a.m., Houston, Texas, time, on February 28, 2013, or any earlier date on which the Commitment terminates as provided in this agreement*. The parties agree to postpone the termination date by two months. The agreement could be revised in two different ways to reflect this change. The parties could substitute one date for the other: *The definition of "Termination Date" is*

hereby revised by replacing "February 28, 2013" with "April 30, 2013." Or they could restate the entire definition, revised to include the new date: *The definition of "Termination Date" is hereby amended to read in its entirety as follows: . . . .*

18.14 The former approach is more concise and has the benefit of highlighting the change that was made. But that change is presented out of context, so a reader can't be sure of understanding its significance without referring to the underlying agreement. Restating the amended provision in its entirety avoids that problem, but at the cost of making the amendment longer and less specific, although the reason for the amendment could be stated in the recitals or in the amendment proper. Which approach is preferable in a given context requires balancing the pros and cons of each.

Change Affecting an Entire Provision

ADDING

18.15 An amendment can serve to add a new section, subsection, or enumerated clause: *The Agreement is hereby amended by adding after section 10 the following new section 11: . . . .* Unless the new section, subsection, or enumerated clause is inserted at the end of the agreement, section, or series of enumerated clauses, respectively, contract enumeration would be affected. The amendment necessary to change the enumeration would generally follow immediately after the amendment requiring the change in enumeration: *The Agreement*

is hereby amended as follows: (1) by adding after section 10 the following new section 11 and (2) by renumbering sections 11 through 19 as sections 12 through 20.

18.16 It could be that the original contract's internal cross-references, or references to the original contract that are contained in another contract, would be rendered inaccurate by a change in enumeration. That problem could presumably be addressed by further amendment (of both the original contract and any referencing contract), but it would be best if you could avoid the problem by inserting the new section, subsection, or enumerated clause at the end of the agreement, section, or series of enumerated clauses, respectively.

18.17 Adding an enumerated clause as the penultimate or last in a series of enumerated clauses requires some fine-tuning to address the fact that in the penultimate clause the semicolon is followed by *and* or *or* and the last clause ends in a period. For example, adding an enumerated clause at the end of a series of enumerated clauses would, strictly speaking, require amending language along the lines of the following: *Section 9 is hereby amended as follows: (1) by deleting the word "or" at the end of clause (4); (2) by deleting the period at the end of clause (5) and replacing it with "; or"; and (3) by inserting the following as a new clause (6):* . . . . But inserting an enumerated clause without doing this fine-tuning wouldn't change the meaning of any provision and so couldn't harm a party's interest.

18.18 An amendment can serve to delete a section, subsection, or enumerated clause of the original contract: *The Agreement is hereby amended by deleting section 10 in its entirety.* Unless the section, subsection, or enumerated clause being deleted occurs at the end of the agreement, section, or series of enumerated clauses, respectively, enumeration in the contract would be affected. One could address this by tacking on a further amendment: *The Agreement is hereby amended as follows: (1) by deleting section 10 in its entirety; and (2) by renumbering sections 11 through 19 as sections 10 through 18.* But you might find it simpler to retain the enumeration of the provision being deleted and replace the provision itself with the bracketed notation *Intentionally omitted*, which acts as a place-filler (see 4.102). This would have the added advantage of leaving unaffected internal cross-references in the original contract and any references to the original contract that are contained in another contract (unless any of those references is to the deleted provision).

18.19 Deleting the penultimate or last in a series of enumerated clauses requires fine-tuning of the sort required when you add such a clause (see 18.17). For example, deleting the last of a series of enumerated clauses would require amending language of the following sort: *Section 9 is hereby amended as follows: (1) by adding the word "or" at the end of clause (3); (2) deleting the "; or" at the*

end of clause (4) and replacing it with a period; and (3) deleting in its entirety clause (5). Here too, omitting such adjustments when deleting an enumerated clause couldn't harm a party's interests.

LAYOUT

18.20 A common amendment is adding an entire section, subsection, or tabulated enumerated clause to the contract that's being amended, indenting that block of text, stating it in italics, and otherwise formatting it as you would if it were being stated in the contract being amended would help distinguish it from text that pertains to the amendment itself. This approach is shown in sample 16.

SAMPLE 16 ■ USE OF ITALICS IN AMENDMENTS

1. **Defined Terms.** Defined terms used but not defined in this agreement are as defined in the Supply Agreement.

2. **Amendment to Section 4.1.** Section 4.1 of the Supply Agreement is hereby amended by replacing "July 16, 2013" with "September 16, 2013."

3. **Amendments to Article 5.** Article 5 of the Supply Agreement is hereby amended as follows:

(1) by inserting after section 5.2 the following new section 5.3:

*5.3 **Transition Services Agreement.** Subject to the Transition Services Agreement between Waferco and Digital dated November 12, 2012, Waferco shall comply with exhibit G (Delivery and Logistics) in its shipping and handling of finished Wafers.*

(2) by renumbering sections 5.4 through 5.10 as sections 5.5 through 5.11.

CHAPTER 19

LETTER AGREEMENTS

FUNCTION

19.1 Instead of being in the form of a regular contract, an agreement might be embodied in a letter agreement, which is a letter that contains the terms of the agreement and is signed by the sender and the recipient. By convention, some categories of agreement, notably letters of intent, are generally in the form of a letter agreement. Don't give a regular contract the title "letter of intent"—it sends mixed signals.

19.2 Usually the letter-agreement format is used for short agreements, but sometimes they can be quite lengthy. For example, it's not unusual for credit agreements to be in the form of letter agreements.

COMPONENTS

19.3 A letter agreement will typically contain the following: the sender's address; the date; the recipient's address; the salutation; an introductory sentence; the substantive terms; a closing sentence;

the sender's signature; and the recipient's signature. A letter agreement might also have a subject line, but it shouldn't bear a title.

Sender's Address

19.4 The sender should be the person or entity that's to be bound by the terms of the agreement and not a representative of that entity. The sender's address can be typed or included in preprinted letterhead.

Date

19.5 The date to use in a letter agreement is subject to the same considerations as the date to use in the introductory clause of a regular contract (see 2.21–44), except that it would be unorthodox to use an *as of* date (see 2.33), even if the date used were different from the date the letter agreement was actually signed.

Recipient's Address

19.6 The recipients of a letter agreement would be those one or more persons or entities, other than the sender, that are to be bound by the letter agreement. If a recipient is an entity, usually one would include in an "Attention" line the name of a representative of the recipient.

Salutation

19.7 If the recipient is a person, the salutation should refer to that person by name. If the recipient is an entity, the simplest salutation would be *Dear*

Sirs, although it's commonplace to use the name of the chief executive officer. (That person's name would presumably be in the "Attention" line of the recipient's address; see 19.6.) Although it's best to avoid gender-specific drafting (see 17.10), the gender neutral alternatives to *Dear Sirs* are too awkward to use in this context. For example, *Ladies and Gentlemen* makes it sound as if one is writing to a group of individuals.

Introductory Sentence

19.8 The introductory sentence is often along the following lines: *The purpose of this letter agreement is to state the terms of* [*the transaction*].

Substantive Terms

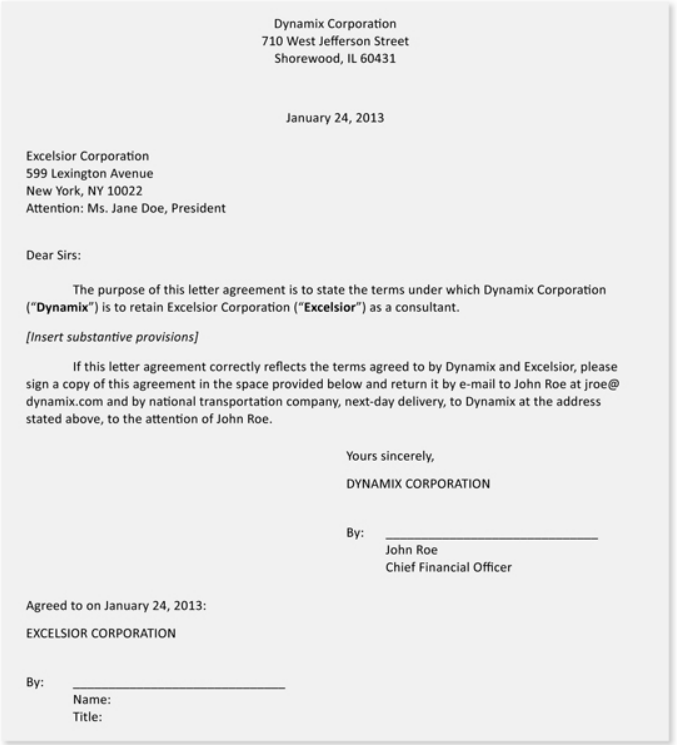
19.9 The substantive terms of a letter agreement should be phrased just as they would be in a regular contract. In a letter agreement one can dispense with section numbers and headings, but generally it's helpful to retain them.

19.10 The third person rather than *you*, on the one hand, and *we* and *us*, on the other hand (see 3.7).

Closing Sentence

19.11 The closing sentence would normally be along the lines of that in sample 17.

SAMPLE 17 ■ LETTER AGREEMENT



Dynamix Corporation
710 West Jefferson Street
Shorewood, IL 60431

January 24, 2013

Excelsior Corporation
599 Lexington Avenue
New York, NY 10022
Attention: Ms. Jane Doe, President

Dear Sirs:

The purpose of this letter agreement is to state the terms under which Dynamix Corporation ("**Dynamix**") is to retain Excelsior Corporation ("**Excelsior**") as a consultant.

[Insert substantive provisions]

If this letter agreement correctly reflects the terms agreed to by Dynamix and Excelsior, please sign a copy of this agreement in the space provided below and return it by e-mail to John Roe at jroe@dynamix.com and by national transportation company, next-day delivery, to Dynamix at the address stated above, to the attention of John Roe.

Yours sincerely,

DYNAMIX CORPORATION

By: _____
John Roe
Chief Financial Officer

Agreed to on January 24, 2013:

EXCELSIOR CORPORATION

By: _____
Name:
Title:

Sender's Signature

19.12 The sender's signature block is placed where the sender usually signs a letter (see sample 17). Letter-agreement signature blocks use the same format as signature blocks in regular contracts (see 5.24).

19.13 If the sender is an entity, the sender's signature block should be in the name of the sender rather than a representative of the sender, although a representative would be the one who signs.

Recipient's Signature

19.14 A letter agreement should contain a signature block for each recipient. They're usually placed under the sender's signature block, flush left (see sample 17).

19.15 Each recipient's signature block should be preceded by text indicating that the recipient is agreeing to the terms of the letter agreement. *Agreed to* is adequate; adding *and accepted* does nothing. And it's generally helpful to include a date. In the absence of a date a court might conclude that the date at the top of the letter applies, but there's no point in leaving that to chance.)

19.16 If it's important that the date be a particular date (for example, the same as the date at the top of the letter agreement), the drafter should include that date rather than leaving it blank for the signatory to fill in by hand. Saying *Agreed to on the date of this letter agreement*—assuming that's appropriate—would leave the drafter only one date to adjust—the one at the top—when finalizing the letter agreement. It would be preferable not to use an *as of* date (see 2.33).

CHAPTER 20

DRAFTING CORPORATE RESOLUTIONS

20.1 The governing bodies of U.S. legal entities act by means of resolutions, which appear in minutes of meetings and—if state law and the entity's organizational documents permit it—in written consents that are adopted as an alternative to holding a meeting.

20.2 This chapter examines how corporate resolutions have traditionally been drafted and how they can be improved. It focuses on written consents, because lawyers in private practice tend to draft consents more often than minutes. The traditional form of written consent contains a number of elements: the title, the introductory clause, recitals, the lead-in, resolutions, the concluding clause, and signature blocks. A consent may also include one or more attachments.

20.3 This topic is, strictly speaking, beyond the scope suggested by the title of this manual, but it's included for three reasons. First, lawyers who draft contracts generally find themselves also drafting corporate resolutions. Second, the usages employed in the traditional form of resolution are analogous to contract usages. And third, aside from the article on

which this chapter is based (Kenneth A. Adams, *Legal Usage in Drafting Corporate Resolutions*, Practical Lawyer, Sept. 2002), no meaningful literature on this topic exists.

20.4 Because current usages are so deficient, this chapter recommends significant changes to how written consents are drafted. That the recommended format wouldn't affect meaning should, instead of being an impediment to change, make it easier for lawyers to adopt that format, safe in the knowledge that the resulting improvements in style and readability wouldn't come at the client's expense. To see the effect of the recommended changes, see samples 18 and 19, "before" and "after" versions of a written consent of the board of directors of a Delaware corporation.

THE TITLE

20.5 The title of a consent could be limited simply to *consent*, but invariably drafters also specify, for ease of reference, the governing body and the name of the entity.

20.6 The title usually refers to the consent as a "written consent." It's not strictly necessary to do so—a consent is manifestly written, whether or not it's described as such in the title—but it serves to highlight that the resolutions were adopted by means of the statutory alternative to vote at a meeting. If a consent is unanimous or is by a sole director or shareholder, drafters usually say so in the title,

although they often make the mistake of describing as unanimous a consent by a one-member governing body.

20.7 The clearest layout for the title is to state the entity name at the top, in bold all-capitals, with underneath, in regular all-capitals, *unanimous written consent of*, followed by the governing body in question.

THE LEAD-IN

20.8 Traditionally, consents open with a statement to the effect that the signatories are adopting the resolutions that follow. This statement is analogous to the lead-in of a contract (see 2.145).

20.9 A consent lead-in contains more information than a contract lead-in. For one thing, it states the capacity in which the signatories are signing the consent (as shareholders, directors, or otherwise) and what proportion of the applicable governing body they represent (all of it, a majority, more than two-thirds, or otherwise). Usually it also includes a statement that the signatories are acting by written consent in accordance with a section of whichever state law authorizes that governing body to make decisions by written consent instead of holding a meeting. This is often stated, in the alternative or in addition, as a subtitle between the title and the lead-in, but you don't need to waste space by giving it such prominence, and you certainly don't need to state it twice.

20.10 In the lead-in, drafters also invariably state the defined term for the entity that's the subject of the consent. Given that in consents the focus is on a single entity, it's appropriate to use a generic common noun such as *the Company*. Doing so has the benefit of allowing readers to more readily distinguish that entity from any other entities that might be mentioned.

20.11 A traditional lead-in states that the undersigned *hereby consent to the adoption of the following resolutions*, but it's preferable to have the signatories *resolve as follows.* Because as discussed in 20.19 the best place for recitals is before the lead-in, the lead-in should contain *therefore resolve as follows* if the consent contains recitals.

20.12 There are three reasons for using *resolve as follows.* The first relates to structure: using the verb *resolve* in the lead-in allows you to omit it from the resolutions, which in turn permits you to format the resolutions more efficiently (see 20.20–21). The second relates to brevity: because *resolve* means "to adopt or pass a resolution," *resolve as follows* expresses in three words what the traditional formula uses nine words to convey. The third relates to clarity: the indirection of the traditional formula—requiring consent plus adoption—leads some drafters to think that one must not only consent to adoption of a resolution, but also adopt it, and so use the formula *hereby consent to the adoption of, and hereby adopt, the following*

resolutions. This only makes worse an already inferior usage.

20.13 Using the verb *resolve* in the lead-in raises the question whether for a written consent to be effective the signatories must *consent* to resolutions rather than simply *resolve*. But once one has stated that the signatories are acting by written consent, nothing in the relevant state laws requires that one use the verb *consent.* For example, section 228 of the Delaware General Corporation Law, which governs shareholders acting by consent instead of holding a meeting, simply requires that a consent "set forth the action taken without a meeting." There's no reason why that can't be accomplished by having the shareholders *resolve as follows*.

20.14 Many drafters would state that the signatories *do hereby resolve*. For two reasons, this is less than ideal. First, *do* used as an auxiliary in this manner is an archaism (see 3.23). Second, as discussed in 3.17, *hereby* is best omitted in language of agreement, and *resolve as follows* is analogous to language of agreement.

20.15 Another lead-in redundancy is a statement—often long-winded—that the resolutions were adopted as though at a meeting. This is implicit in the fact that the signatories are acting by written consent, and anyone with any questions as to the effect of a written consent can check the cited section of the applicable state statute.

20.16 Drafters sometimes double-space the lead-in, as well as the concluding clause, presumably with a view to distinguishing them from the resolutions. It's inefficient and distracting to do so.

RECITALS

20.17 A consent will often contain, after the lead-in, paragraphs beginning with *whereas* in all capitals that explain the background to the resolutions. Such paragraphs are analogous to the recitals that routinely precede a contract lead-in (see 2.115), so it's appropriate to use the term "recitals" to describe them. (They're also referred to collectively as the "preamble.")

20.18 Using *whereas* in recitals, whether in contracts or consents, is archaic (see 2.128). One can readily distinguish recitals from resolutions without using *whereas* to signpost them.

20.19 A more interesting issue is where in consents you should place recitals. In contracts they're placed before the lead-in, but in the traditional form of consent they invariably follow it. Since the preferred form of lead-in and, as discussed in 20.21, the preferred form of resolution don't permit any intervening language, this requires that recitals be placed before the lead-in rather than after. This unorthodox approach is acceptable, even preferable, because it's consistent with contract usage. And it is a little anomalous to place recitals

after the lead-in: the lead-in refers to the resolutions that follow, but recitals aren't resolutions.

RESOLUTIONS

Where to Place the Verb "Resolve"

20.20 It has long been standard practice to introduce each recital with *resolved*, generally in all capitals. In this context, *resolved*, which is a truncated version of *it is resolved that*, constitutes language of performance (see 3.19). (If a consent contains recitals, drafters often begin the first resolution with *it is therefore resolved*. And if there is more than one resolution, some drafters begin the second and subsequent resolutions with *it is further resolved*.) Legal usage should be consistent with standard English unless there are compelling reasons why it should not (see the introduction); this stilted and archaic use of *resolved* couldn't be confused with standard English.

20.21 There are two alternatives. One is to use, in each recital, language of agreement that is less archaic, but your options would essentially be limited to introducing each recital with *it is resolved that*. This wouldn't represent much of an improvement. A more effective solution is to modify the lead-in by having the signatories *resolve as follows* rather than, say, *adopt the following resolutions*, and to eliminate *resolved* from each resolution and instead phrase it as a *that*-clause. The result is resolutions that are clearer, more

economical, and more consistent with standard English.

20.22 *That*-clauses aren't sentences, so each resolution should end with a semicolon. Tack *and* onto the penultimate resolution and end the final resolution with a period. *That*-clauses aren't paragraphs either, so are best broken out as tabulated clauses (see 4.34), but with bullet points rather than enumeration, since little would be gained by numbering each resolution.

Factual Resolutions

20.23 Viewed from a grammar perspective, a resolution consists of a *that*-clause functioning as an object. Two main categories of verbs precede such *that*-clauses, namely "factual" verbs and "suasive" verbs. Factual verbs such as *certify*, *claim*, and *declare* introduce factual information, whereas suasive verbs such as *beg*, *recommend*, and *urge* imply an intention to bring about some change in the future. Some verbs, such as *insist*, can be both factual (*I insisted that I was right*) and suasive (*I insisted that he apologize*), and in the context of corporate resolutions *resolve* can be both factual and suasive. For purposes of the following discussion, the terms "factual resolution" and "suasive resolution" are used to describe those resolutions in which *resolve* is used as a factual and a suasive verb, respectively.

PERFORMATIVE RESOLUTIONS

20.24 Factual resolutions can be divided into two categories. One category is those factual resolutions that accomplish an action when the consent is signed and as such constitute language of performance. By means of performative resolutions, a governing body can fill a vacancy, select a consultant, or take any number of other actions. Here's an example: *that the Company hereby engages Acme Accountants LLP to act as its independent auditors*.

20.25 The most common performative resolutions are those that authorize an action or authorize someone to do something and those that direct someone to do something. For example, a board of directors might resolve *that each of the officers of Acme is hereby authorized to execute and deliver the Merger Agreement.* In the following discussion, such resolutions are termed "performative resolutions."

20.26 Officers often in the same resolution direct *and* authorize someone to do something, but if Acme's board of directors directs Smith to sign an agreement, then by definition Smith is authorized to do so—in a resolution stating that Smith *is hereby authorized and directed*, the word *authorized* is redundant. (You can use suasive resolutions as an alternative to directing language; see 20.34–35.)

20.27 Less commonplace are performative resolutions that ratify an action, in other words approve it after the fact. A resolution might state that an action is *ratified, confirmed, approved, and*

adopted; just *ratified* is sufficient. (Regarding redundancy in strings of words, see 1.42.)

20.28 It's standard advice that you should use the active voice (see 3.10), but performative resolutions are generally phrased in the passive voice. In the case of directing or authorizing resolutions, it would be pedantic to require the active voice, as in *that the undersigned hereby authorize Acme*: who is doing the authorizing or directing is never in question, and using the active voice would make this kind of resolution less concise. In the case of ratifying resolutions, which voice is preferable is a function of whether the statement of what is being ratified is succinct. If it requires a couple of lines or more, you might want to use the active voice (*that the undersigned hereby ratify*), because the passive voice would result in the verb being rather awkwardly tacked on at the end.

20.29 As it's appropriate to use *hereby* in language of performance in contracts (see 3.20), it's also appropriate to use *hereby* in performative resolutions. In a resolution stating *that each of the officers of Acme is hereby authorized to execute and deliver the Merger Agreement*, the word *hereby* serves to make it clear that it's through the resolution that the officers derive their authority.

OTHER FACTUAL RESOLUTIONS

20.30 Another category of factual resolutions consists of resolutions that don't accomplish an action. There are three kinds:

20.31 First, those resolutions that reflect a value judgment made by the signatories—for example, *that it is in the best interests of Acme to enter into the Merger Agreement*. Such resolutions are analogous to statements that, in a contract, would be included in the recitals.

20.32 Second, those resolutions that state facts—for example, a resolution that, after authorizing Acme to issue certain shares, states that upon issuance *the Shares will be validly issued, fully paid, and nonassessable shares of Acme common stock*. Such resolutions are analogous to statements of fact in a contract, which are a form of language of declaration (see 3.273).

20.33 Third, those resolutions that reflect rules implemented by the signatories—for example, *that the fiscal year of the Corporation ends on December 31 of each year*. Such resolutions are analogous to language of policy (see 3.240).

Suasive Resolutions

20.34 A suasive resolution allows consent signatories to express that they intend a specified action to take place in the future. When a suasive verb is followed by a *that*-clause, as is the case in suasive resolutions, standard usage requires that one use in the *that*-clause either the putative *should* (We demanded that she *should* leave) or the mandative subjunctive mood (We demanded that she *leave*). A third possibility, using the indicative mood (We demanded that she *leaves*), is largely restricted to

British English. The putative *should* is appropriate if you are referring to another person over whom you have no control, but it doesn't make sense for purposes of corporate resolutions. Consequently, the mandative subjunctive is the best option for U.S. drafters. A resolution *that Acme issue to Jones 1,000 shares of Series A preferred stock* represents a clear expression of intent. The verb *issue* is in the mandative subjunctive (the indicative would be *issues*). Because suasive resolutions don't serve to memorialize an action that's concurrent with the signing of the consent, you shouldn't use *hereby* with suasive resolutions.

20.35 Instead of suasive resolutions, you could use factual resolutions (or, more specifically, performative resolutions) to express an intention to bring about change in the future. For example, as an alternative to the resolution stated immediately above, you could resolve *that Acme is hereby directed to issue to Jones 1,000 shares of Series A preferred stock*. This formulation is equally effective, but a little less economical.

20.36 More often than not, drafters have a board of directors resolve that each officer of the corporation *be, and hereby is, authorized*. (Some drafters insist on expending a few additional words to convey the same meaning by having the board resolve that the officers of the corporation *be, and each of them hereby is, authorized*.) This bizarre usage has *resolve* acting as both a factual and a suasive verb: *be authorized* is in the mandative

subjunctive and is consistent with use of *resolve* as a suasive verb; *is authorized* is in the indicative and is consistent with use of *resolve* as a factual verb. This results in an inherent contradiction: if you are, by means of a performative resolution, conferring authority on someone, it makes no sense in that same resolution to use suasive language to convey an intention to authorize that person at some time in the future. You should use only performative resolutions to confer authority. Drafters also use this inappropriate dual structure with directing and ratifying performative resolutions, and the same analysis applies.

Don't Use Language of Obligation

20.37 Don't use *shall* or the other main verb of language of obligation, *must* (see chapter 3), in resolutions, as resolutions don't serve to impose obligations. Drafters nevertheless often use *shall* in policy resolutions—for example, "the fiscal year of the Corporation *shall end* [read *ends*] on December 31 of each year." In addition, *shall* is often used to express future time, even when standard usage would require use of the present tense—for example, "all such expenses as the officers of the Company *shall determine* [read *determine*] to be necessary or appropriate." (See 3.336.)

THE CONCLUDING CLAUSE

20.38 After the resolutions and before the signatures is a statement as to when the consent is

being signed. By analogy to contracts, one can refer to this statement as the "concluding clause."

Wording

20.39 concluding clauses use some variation on the following format: *IN WITNESS WHEREOF, the undersigned have duly executed this Unanimous Written Consent on the 3rd day of February, 2013.* This format has a number of shortcomings:

- *IN WITNESS WHEREOF*, like *WHEREAS*, is archaic (see 5.22).
- *The undersigned* is sufficiently cumbersome that this is one context where it's better to use the passive voice and exclude the *by*-agent (*the undersigned*) (see 3.13).
- *Execute* is jargon; *sign* is simpler (see 5.9–13).
- It seems odd to have the signatories assert in the concluding clause that they have signed the consent, given that the signature blocks don't precede that assertion, but follow it. Instead of the present perfect (*has been signed*), use the present progressive (*is being signed*). (See 5.15–16 for a discussion of this issue with respect to the concluding clause of contracts.)
- A consent is not enhanced by having signatories affirm that they are *duly* signing it (in other words, signing it in accordance with legal requirements), as opposed to simply signing it.
- Nothing is gained by reiterating that the consent is unanimous and written. And you don't need to use a capital *C* in *consent*, as it refers to a category of document rather than the title of a work (see 17.21).

- The format the *3rd day of February, 2013* is a long-winded and old-fashioned way to express dates (see 2.30).

20.40 Given these objections, the recommended form of concluding clause is as follows: *This consent is being signed on February 3, 2013*.

What Date to Use

20.41 Section 228(c) of the Delaware General Corporation Law requires that every written consent "bear the date of signature of each stockholder or member who signs the consent." The date of a consent is significant because a consent is effective only if no later than 60 days after the date of the earliest dated consent a number of consents sufficient to take the corporate action in question have been delivered to the company. Use of an *as of* date (see 2.33) or a preprinted date other than the date of signing is inconsistent with section 228(c), in that giving a consent a date later than the date it was actually signed could serve to circumvent the 60-day time limit.

20.42 This was confirmed by the holding of the Delaware Court of Chancery in *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129 (Del. Ch. 2003). In this case, the plaintiff claimed that a consent signed by certain shareholders was invalid because the shareholders hadn't dated the consent—instead, each consent bore the same preprinted date. The defendants argued that because there was no question that the consents had been delivered within

the 60-day period, how the consents were dated was of no significance.

20.43 The court disagreed. It noted that under section 228(c), for a consent to be valid it has to bear the date of signature of each shareholder. The court also noted that although in this case it might be possible to determine whether the consents had been delivered within the 60-day limit, that would not always be the case, so the date requirement must be strictly enforced. The court refused to dismiss the plaintiff's claim.

20.44 The court suggested that there were two potential problems with the way the consents in question were dated. First, each signature was not individually dated. (The court stated that "The defendants do not dispute that the signers did not individually date their Consents.") And second, the one date that was on the consent was preprinted.

20.45 As a matter of semantics, you should be able to satisfy the section 228(c) requirement that a consent "bear the date of signature" by having one date on the consent, as long as it's the date when all shareholders signed. Furthermore, as long as it's the actual date of signing, a date that's preprinted shouldn't be any less satisfactory than a handwritten date. But not using a preprinted date would reduce the risk of anyone's questioning whether the date on a consent was the date it was signed.

20.46 Note that if shareholders sign a consent on different dates and two or more of them sign the

same piece of paper, you would need to include a separate date for each signature line. But if they sign counterpart copies, you could make do with the one date at the bottom, with a blank day, or day and month, or day and month and year, that each signatory would fill in by hand.

Counterparts

20.47 Many consents include, as part of the concluding clause or as a separate paragraph preceding it, a statement that the consent may be signed in two or more counterparts that together constitute "one and the same" consent. Such statements are unnecessary—even absent such a statement a consent with counterpart signatures would be effective unless the entity's organizational documents prohibit counterpart signatures. Nothing in the Delaware General Corporation Law brings into question the effectiveness of counterpart signatures to written consents. Stating that one can validly deliver counterpart signature pages by fax is also unnecessary, at least in Delaware, given that section 228(d)(2) of the Delaware General Corporation Law provides that a fax copy of a consent is as effective as an original.

THE SIGNATURE BLOCKS

20.48 A signature block consists of a signatory's name accompanied by a signature line. The conventions used are essentially the same as those used for contract signature blocks (see 5.24),

except that when all signatories are individuals, it's appropriate to state each signatory's name in initial capitals rather than all capitals.

ATTACHMENTS

20.49 When in a consent a governing body authorizes or directs an entity to enter into an agreement, or ratifies entry into an agreement, a copy of the agreement is often attached to the consent as an exhibit. If the consent authorizes or directs entry into the agreement, the exhibit could be the final form of the agreement, but often it's a draft, in which case the consent will usually authorize entry into the agreement in the form attached together with such changes as are acceptable to the officers or one or more named officers.

20.50 It's best to avoid attaching contracts to consents, as doing so generally results in an unnecessarily bulky and cluttered minute book. Instead, if the document that would have been attached is a draft, you can identify it by referring to the date that it was distributed to the governing body in question (whether by e-mail or otherwise), and retain, or make sure the company retains, a set of those drafts in files.

20.51 When a consent authorizes officers to negotiate any changes to an approved draft that are acceptable to them, the consent will often state that execution and delivery of the agreement containing any such changes will serve as conclusive evidence

that those changes were acceptable to the officers. Presumably the intention is to prevent any after-the-fact debate as to whether a particular change had in fact been accepted by the officers, as opposed to having been overlooked. Sometimes such consents refer to execution and delivery serving as conclusive evidence of approval of those changes by the governing body adopting the consent. That's a mistake, as the consent doesn't require the governing body to approve any changes.

A SAMPLE WRITTEN CONSENT, "BEFORE" AND "AFTER"

20.52 To give a sense of the overall effect of the approaches recommended in this chapter, samples 18 and 19 represent "before" and "after" versions of a simple written consent of the board of directors of a Delaware corporation. The "before" version incorporates many widely accepted usages; the "after" version is the result of revising the "before" version in accordance with recommendations contained in this chapter and other more general recommendations contained elsewhere in this manual.

SAMPLE 18 ■ "BEFORE" VERSION OF WRITTEN CONSENT

UNANIMOUS WRITTEN CONSENT
OF
THE BOARD OF DIRECTORS
OF
ACME TECHNOLOGIES, INC.

Pursuant to Section 141(f) of the General Corporation Law of the State of Delaware

The undersigned, constituting all the members of the Board of Directors of Acme Technologies, Inc., a Delaware corporation (the "Company"), acting by written consent in lieu of a meeting pursuant to section 141(f) of the General Corporation Law of the State of Delaware, hereby consent to the adoption of the following resolutions as though adopted at a meeting duly called and held with a quorum being present and acting throughout:

WHEREAS, on January 21, 2013, the Company entered into a letter of intent with Dynamic Research, Inc. ("Dynamic"), a company developing global-positioning-satellite technologies, to purchase preferred stock representing a 35% ownership interest in Dynamic; and

WHEREAS, the Company has investigated Dynamic's operations, technologies and corporate governance and has not uncovered any information to indicate that the Company should not consummate this transaction;

NOW, THEREFORE, IT IS RESOLVED, that the Company's execution of the letter of intent be, and it hereby is, ratified;

RESOLVED, the Company be, and hereby is, authorized and directed to enter into and to perform its obligations under the Preferred Stock Purchase Agreement between the Company and Dynamic substantially in the form attached hereto as Appendix A, and those ancillary agreements provided for therein to which the Company is a party, each with such changes, if any, as shall be acceptable to the officers of the Company in their sole discretion, execution and delivery of those documents by the Company to be conclusive evidence of the approval of Board of Directors of the Company; and

RESOLVED, that the officers of the Company be, and each of them hereby is, hereby authorized to execute and deliver on behalf of the Company all such further documents, certificates, and instruments, to take on behalf of the Company all such further actions, and to pay on behalf of the Company all such expenses as the officers of the Company shall determine to be necessary or desirable in order to carry out the foregoing resolutions, the execution and delivery of any such documents, certificates, and instruments, the taking of any such actions, and the payment of any such expenses to be conclusive evidence of the approval of the Board of Directors of the Company.

This Unanimous Written Consent may be executed in two or more counterparts, each of which shall be deemed an original instrument, but all such counterparts shall together constitute for all purposes one and the same instrument.

IN WITNESS WHEREOF, the undersigned have duly executed this Unanimous Written Consent on the 18th day of February, 2013.

_____
John Doe

_____
Robert Roe

_____
Jane Doe

SAMPLE 19 ■ "AFTER" VERSION OF WRITTEN CONSENT

ACME TECHNOLOGIES, INC.

UNANIMOUS WRITTEN CONSENT OF
THE BOARD OF DIRECTORS

On January 21, 2013, Acme Technologies, Inc., a Delaware corporation (the **"Company"**), entered into a letter of intent with Dynamic Research, Inc. (**"Dynamic"**), a company developing global-positioning-satellite technologies, to purchase preferred stock representing a 35% ownership interest in Dynamic.

The Company has investigated Dynamic's operations, technologies, and corporate governance and has not uncovered any information to indicate that the Company should not consummate this transaction.

The undersigned, constituting all the members of the Company's board of directors and acting by written consent in lieu of a meeting in accordance with section 141(f) of the Delaware General Corporation Law, therefore resolve as follows:

- that the Company's execution and delivery of the letter of intent is hereby ratified;
- that the Company enter into and perform its obligations under the preferred stock purchase agreement between the Company and Dynamic substantially in the form distributed to Company board members by e-mail on January 14, 2013, and those ancillary agreements provided for therein to which the Company is a party, each with such changes, if any, as are acceptable to the officers of the Company in their sole discretion, execution and delivery of those documents by the Company to be conclusive evidence of that acceptability; and
- that each of the officers of the Company is hereby authorized to sign on behalf of the Company all such further documents, certificates, and instruments, to take on behalf of the Company all such further actions, and to pay on behalf of the Company all such expenses that the officers of the Company determine to be necessary or desirable to carry out the foregoing resolutions, the execution and delivery of any such documents, certificates, and instruments, the taking of any such actions, and the payment of any such expenses to be conclusive evidence of that determination.

This consent is being signed on February 18, 2013.

_____
John Doe

_____
Robert Roe

_____
Jane Doe

APPENDIX 1

This appendix consists of three versions of a contract.

Appendix 1-A is the "before" version. It's a template of a "golden parachute" termination agreement—an agreement between a company and one of its executives in which the company agrees to provide the executive with various benefits if the executive's employment is terminated after a change in control of the company. This template was prepared by lawyers at a national U.S. law firm. It can be said to be representative of mainstream contract drafting, to the extent that any one contract can be said to be representative.

Appendix 1-B is the "before" version annotated with footnotes to show its drafting shortcomings. Many footnotes cite relevant sections of this manual.

Appendix 1-C is the "after" version—the contract redrafted consistent with the recommendations in this manual. As noted in the footnotes to appendix 1-B, sections 8 (Arbitration), 10 (Notices), 11 (Severability), and 13 (Governing Law) replace the corresponding sections in appendix 1-A, on the grounds that readers would likely find the author's versions of those boilerplate provisions more helpful than cleaned-up but still problematic versions of the corresponding appendix 1-A sections.

The difference between the "before" version and the "after" version serves to demonstrate the cumulative effect of a rigorous approach to the full spectrum of drafting usages. For one thing, the "after" version is 85% the number of words of the "before" version—informed drafting results in shorter contracts. If you omit from both the boilerplate provisions replaced in appendix 1-C—in the "after" version, those sections are different from, and significantly longer than, the corresponding sections in the "before" version—that figure drops to 78%.

Furthermore, the "after" version is vastly clearer and easier to read, and it fixes some significant problems of structure and logic present in the "before" version. Such problems are easy to miss in the murk that is mainstream contract language.

It's safe to assume that virtually any contract could be redrafted to similar effect. If an organization were to experience improvements on that scale in all its contracts, the gains would likely be dramatic. Its contract process would operate faster and more cost-effectively, with reduced confusion, contention, and spinning of wheels. And the likelihood of drafting problems metastasizing into contract disputes would be significantly reduced.

Neither the "before" version nor the "after" version is included for use as a template. For the "after" version, the language and structure of the "before" version were retooled, but not the deal terms. This manual offers no opinion as to whether the deal terms are appropriate or could be improved on.

APPENDIX 1-A: BEFORE

TERMINATION AGREEMENT

This Agreement is made as of_____, 20___, between RMA WIDGETS, INC., a Delaware corporation, with its principal offices at 500 Third Avenue, Suite 400, New York, NY 10022 (the "Company") and _____("Employee"), residing at _____.

WITNESSETH THAT:

WHEREAS, this Agreement is intended to specify the financial arrangements that the Company will provide to the Employee upon Employee's separation from employment with the Company under any of the circumstances described herein; and

WHEREAS, this Agreement is entered into by the Company in the belief that it is in the best interests of the Company and its shareholders to provide stable conditions of employment for Employee notwithstanding the possibility, threat or occurrence of certain types of change in control, thereby enhancing the Company's ability to attract and retain highly qualified people.

NOW, THEREFORE, to assure the Company that it will have the continued dedication of Employee notwithstanding the possibility, threat or occurrence of a bid to take over control of the Company, and to induce Employee to remain in the employ of the

Company, and for other good and valuable consideration, the Company and Employee agree as follows:

1. Term of Agreement. The term of this Agreement shall commence on the date hereof as first written above and shall continue in effect through December 31, 20__ [year of execution]; provided that commencing on January 1, 20__ [year following year of execution] and each January 1 thereafter, the term of this Agreement shall automatically be extended for one additional year unless not later than twelve months prior to such January 1, the Company shall have given notice to Employee that it does not wish to extend this Agreement (which notice may not, in any event, be given sooner than January 1, 20__ [year following year of execution] such that this Agreement may not terminate prior to December 31, 20__ [year following year of execution]); and provided, further, that notwithstanding any such notice by the Company not to extend, this Agreement shall automatically continue in effect for a period of 24 months beyond the then current term if a Change in Control (as defined in Section 3(i) hereof) shall have occurred during such term.

2. Termination of Employment

(i) Prior to a Change in Control. Prior to a Change in Control (as defined in Section 3(i) hereof), the Company may terminate Employee from employment with the Company at will, with or

without Cause (as defined in Section 3(iii) hereof), at any time.

(ii) After a Change in Control

(a) From and after the date of a Change in Control (as defined in Section 3(i) hereof) during the term of this Agreement, the Company shall not terminate Employee from employment with the Company except as provided in this Section 2(ii) or as a result of Employee's Disability (as defined in Section 3(iv) hereof) or his death.

(b) From and after the date of a Change in Control (as defined in Section 3(i) hereof) during the term of this Agreement, the Company shall have the right to terminate Employee from employment with the Company at any time during the term of this Agreement for Cause (as defined in Section 3(iii) hereof), by written notice to the Employee, specifying the particulars of the conduct of Employee forming the basis for such termination.

(c) From and after the date of a Change in Control (as defined in Section 3(i) hereof) during the term of this Agreement: (x) the Company shall have the right to terminate Employee's employment without Cause (as defined in Section 3(iii) hereof), at any time; and (y) the Employee shall, upon the occurrence of such a termination by the Company without Cause, or upon the voluntary termination of Employee's employment by Employee for Good Reason (as defined in Section 3(ii) hereof), be entitled to receive the benefits provided in Section 4

hereof. Employee shall evidence a voluntary termination for Good Reason by written notice to the Company given within 60 days after the date as of which the Employee knows or should reasonably have known an event has occurred which constitutes Good Reason for voluntary termination. Such notice need only identify the Employee and set forth in reasonable detail the facts and circumstances claimed by Employee to constitute Good Reason.

Any notice given by Employee pursuant to this Section 2 shall be effective five business days after the date it is given by Employee.

3. Definitions

(i) A "Change in Control" shall mean:

(a) a change in control of a nature that would be required to be reported in response to Item 6(e) of Schedule 14A of Regulation 14A promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), or successor provision thereto, whether or not the Company is then subject to such reporting requirement;

(b) any "person" (as such term is used in Sections 13(d) and 14(d) of the Exchange Act) is or becomes the "beneficial owner" (as defined in Rule 13d-3 promulgated under the Exchange Act), directly or indirectly, of securities of the Company representing 35% or more of the combined voting power of the Company's then outstanding securities;

(c) the Continuing Directors (as defined in Section 3(v) hereof) cease to constitute a majority of the Company's Board of Directors; provided that such change is the direct or indirect result of a proxy fight and contested election or elections for positions on the Board of Directors; or

(d) the majority of the Continuing Directors (as defined in Section 3(v) hereof) determine in their sole and absolute discretion that there has been a change in control of the Company.

(ii) "Good Reason" shall mean the occurrence of any of the following events, except for the occurrence of such an event in connection with the termination or reassignment of Employee's employment by the Company for Cause (as defined in Section 3(iii) hereof), for Disability (as defined in Section 3(iv) hereof) or for death;

(a) the assignment to Employee of employment responsibilities which are not of comparable responsibility and status as the employment responsibilities held by Employee immediately prior to a Change in Control;

(b) a reduction by the Company in Employee's base salary as in effect immediately prior to a Change in Control;

(c) an amendment or modification of the Company's incentive compensation program (except as may be required by applicable law) which affects the terms or administration of the program in a manner adverse to the interest of Employee as compared to

the terms and administration of such program immediately prior to a Change in Control;

(d) the Company's requiring Employee to be based anywhere other than within 50 miles of Employee's office location immediately prior to a Change in Control, except for requirements of temporary travel on the Company's business to an extent substantially consistent with Employee's business travel obligations immediately prior to a Change in Control;

(e) except to the extent otherwise required by applicable law, the failure by the Company to continue in effect any benefit or compensation plan, stock ownership plan, stock purchase plan, bonus plan, life insurance plan, health-and-accident plan or disability plan in which Employee is participating immediately prior to a Change in Control (or plans providing Employee with substantially similar benefits), the taking of any action by the Company which would adversely affect Employee's participation in, or materially reduce Employee's benefits under, any of such plans or deprive Employee of any material fringe benefit enjoyed by Employee immediately prior to such Change in Control, or the failure by the Company to provide Employee with the number of paid vacation days to which Employee is entitled immediately prior to such Change in Control in accordance with the Company's vacation policy as then in effect; or

(f) the failure by the Company to obtain, as specified in Section 5(i) hereof, an assumption of the

obligations of the Company to perform this Agreement by any successor to the Company.

(iii) "Cause" shall mean termination by the Company of Employee's employment based upon (a) the willful and continued failure by Employee substantially to perform his duties and obligations (other than any such failure resulting from his incapacity due to physical or mental illness or any such actual or anticipated failure resulting from Employee's termination for Good Reason) or (b) the willful engaging by Employee in misconduct which is materially injurious to the Company, monetarily or otherwise. For purposes of this Section 3(iii), no action or failure to act on Employee's part shall be considered "willful" unless done, or omitted to be done, by Employee in bad faith and without reasonable belief that his action or omission was in the best interests of the Company.

(iv) "Disability" shall mean any physical or mental condition which would qualify Employee for a disability benefit under the Company's long-term disability plan.

(v) "Continuing Director" shall mean any person who is a member of the Board of Directors of the Company, while such person is a member of the Board of Directors, who is not an Acquiring Person (as hereinafter defined) or an Affiliate or Associate (as hereinafter defined) of an Acquiring Person, or a representative of an Acquiring Person or of any such Affiliate or Associate, and who (a) was a member of the Board of Directors on the date of this Agreement

as first written above or (b) subsequently becomes a member of the Board of Directors, if such person's initial nomination for election or initial election to the Board of Directors is recommended or approved by a majority of the Continuing Directors. For purposes of this Section 3(v): "Acquiring Person" shall mean any "person" (as such term is used in Sections 13(d) and 14(d) of the Exchange Act) who or which, together with all Affiliates and Associates of such person, is the "beneficial owner" (as defined in Rule 13d-3 promulgated under the Exchange Act) of 20% or more of the shares of Common Stock of the Company then outstanding, but shall not include the Company, any subsidiary of the Company or any employee benefit plan of the Company or of any subsidiary of the Company or any entity holding shares of Common Stock organized, appointed or established for, or pursuant to the terms of, any such plan; and "Affiliate" and "Associate" shall have the respective meanings ascribed to such terms in Rule 12b-2 promulgated under the Exchange Act.

4. Benefits upon Termination under Section 2(ii)(c)

(i) Upon the termination (voluntary or involuntary) of the employment of Employee pursuant to Section 2(ii)(c) hereof, Employee shall be entitled to receive the benefits specified in this Section 4. The amounts due to Employee under subparagraphs (a), (b) and (c) of this Section 4(i) shall be paid to Employee not later than one business day prior to the date that the termination of Employee's employment becomes effective. All benefits to Employee pursuant to this

Section 4(i) shall be subject to any applicable payroll or other taxes required by law to be withheld.

(a) The Company shall pay to Employee any and all amounts payable to Employee pursuant to any standard or general severance policy of the Company or its Board of Directors;

(b) In lieu of any further base salary payments to Employee for periods subsequent to the date that the termination of Employee's employment becomes effective, the Company shall pay as severance pay to Employee a lump-sum cash amount equal to twenty-four (24) times the Employee's monthly base salary (as in effect in the month preceding the month in which the termination becomes effective or as in effect in the month preceding the Change in Control, whichever is higher);

(c) The Company shall also pay to Employee all legal fees and expenses incurred by Employee as a result of such termination of employment (including all fees and expenses, if any, incurred by Employee in seeking to obtain or enforce any right or benefit provided to Employee by this Agreement whether by arbitration or otherwise); and

(d) Any and all contracts, agreements or arrangements between the Company and Employee prohibiting or restricting the Employee from owning, operating, participating in, or providing employment or consulting services to, any business or company competitive with the Company at any

time or during any period after the date the termination of Employee's employment becomes effective, shall be deemed terminated and of no further force or effect as of the date the termination of Employee's employment becomes effective, to the extent, but only to the extent, such contracts, agreements or arrangements so prohibit or restrict the Employee; provided that the foregoing provisions shall not constitute a license or right to use any proprietary information of the Company and shall in no way affect any such contracts, agreements or arrangements insofar as they relate to nondisclosure and nonuse of proprietary information of the Company notwithstanding the fact that such nondisclosure and nonuse may prohibit or restrict the Employee in certain competitive activities.

(ii) Employee shall not be required to mitigate the amount of any payment provided for in this Section 4 by seeking other employment or otherwise. The amount of any payment or benefit provided in this Section 4 shall not be reduced by any compensation earned by Employee as a result of any employment by another employer or from any other source.

(iii) In the event that any payment or benefit received or to be received by Employee in connection with a Change in Control of the Company or termination of Employee's employment (whether payable pursuant to the terms of this Agreement or pursuant to any other plan, contract, agreement or arrangement with the Company, with any person whose actions result in a Change in

Control of the Company or with any person constituting a member of an "affiliated group" as defined in Section 280G(d)(5) of the Internal Revenue Code of 1986, as amended (the "Code"), with the Company or with any person whose actions result in a Change in Control of the Company (collectively, the "Total Payments")) would be subject to the excise tax imposed by Section 4999 of the Code or any interest, penalties or additions to tax with respect to such excise tax (such excise tax, together with any such interest, penalties or additions to tax, are collectively referred to as the "Excise Tax"), then Employee shall be entitled to receive from the Company an additional cash payment (a "Gross-Up Payment") in an amount such that after payment by Employee of all taxes (including any interest, penalties or additions to tax imposed with respect to such taxes), including any Excise Tax, imposed upon the Gross-Up Payment, Employee would retain an amount of the Gross-Up Payment equal to the Excise Tax imposed upon the Total Payments, as determined in accordance with the provisions of this Section 4(iii).

(a) All determinations required to be made under this Section 4(iii), including whether a Gross-Up Payment is required and the amount of such Gross-Up Payment, shall be made by the independent accounting firm retained by the Company on the date of the Change in Control (the "Accounting Firm"). The Accounting Firm shall provide detailed supporting calculations of its determination to both the Company and the

Employee within 15 business days of the Employment Termination Date, or at such earlier time as is requested by the Company. For purposes of determining the amount of any tax pursuant to this Section 4(iii), the Employee's tax rate shall be deemed to be the highest statutory marginal state and Federal tax rate (on a combined basis and including the Employee's share of F.I.C.A. and Medicare taxes) then in effect.

(b) Employee shall in good faith cooperate with the Accounting Firm in making the determination of whether a Gross-Up Payment is required, including but not limited to providing the Accounting Firm with information or documentation as reasonably requested by the Accounting Firm. A determination by the Accounting Firm regarding whether a Gross-Up Payment is required and the amount of such Gross-Up Payment shall be conclusive and binding upon the Employee and the Company for all purposes.

(c) A Gross-Up Payment required to be made pursuant to this Section 4(iii) shall be paid to Employee within 30 days of a final determination by the Accounting Firm that the Gross-Up Payment is required. Employee and Company shall report all amounts paid to Employee on their respective tax returns consistent with the determination of the Accounting Firm.

(d) The Company and the Employee shall promptly deliver to each other copies of any written communications, and summaries of any oral

communications, with any tax authority regarding the applicability of Section 280G or 4999 of the Code to any portion of the Total Payments. In the event of any controversy with the Internal Revenue Service or other tax authority regarding the applicability of Section 280G or 4999 of the Code to any portion of the Total Payments, Company shall have the right, exercisable in its sole discretion, to control the resolution of such controversy at its own expense. Employee and the Company shall in good faith cooperate in the resolution of such controversy.

(e) If the Internal Revenue Service or any tax authority makes a final determination that a greater Excise Tax should be imposed upon the Total Payments than is determined by the Accounting Firm or reflected in the Employee's tax return pursuant to this Section, the Employee shall be entitled to receive from the Company the full Gross-Up Payment calculated on the basis of the amount of Excise Tax determined to be payable by such tax authority. That amount shall be paid to the Participant within 30 days of the date of such final determination by the relevant tax authority.

5. Successors and Binding Agreement

(i) The Company will require any successor (whether direct or indirect, by purchase, merger, consolidation or otherwise to all or substantially all of the business and/or assets of the Company), by agreement in form and substance satisfactory to Employee, to expressly assume and agree to perform this Agreement in the same manner and to the same

extent that the Company would be required to perform it if no such succession had taken place. Failure of the Company to obtain such agreement prior to the effectiveness of any such succession shall be a breach of this Agreement and shall entitle Employee to compensation from the Company in the same amount and on the same terms as Employee would be entitled hereunder if employee terminated Employee's employment after a Change in Control for Good Reason, except that for purposes of implementing the foregoing, the date on which any such succession becomes effective shall be deemed the date that the termination of Employee's employment becomes effective. As used in this Agreement, "Company" shall mean the Company and any successor to its business and/or assets which executes and delivers the agreement provided for in this Section 5(i) or which otherwise becomes bound by all the terms and provisions of this Agreement by operation of law.

(ii) This Agreement is personal to Employee, and Employee may not assign or transfer any part of Employee's rights or duties hereunder, or any compensation due to Employee hereunder, to any other person. Notwithstanding the foregoing, this Agreement shall inure to the benefit of and be enforceable by Employee's personal or legal representatives, executors, administrators, heirs, distributees, devisees and legatees.

6. Arbitration. Any dispute or controversy arising under or in connection with this Agreement shall be

settled exclusively by arbitration in the Borough of Manhattan, in accordance with the applicable rules of the American Arbitration Association then in effect. Judgment may be entered on the arbitrator's award in any court having jurisdiction.

7. Modification; Waiver. No provisions of this Agreement may be modified, waived or discharged unless such waiver, modification or discharge is agreed to in a writing signed by Employee and such officer as may be specifically designated by the Board of Directors of the Company. No waiver by either party hereto at any time of any breach by the other party hereto of, or compliance with, any condition or provision of this Agreement to be performed by such other party shall be deemed a waiver of similar or dissimilar provisions or conditions at the same or at any prior or subsequent time.

8. Notice. All notices, requests, demands and all other communications required or permitted by either party to the other party by this Agreement (including, without limitation, any notice of termination of employment and any notice of intention to arbitrate) shall be in writing and shall be deemed to have been duly given when delivered personally or received by certified or registered mail, return receipt requested, postage prepaid, at the address of the other party, as first written above (directed to the attention of the Board of Directors and Corporate Secretary in the case of the Company). Either party hereto may change its

address for purposes of this Section 8 by giving 15 days' prior notice to the other party hereto.

9. Severability. If any term or provision of this Agreement or the application hereof to any person or circumstances shall to any extent be invalid or unenforceable, the remainder of this Agreement or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

10. Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

11. Governing Law. This Agreement has been executed and delivered in the State of New York and shall in all respects be governed by, and construed and enforced in accordance with, the laws of the State of New York, including all matters of construction, validity and performance, and without taking into consideration the conflict of law provisions of such state.

12. Effect of Agreement; Entire Agreement. The Company and the Employee understand and agree that this Agreement is intended to reflect their agreement only with respect to payments and benefits upon termination in certain cases and is not intended to create any obligation on the part of

either party to continue employment. This Agreement supersedes any and all other oral or written agreements or policies made relating to the subject matter hereof and constitutes the entire agreement of the parties relating to the subject matter hereof; provided that this Agreement shall not supersede or limit in any way Employee's rights under any benefit plan, program or arrangements in accordance with their terms.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed, all as of the date first written above.

RMA WIDGETS, INC.

By

_____

Janet Doe

Its Vice President, Human Resources

_____

Employee, _____

APPENDIX 1-B: BEFORE, ANNOTATED

TERMINATION AGREEMENT[1]

This Agreement[2] is made[3] as of[4] _____, 20 __, between RMA WIDGETS, INC., a Delaware corporation, with its principal offices at 500 Third Avenue, Suite 400, New York, New York 10022[5] (the "Company")[6] and _____("Employee")[7], residing at _____.[8]

WITNESSETH THAT:[9]

WHEREAS,[10] this Agreement is intended to specify the financial arrangements that the Company will provide to the Employee[11] upon Employee's separation from employment with the Company under any of the circumstances described herein; and

WHEREAS, this Agreement is entered into by the Company in the belief that it is in the best interests of the Company and its shareholders to provide stable conditions of employment for Employee notwithstanding the possibility, threat or occurrence of certain types of change in control, thereby enhancing the Company's ability to attract and retain highly qualified people.[12]

NOW, THEREFORE,[13] to assure the Company that it will have the continued dedication of Employee notwithstanding the possibility, threat or occurrence of a bid to take over control of the Company, and to

induce Employee to remain in the employ of the Company,[14] and for other good and valuable consideration,[15] the Company and Employee agree as follows:

1.[16] Term of Agreement[17]. The term of this Agreement shall[18] commence on the date hereof as first written above[19] and shall[18] continue in effect through December 31, 20_ [year of execution][20]; provided that[21] commencing on January 1, 20_ [year following year of execution] and each January 1 thereafter,[22] the term of this Agreement shall[18] automatically be extended for one additional year unless not later than twelve months[23] prior to[24] such[25] January 1, the Company shall have given notice[26] to Employee that it does not wish to extend this Agreement (which notice may not, in any event, be given sooner than January 1, 20_ [year following year of execution] such that this Agreement may not terminate prior to December 31, 20_ [year following year of execution])[27]; and provided, further, that[28] notwithstanding[29] any such notice by the Company not to extend, this Agreement shall[18] automatically continue in effect for a period of 24 months beyond the then current term[30] if a Change in Control (as defined in Section[31] 3(i) hereof[32])[33] shall have occurred[34] during such[25] term.[35]

2. Termination of Employment[36]

(i) Prior to a Change in Control. Prior to[24] a Change in Control (as defined in Section 3(i) hereof), the Company may terminate Employee from employment with the Company at will, with or

without Cause (as defined in Section 3(iii) hereof), at any time[37].

(ii) After a Change in Control

(a) From and after[38] the date of a Change in Control (as defined in Section 3(i) hereof) during the term of this Agreement,[39] the Company shall not terminate Employee from employment with the Company except as provided in this Section 2(ii)[40] or as a result of Employee's Disability (as defined in Section 3(iv) hereof) or his[41] death.

(b) From and after the date of a Change in Control (as defined in Section 3(i) hereof) during the term of this Agreement,[39] the Company shall have the right to[42] terminate Employee from employment with the Company at any time[37] during the term of this Agreement[39] for Cause (as defined in Section 3(iii) hereof), by written notice[43] to the Employee, specifying the particulars of the conduct of Employee forming the basis for such[25] termination.

(c) From and after the date of a Change in Control (as defined in Section 3(i) hereof) during the term of this Agreement: (x) the Company shall have the right to[42] terminate Employee's employment without Cause (as defined in Section 3(iii) hereof), at any time[37]; and (y) the Employee shall, upon the occurrence of such a termination by the Company without Cause, or upon the voluntary termination of Employee's employment by Employee for Good Reason (as defined in Section 3(ii) hereof), be entitled to receive[44] the benefits provided in Section

4 hereof.[40] Employee shall evidence[45] a voluntary termination for Good Reason by written notice[43] to the Company given within[46] 60 days after the date as of which the Employee knows or should reasonably have known an event has occurred which constitutes Good Reason for voluntary termination. Such[25] notice need only[47] identify the Employee and set forth in[48] reasonable detail the facts and circumstances claimed by Employee to constitute Good Reason.[49]

[50]Any notice given by Employee pursuant to[51] this Section 2 shall[18] be effective[52] five business days after the date it is given by Employee.

3.[53] Definitions[54]

(i)[55] A[56] "Change in Control"[57] shall[18] mean[58]:

(a) a change in control[59] of a nature[60] that would be required to be reported in response to[61] Item 6(e) of Schedule 14A of Regulation 14A promulgated under the Securities Exchange Act of 1934, as amended[62] (the "Exchange Act")[63], or successor provision thereto[64], whether or not the Company is then subject to such[25] reporting requirement;

(b) any "person"[65] (as such[25] term is used in Sections 13(d) and 14(d) of the Exchange Act) is or becomes the "beneficial owner"[65] (as defined in Rule 13d-3 promulgated under the Exchange Act), directly or indirectly, of securities of the Company representing 35% or more of the combined voting power of the Company's then outstanding securities;

(c) the Continuing Directors (as defined in Section 3(v) hereof) cease to constitute a majority of the Company's Board of Directors[66]; provided that[67] such change is the direct or indirect result[68] of a proxy fight[69] and contested election or elections[70] for positions on the Board of Directors; or

(d) the majority of the Continuing Directors (as defined in Section 3(v) hereof) determine in their sole and absolute[71] discretion[72] that there has been a change in control of the Company.

(ii) "Good Reason" shall[18] mean[58] the occurrence of any of the following events[73], except for the occurrence of such an event in connection with the[74] termination or reassignment of Employee's employment by the Company for Cause (as defined in Section 3(iii) hereof), for Disability[75] (as defined in Section 3(iv) hereof) or for death:

(a) the assignment[76] to Employee of employment responsibilities which[77] are not of comparable responsibility and status as the employment responsibilities held by Employee[78] immediately prior to[24] a Change in Control;

(b) a reduction[76] by the Company in Employee's base salary as in effect immediately prior to a Change in Control;

(c) an amendment or modification[76] [79] of the Company's incentive compensation program (except as may be required by applicable law)[80] which affects the terms or administration of the program in a manner adverse to the interest of Employee as

compared to the terms and administration of such[25] program immediately prior to a Change in Control;

(d) the Company's requiring[76] Employee to be based anywhere other than within 50 miles of[81] Employee's office location[76] immediately prior to a Change in Control, except for requirements of[82] temporary travel on the Company's business to an extent substantially[83] consistent with Employee's business travel obligations immediately prior to a Change in Control;

(e) except to the extent otherwise required[84] by applicable[85] law, the failure[76] by the Company to continue in effect[86] any benefit[87] or compensation plan, stock ownership plan, stock purchase plan, bonus plan, life insurance plan, health-and-accident plan or disability plan in which Employee is participating immediately prior to a Change in Control (or plans providing Employee with substantially[83] similar benefits), the taking[76] of any action by the Company which[77] would adversely affect Employee's participation in, or materially[88] reduce Employee's benefits under, any of such plans or deprive Employee of any material[89] fringe benefit enjoyed by Employee immediately prior to such[25] Change in Control, or the[74] failure by the Company to provide Employee with the number of paid vacation days to which Employee is entitled immediately prior to such[25] Change in Control in accordance with the Company's vacation policy as then in effect; or

(f) the failure[76] by the Company to obtain, as specified in Section 5(i) hereof, an assumption[76] of the obligations of the Company to perform this Agreement by any successor to the Company[90].

(iii) "Cause" shall[18] mean[58] termination by the Company of Employee's employment based upon[91] (a) the willful[92] and continued failure by Employee substantially[83] to perform his[41] duties[93] and obligations (other than any such failure resulting from his incapacity due to physical or mental illness or any such actual or anticipated failure resulting from Employee's termination[76] for Good Reason) or (b) the willful engaging by Employee in misconduct which[77] is materially[94] injurious to the Company, monetarily or otherwise. For purposes of this Section 3(iii) [95], no action or failure to act on Employee's part shall[18] be considered "willful" unless done, or omitted to be done, by Employee in bad faith and without reasonable belief that his action or omission was in the best interests of the Company.

(iv) "Disability" shall mean any physical or mental condition which would qualify Employee for a disability benefit under the Company's long-term disability plan.[96]

(v) "Continuing Director" shall[18] mean any person who is a member of the Board of Directors[66] of the Company[97], while such[25] person is a member of the Board of Directors,[98] who is not an Acquiring Person (as hereinafter defined) or an Affiliate or Associate (as hereinafter defined)[99] of an Acquiring

Person, or a representative of an Acquiring Person or of any such Affiliate or Associate, and who (a) was a member of the Board of Directors on the date of this Agreement as first written above[100] or (b) subsequently becomes a member of the Board of Directors, if such[25] person's initial nomination for election or initial election to the Board of Directors is recommended or approved by a majority of the[101] Continuing Directors[102]. For purposes of this Section 3(v): "Acquiring Person"[103] shall[18] mean any "person"[65] (as such[25] term is used in Sections 13(d) and 14(d) of the Exchange Act) who or which, together with all Affiliates and Associates[99] of such[25] person, is the "beneficial owner" (as defined in Rule 13d-3 promulgated under the Exchange Act) of 20% or more of the shares of Common Stock[104] of the Company[97] then outstanding, but shall[18] not include the Company, any subsidiary of the Company or any employee benefit plan of the Company or of any subsidiary of the Company or any entity holding shares of Common Stock[104] organized, appointed or established for, or pursuant to[51] the terms of, any such plan; and "Affiliate" and "Associate" shall have the respective meanings ascribed to such[25] terms in Rule 12b-2 promulgated under the Exchange Act.[105]

4. Benefits upon Termination under Section 2(ii)(c)[106]

(i)[107] Upon the termination[76] (voluntary or involuntary) of the employment of Employee pursuant to Section 2(ii)(c) hereof,[108] Employee

shall be entitled to receive[44] the benefits specified in this Section 4.[109] The amounts due to Employee under subparagraphs (a), (b) and (c) of this Section 4(i)[109] shall be paid[110] to Employee not later than one business day prior to[24] the date that[111] the[74] termination of Employee's employment becomes effective. All benefits to Employee pursuant to this Section 4(i) shall[18] be subject to any applicable payroll or other taxes required by law to be withheld.

(a) The Company shall pay to Employee any and all[112] amounts payable[113] to Employee pursuant to[51] any standard or general[114] severance policy of the Company or its Board of Directors;[115]

(b) In lieu of[116] any further base salary payments to Employee for periods subsequent to[117] the date that the termination of Employee's employment becomes effective, the Company shall pay as severance pay to Employee a lump-sum cash[118] amount equal to twenty-four (24)[119] times the Employee's monthly base salary (as in effect in the month preceding the month in which the termination becomes effective or as in effect in the month preceding the Change in Control, whichever is higher);

(c) The Company shall also pay to Employee all legal fees and expenses incurred by Employee as a result of such[25] termination of employment (including all fees and expenses, if any, incurred by Employee in seeking to obtain or enforce any right or benefit provided to Employee by this Agreement whether by arbitration or otherwise); and

(d) Any and all[112] contracts, agreements or arrangements[120] between the Company and Employee prohibiting or restricting the Employee from owning, operating, participating in, or providing employment or consulting services to, any business or company competitive with[121] the Company at any time or during any period after the date the termination of Employee's employment becomes effective[122], shall be deemed terminated[123] and of no further force or effect[124] as of the date[125] the[74] termination of Employee's employment becomes effective, to the extent, but only to the extent[126], such[25] contracts, agreements or arrangements so prohibit or restrict the Employee; provided that[127] the foregoing provisions shall[18] not constitute a license or right to use any proprietary[128] information of the Company and shall[18] in no way affect any such contracts, agreements or arrangements insofar as they relate to nondisclosure and nonuse of proprietary information of the Company notwithstanding the fact that[129] such nondisclosure and nonuse may[130] prohibit[131] or restrict the Employee in certain competitive[132] activities.

(ii) Employee shall[18] not be required to mitigate the amount of any payment provided for in this Section 4 by seeking other employment or otherwise.[133] The amount of any payment or benefit provided in this Section 4 shall[18] not be reduced by any compensation earned by Employee as a result of any employment by another employer or from any other source.

(iii)[134] In the event that[135] any payment or benefit received or to be received by Employee in connection with a Change in Control of the Company[136] or termination of Employee's employment (whether payable[137] pursuant to[51] the terms of this Agreement or pursuant to[51] any other plan, contract, agreement or arrangement[138] with the Company, with any person whose actions result in a Change in Control of the Company[136] or with any person constituting a member of an "affiliated group" as defined in Section 280G(d)(5) of the Internal Revenue Code of 1986, as amended[62] (the "Code"), with the Company or with any person whose actions result in a Change in Control of the Company[136] [139] (collectively, the "Total Payments"[140])) would be subject to the excise tax imposed by Section 4999 of the Code or any interest, penalties or additions to tax with respect to such[25] excise tax (such excise tax, together with any such interest, penalties or additions to tax, are collectively referred to as[141] the "Excise Tax"), then Employee shall be entitled to receive[44] from the Company an additional cash payment (a "Gross-Up Payment") in an amount such that after payment by Employee of all taxes (including any interest, penalties or additions to tax imposed with respect to such taxes), including any Excise Tax, imposed upon the Gross-Up Payment, Employee would retain an amount of the Gross-Up Payment equal to the Excise Tax imposed upon[142] the Total Payments, as determined in accordance with the provisions of[143] this Section 4(iii).

(a) All determinations required to be made[144] under this Section 4(iii), including whether a Gross-Up Payment is required and the amount of such[25] Gross-Up Payment, shall be made by[145] the independent accounting firm retained by the Company[146] on the date of the Change in Control (the "Accounting Firm"[147]). The Accounting Firm shall[145] provide detailed supporting calculations of its determination to both the Company and the Employee within[46] 15 business days of the Employment Termination Date[148], or at such earlier time as is requested by the Company[149]. For purposes of determining the amount of any tax pursuant to[51] this Section 4(iii), the Employee's tax rate shall be deemed[18] to be the highest statutory marginal state and Federal tax rate (on a combined basis and including the Employee's share of F.I.C.A. and Medicare taxes) then in effect.

(b) Employee shall in good faith[150] cooperate with the Accounting Firm in making[151] the determination of[76] whether a Gross-Up Payment is required, including but not limited to[152] providing the Accounting Firm with information or documentation as reasonably requested by the Accounting Firm[153]. A determination by the Accounting Firm regarding whether a Gross-Up Payment is required and the amount of such[25] Gross-Up Payment shall[18] be conclusive and binding upon[76] the Employee and the Company for all purposes[154].

(c) A Gross-Up Payment required to be made pursuant to this Section 4(iii)[155] shall be paid[110] to

Employee within[46] 30 days of a final determination[156] by the Accounting Firm that the Gross-Up Payment is required. Employee and Company shall report all amounts paid to Employee on their respective tax returns consistent with the determination of the Accounting Firm.

(d) The Company and the Employee shall promptly deliver to each other copies of any written communications, and summaries of any oral communications, with any tax authority regarding the applicability[76] of Section 280G or 4999 of the Code to any portion of the Total Payments. In the event of any controversy with the Internal Revenue Service or other tax authority regarding the applicability of Section 280G or 4999 of the Code to any portion of the Total Payments[157], Company shall have the right[42], exercisable in its sole discretion,[72] to control the resolution of such controversy at its own expense. Employee and the Company shall in good faith[150] cooperate in the resolution[76] of such[25] controversy.

(e) If the Internal Revenue Service or any tax authority makes a final determination[156] that a greater Excise Tax should be imposed upon the Total Payments than is determined by the Accounting Firm or reflected in the Employee's tax return pursuant to[51] this Section, the Employee shall be entitled to receive[44] from the Company the full Gross-Up Payment calculated on the basis of the amount of Excise Tax determined to be payable[113] by such[25] tax authority. That amount shall be paid[110]

to the Participant within[46] 30 days of the date of such[25] final determination[156] by the relevant tax authority[158].

5. Successors and Binding Agreement[159]

(i) The Company will[160] require any successor (whether direct or indirect, by purchase, merger, consolidation or otherwise[161] to all or substantially[83] all of the business and/or assets[162] of the Company[97]), by agreement in form and substance[163] satisfactory to Employee, to expressly[164] assume and agree to perform this Agreement[165] in the same manner and to the same extent that the Company would be required to perform it if no such succession had taken place. Failure[76] of the Company to obtain such[166] agreement prior to the effectiveness of[76] any such succession shall[18] be a breach of this Agreement and shall[18] entitle Employee[167] to compensation from the Company in the same amount and on the same terms as Employee would be entitled hereunder if employee terminated Employee's employment after a Change in Control for Good Reason, except that for purposes of implementing the foregoing, the date on which any such succession becomes effective shall[18] be deemed the date that the termination of Employee's employment becomes effective.[168] As used in this Agreement, "Company" shall mean the Company and any successor to its business and/or assets[162] which executes and delivers[169] the agreement provided for in this Section 5(i) or which otherwise becomes bound by all the terms and

provisions[170] of this Agreement by operation of law.[171]

[172](ii) This Agreement is personal to Employee[173], and Employee may not[174] assign or transfer any part[175] of Employee's rights or duties hereunder, or any compensation due to Employee hereunder,[176] to any other person. Notwithstanding the foregoing,[177] this Agreement shall inure to the benefit of and be enforceable by[178] Employee's personal or legal representatives, executors, administrators, heirs, distributees, devisees and legatees[179].

6. Arbitration.[180]Any dispute or controversy arising under or in connection with[181] this Agreement shall be settled[153] exclusively[154] by arbitration in the Borough of Manhattan, in accordance with the applicable rules of the American Arbitration Association then in effect. Judgment may be entered[182] on the arbitrator's award in any court having jurisdiction.

7. Modification; Waiver. No provisions of this Agreement may be modified, waived or discharged[183] unless such[25] waiver, modification or discharge is agreed to in a writing signed by Employee and such[184] officer as may[130] be specifically[185] designated by the Board of Directors[66] of the Company. No waiver by either party hereto[186] at any time[37] of any breach by the other party hereto[186] of, or compliance with, any condition or provision[187] of this Agreement to be performed[188] by such other party shall be deemed[189] a waiver of similar or dissimilar[190] provisions or

conditions at the same or at any prior or subsequent time.[154]

8. Notice.[191] All notices, requests, demands and all other communications required or permitted by either party to the other party by this Agreement (including, without limitation, any notice of termination of employment and any notice of intention to arbitrate) shall be in writing and shall be deemed to have been duly given when delivered personally or received by certified or registered mail, return receipt requested, postage prepaid, at the address of the other party, as first written above (directed to the attention of the Board of Directors and Corporate Secretary in the case of the Company). Either party hereto may change its address for purposes of this Section 8 by giving 15 days' prior notice to the other party hereto.

9. Severability.[192] If any term or provision[193] of this Agreement or the application hereof[194] to any person or circumstances shall[18] to any extent be invalid or unenforceable, the remainder of this Agreement or the application of such[25] term or provision[193] to persons or circumstances other than those as to which it is held invalid or unenforceable[195] shall[18] not be affected thereby, and each term and provision[193] of this Agreement shall[18] be valid and enforceable[196] to the fullest extent permitted by law.

10. Counterparts. This Agreement may be executed[197] in several counterparts, each of which shall[18] be deemed an original, but all of which

together shall[18] constitute one and the same[198] instrument.

11. Governing Law.[199] This Agreement has been executed and delivered in the State of New York and shall in all respects be governed by, and construed and enforced in accordance with, the laws of the State of New York, including all matters of construction, validity and performance, and without taking into consideration the conflict of law provisions of such state.

12. Effect of Agreement; Entire Agreement. The Company and the Employee understand and agree that[200] this Agreement is intended to reflect their agreement only with respect to payments and benefits upon termination in certain cases and is not intended to create any obligation on the part of either party to continue employment.[201] This Agreement supersedes any and all[112] other oral or written agreements or policies made relating to the subject matter hereof[202] and constitutes the entire agreement of the parties relating to the subject matter hereof; provided that[203] this Agreement shall[18] not supersede or limit in any way[204] Employee's rights under any benefit plan, program or arrangements[205] in accordance with their terms[206].

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed, all as of the date first written above.[207]

RMA WIDGETS, INC.[208]

By _____
Janet Doe
Its Vice President, Human Resources

_____[209]
Employee,

_____

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[1] For the font, use Calibri instead of Times New Roman (see 16.2–9).

[2] Don't use a capital *A* in references to "this agreement"; see 2.110.

[3] Use instead "is dated"; see 2.20.

[4] Using *as of* with a date in the introductory clause is a loose convention used to indicate that one or more parties signed the agreement on a date other than the date stated in the introductory clause. This manual recommends not using *as of* dates (see 2.33). Furthermore, it doesn't make sense to use an *as of* date in a template.

[5] It's unnecessary to state in the introductory clause the address of a party that's a legal entity. To distinguish a U.S. legal-entity party from any other entity sharing the same name, it's sufficient to state that the Company is a Delaware corporation (see 2.68).

[6] In this context, it would make the contract easier to read if you were to use as the defined term for

RMA Widgets a name based on that party's name rather than "the Company" (see 2.95).

[7] Because this is a template that is to be used in transactions with different employees, it's appropriate to use the defined term "Employee" (see 2.91–92). But using the definite article *the* with the defined term would render the prose a little less stilted (see 2.98).

[8] In the case of a party that's an individual, in the U.S. stating that party's address is usually the simplest way to distinguish him or her from any other person bearing the same name. But if, as in this case, the contract contains a notices provision, nothing would be served by stating an address twice in the same contract—leave the address out of the introductory clause (see 2.69).

[9] "WITNESSETH" is archaic (see 2.123).

[10] In this context, "WHEREAS" is archaic (see 2.128).

[11] The defined term is "Employee", but this contract refers sporadically to "the Employee". Be consistent (see 2.98).

[12] These recitals would be improved by making them more concise.

[13] "NOW, THEREFORE" is an archaism (see 2.150).

[14] Buried in the lead-in is a purpose recital (see 2.118). It would be clearer to state it as a separate recital.

[15] Use the *MSCD* form of lead-in (see 2.145) and eliminate the traditional recital of consideration (see 2.149–64).

[16] Use the *MSCD* enumeration scheme, "sections" version.

[17] To emphasize section headings, use bold rather than underlining (see 4.15–16).

[18] This is language of policy, so "shall" is inappropriate (see 3.243).

[19] It's sufficiently obvious that a contract becomes effective once the parties have signed it that nothing is gained by saying so. And "the date hereof as first written above" is archaic.

[20] It's misleading to say that the initial term ends on December 31 of the year of execution (in other word, the year the contract is signed). The proviso that follows says that the agreement will automatically be extended for an additional year unless at least 12 months before the beginning of the new term the Company notifies Employee that it doesn't want to renew. Because it would be impossible for the Company to give 12 months' notice to prevent the contract from being extended for an additional year commencing January 1 of the year following the year the contract is signed—the end of the year the contract is signed will always be

less than 12 months away—it's inevitable that the agreement will renew for at least one year. It would be clearer to have the initial term run through December 31 of the year after the year the contract is signed.

[21] Using "provided that" is an imprecise way to signal the relationship between two conjoined contract provisions (see 13.542). In this case, the provision that follows "provided that" can stand on its own.

[22] The phrase "commencing on . . . and each January 1 thereafter" is unnecessary.

[23] In this context, "one year" would be the simpler and therefore better choice.

[24] *Prior to* is a lawyerism; use instead *before* (see 17.14).

[25] Don't use *such* instead of the "pointing words" *the*, *this*, *that*, *there*, or *those* (see 13.636).

[26] The clause beginning "unless" is a conditional clause. The present perfect tense (*has given*) would be acceptable in this context, but the present tense (*gives*) is the simpler choice, as it works in all contexts (see 3.252). Using "shall" isn't appropriate, as no duty is being expressed (see 3.253).

[27] This parenthetical is redundant, because notice given sooner than January 1 of the year following the year in which the contract is signed would in any

event be ineffective to prevent the contract from being extended for an additional year. See note 20.

28 *Provided, further, that* suffers from the same shortcomings as *provided that* (see note 21). In this case, the provision that follows "provided, further, that" can stand on its own.

29 There's always a clearer alternative to *notwithstanding* (see 13.468).

30 In this context, "will automatically be extended by two years" would be more concise.

31 Don't use a capital *S* in *section* (see 17.26).

32 Don't use *hereof* after cross-references (see 4.92).

33 This sort of parenthetical is an inefficient way of cross-referencing, particularly when used to excess, as in this contract (see 6.87–90).

34 The clause beginning "if" is a conditional clause, so the present perfect tense (*has occurred*) would be acceptable in this context, but the present tense (*occurs*) would be the simpler choice, as it works in all contexts (see 3.252). Using "shall" isn't appropriate, as no duty is being expressed (see 3.253).

35 It's not clear whether after a two-year extension the agreement would be subject to further one-year extensions.

[36] Taken together, the elements of section 2 in effect state that both before and after occurrence of a Change in Control the Company may terminate Employee for any reason. Section 2 would be much clearer if it were rewritten to say exactly that. One would also need to retain the notification requirements that apply if the Company terminates for Cause or Employee terminates for Good Reason.

[37] The phrase "at any time" is redundant (see 3.197).

[38] It's redundant to use both "from" and "after".

[39] In this context, the phrase "during the term of this Agreement" is redundant (see 13.177).

[40] Stating that certain rights or obligations are as stated elsewhere in a contract is a reliable sign of inefficient structure.

[41] Because this is a template that is to be used in transactions with different employees, it would be best to use gender-neutral language (see 17.12).

[42] This is language of discretion rather than language of obligation, so use "may" instead of "shall have the right to" (see 3.142).

[43] If the notices provision says that all notices must be in writing, elsewhere you can simply use "notice" rather than "written notice".

[44] Use of *is entitled to* and *receive* obscures who has the duty (see 3.121, 3.122). Use instead

language of obligation imposing the duty on the Company (see 3.46).

45 Instead of imposing on Employee an obligation give notice of termination for Good Reason, it would make more sense to have it be a condition.

46 Use instead "no later than" (see 10.49).

47 Using "need only" isn't the clearest way to express a condition (see 3.266).

48 *Set forth in* is a lawyerism (see 17.14).

49 What constitutes proper notice could be stated more succinctly.

50 With only a few exceptions, all text in the body of the contract should be enumerated (see 4.21). This sentence doesn't constitute one of the exceptions. But more to the point, it would be more efficient to integrate this sentence with the rest of this section.

51 Don't use the lawyerism *pursuant to* (see 17.14).

52 It would be clearer to say that termination, rather than the notice, will be effective after five business days.

53 Because the defined terms are interrelated, relatively lengthy, and are used in three different sections, it would make sense to collect the definitions as autonomous definitions within a separate section (see 6.62). And because the defined terms don't have a universally accepted meaning, it

would be best to place them "on site" rather than tucking them at the end of the contract (see 6.64). So retain the section containing definitions—which is more modest in scope than a conventional definition section (see 6.63)—and move it further back in the contract, but not to the end.

54 Add introductory language (see 6.17).

55 Nothing is gained by enumerating the autonomous definitions in a section composed entirely of autonomous definitions (see 6.18).

56 Omit the indefinite article (see 6.16).

57 Put in alphabetical order the autonomous definitions in a section composed entirely of autonomous definitions (see 6.18).

58 *Refers to* would be a better definitional verb, because in this case the defined term isn't equivalent to all elements of the definition (see 5.22).

59 This defined term refers only to changes in control of the Company, so add "of the Company".

60 The phrase "of a nature" is redundant.

61 Awkward wording.

62 The "as amended" is unnecessary (see 13.33).

63 Don't include an integrated definition within an autonomous definition (see 6.38).

64 The "thereto" is unnecessary.

65 The quotation marks are unnecessary.

66 Don't use initial capitals in *board of directors* (see 17.22).

67 Instead of stating a general proposition, then narrowing it by means of a proviso, it would be more logical to make the proposition narrower. To do that, put first what had been the proviso, but have it begin "as a result of".

68 "Direct or indirect result" is an example of needless elaboration (see 1.55). Refer just to "result" or be more specific.

69 The reference to "a proxy fight" is redundant, because a proxy fight entails a contested election.

70 The formula *one or more Xs* is simpler than *X or Xs* (see 13.753).

71 This is rhetorical emphasis (see 1.60).

72 Either this is redundant or it represents a problematic attempt to skirt the implied duty of good faith (see 3.168–96).

73 Each element of this definition relates to a Change of Control. It would make those elements more concise if the reference to Change of Control were moved to the introductory language.

74 The "the" is extraneous (see 17.27).

75 Once section 2 is cleaned up, this is the only place where the concept of disability is referred to. Rather than create a defined term that is used only once, incorporate the definition here and eliminate the defined term.

[76] Use a verb rather than a "buried verb" (see 17.7).

[77] Use "that" instead of "which" (see 12.41).

[78] Awkward wording.

[79] The "or modification" is redundant.

[80] Move this phrase to the beginning of this element, eliminating the parentheses.

[81] It would be more direct and concise to say "more than 50 miles from".

[82] Awkward wording.

[83] *Substantially* is both vague and imprecise (see 13.621–23). But it's retained in appendix 1-C, as replacing it wherever it occurs would require extensive changes.

[84] Saying "except as required" would be more concise.

[85] In references to *applicable law*, the *applicable* is redundant (see 13.14).

[86] The "in effect" is redundant.

[87] The following plans all constitute employee benefit plans; revise accordingly.

[88] *Materially* is ambiguous, as is *material* (used later in the sentence), so use unambiguous language instead (see 9.3).

[89] See note 88.

[90] The "to the Company" is redundant.

[91] Because "Cause" is used only in the phrase "termination for Cause", there's no need to refer to termination when defining "Cause".

[92] Don't use *willful*—it's ambiguous (see 13.761).

[93] The reference to "duty" is redundant (see 16.11).

[94] The "materially" is ambiguous, so use unambiguous language instead (see 8.3).

[95] Say instead that it's for purposes of this definition.

[96] This defined term is unnecessary (see note 75).

[97] Use the possessive (see 17.20).

[98] The immediately preceding phrase is unnecessary.

[99] Don't make these defined terms. Instead, say in parentheses that they have the meaning given them in the statute.

[100] "First written above" is archaic and imprecise.

[101] Insert "then".

[102] Reverse the order of the "(a)" and "(b)" enumerated clauses, to make clear that the modifiers after the "(b)" enumerated clause don't also modify the "(a)" enumerated clause (see 12.9).

[103] State this as a separate definition.

104 Don't use initial capitals (see 17.25).

105 Delete the definitions of "Affiliate" and "Associate" (see note 99).

106 It's odd to include a cross-reference in a section heading.

107 The enumeration in this section is unhelpful—because the *(i)* hierarchy has the same layout as the *(a)* hierarchy, the reader cannot determine based on layout alone which takes precedence.

108 State what kind of termination entitles Employee to benefits, rather than relying on a cross-reference.

109 Instead of referring indirectly to the benefits, say what they are.

110 Use the active rather than the passive voice to express an obligation (see 3.113).

111 Using "the date that" is redundant.

112 Eliminate redundancy by using one or other word in this traditional couplet (see 1.42).

113 *Payable* is a feature of "passive-type policies" (see 3.244). Rephrase this to make clear that it is a duty that is being referred to.

114 The word "standard" adds nothing.

115 It's sufficient to refer to a severance policy of the Company.

[116] A lawyerism; replace with *instead of* (see 17.14).

[117] A lawyerism; use instead *after* (see 17.14).

[118] The words "lump-sum cash" are redundant (see 13.385).

[119] For numbers over ten, use digits only (see 14.9).

[120] Eliminate the redundancy by using only "agreements" (see 1.42).

[121] "Competitive" means "likely to succeed in competition"; use instead "that competes with" (see 13.93).

[122] Make this more concise.

[123] *Deem* serves to establish a legal fiction. Here, the parties don't need to rely on a legal fiction; they can instead just say that the contracts in question will terminate (see 13.141).

[124] The phrase "and of no further force or effect" is redundant.

[125] Say instead "when".

[126] Eliminate the rhetorical emphasis—say "but only to the extent" (see 1.60).

[127] *Provided that* is an imprecise way to signal the relationship between two conjoined contract provisions (see 13.541). In this case, Employee

could simply acknowledge, in a separate provision rather than a proviso, the limitations in question.

128 Because the concern here is confidentiality, use the word "confidential" instead of "proprietary" (see 13.538).

129 Saying "notwithstanding the fact that" is wordy; use instead "even if".

130 This "may" is unnecessary (see 3.335).

131 Nondisclosure or nonuse can't prohibit anything—"prevent" would be a better word.

132 "Competitive" is the wrong word to use, as it means "likely to succeed in competition" (see 13.93).

133 Express more concisely.

134 Carve out the rest of this section as a separate section with the heading "Gross-up Payment."

135 This is a lawyerism; instead use "if" (see 17.14).

136 The defined term is "Change of Control" and it's defined with respect to the Company, so "of the Company" is superfluous (see 6.94).

137 *Payable* is a potentially confusing word (see note 113) so it's best to avoid using it. Here, it can simply be omitted.

138 Eliminate the redundancy by using just "agreement" (see 1.42).

[139] The immediately preceding phrase is superfluous, in that it also occurs earlier in the parenthetical.

[140] This provision would be easier to read if "Total Payments" were defined using an autonomous definition rather than an integrated definition, and if a more informative defined term were used.

[141] Wordy; replace everything in these parentheses up to this point with "collectively".

[142] Use "on"; *upon* is best used to refer only to the simultaneous occurrence of events.

[143] The phrase "the provisions of" is redundant.

[144] The phrase "to be made" is redundant.

[145] Don't use "shall"—the Accounting Firm isn't a party and so isn't assuming any obligations (see 3.119).

[146] Make it an obligation of the Company to retain an accounting firm.

[147] This defined term doesn't add enough value to offset the cost of adding another defined term to the contract (see 6.91).

[148] This term isn't defined.

[149] The passive voice is unhelpful here (see 3.10). A good alternative to using the active voice would be to use "unless".

150 The reference to good faith is redundant, as good faith is inherent in the notion of parties cooperating (see 13.552).

151 This construction suggests, inappropriately, that Employee will be involved in "making the determination."

152 Omit "but not limited to" (see 13.264).

153 Use the active voice (see 3.10).

154 The phrase "for all purposes" is unnecessary.

155 It would be better to say "any Gross-Up Payment".

156 In this context it wouldn't be feasible to use a verb rather than the buried verb *determination* (see 17.7), in that "determine finally" would convey a different meaning than "final determination".

157 Needless repetition; instead say "in that regard".

158 The subsection would be more concise if the essence of the second sentence were incorporated into the first sentence.

159 Split this into two sections.

160 This is language of obligation; use *shall* (see 3.46).

161 This is where the closing parenthesis should be, not after "Company".

[162] Regarding *and/or*, see 11.73. Rather than saying "the business or assets or both," a simpler fix would be to omit "business" (see 1.42).

[163] *In form and substance* is redundant (see 13.216).

[164] Instead of using "expressly", state that the agreement has to be in writing.

[165] One doesn't assume or perform an agreement but rather obligations under that agreement.

[166] Use instead "any such".

[167] Use of "shall entitle" is a wordy and unclear way of expressing an obligation. Use instead language of obligation imposing the duty on the Company (see 3.46).

[168] The preceding sentence is unnecessary, as the definition of "Good Reason" includes breach by RMA of its obligations under this subsection. Move to the definition of "Good Reason" the part stating when termination for Good Reason will be deemed to have occurred.

[169] Use "enters into" instead of "executes and delivers" (see 13.194).

[170] Use "terms" instead of "terms and provisions" (see 13.672).

[171] This sentence is unnecessary.

[172] This is an appropriate place to put the "Definitions" section.

[173] To make this provision easier to read, make the preceding language a separate sentence.

[174] Because *may not* is ambiguous, *shall not* is a better choice for language of prohibition (see 3.224).

[175] The word "part" is redundant.

[176] Refer instead to assignment of rights and delegation of obligations.

[177] Use instead "except that", and join the second sentence to the first.

[178] Unnecessarily wordy and legalistic.

[179] Instead of stringing together somewhat obscure and overlapping terms of art, refer to receipt of property by will or intestate succession.

[180] In appendix 1-C, this section is replaced by one based on language proposed in Kenneth A. Adams, *The AAA Standard Arbitration Clause: Room for Improvement*, New York Law Journal, Mar. 9, 2010.

[181] "Arising under"—or rather "arising out of"—is sufficient (see 13.18).

[182] This instance of the passive voice is unobjectionable (see 3.13).

[183] It would be simpler to refer to amendment rather than modification, and the concept of discharge is both unnecessary and overbroad. And rather than expressing this sentence as a prohibition, it would make more sense to address effectiveness

of any amendment or waiver. (Regarding confusion between obligations and conditions, see 3.263.)

184 In this context, use "any" instead of "such".

185 Delete "specifically"—it's an example of rhetorical emphasis (see 1.60).

186 The "hereto" is unnecessary, as it would be unreasonable to think that without it this would constitute a reference to parties to some other agreement (see 2.102).

187 Be more specific—use "obligation" instead of "provision".

188 You don't *breach*, *comply with*, or *perform* a condition, you *satisfy* it.

189 *Deem* serves to establish a legal fiction (see 13.141). Here, no legal fiction is required.

190 "Similar or dissimilar" is needless elaboration (see 16.24).

191 In appendix 1-C, this section is replaced by one developed for Koncision Contract Automation's confidentiality-agreement template. No annotations are offered, as addressing all the drafting issues raised by this section would clog things up.

192 In appendix 1-C, this section is replaced by a basic severability section, using language of intention (see 3.322), developed for Koncision Contract Automation's confidentiality-agreement template. It's not clear whether this kind of severability provision is helpful in this context, but

that analysis is beyond the scope of these annotations.

193 "Term" is redundant (see 1.42).

194 The phrase "or the application hereof" is redundant.

195 Eliminate the redundancy by using just "enforceable" (see 1.42).

196 "Valid" is redundant.

197 Language of policy (see 3.240) makes more sense here than language of discretion.

198 Eliminate redundancy by deleting "the same" (see 1.42).

199 In appendix 1-C, this section is replaced by one developed for Koncision Contract Automation's confidentiality-agreement template. No annotations are offered, as addressing all the drafting issues raised by this section would clog things up.

200 This is redundant, as the lead-in states that the parties are agreeing to everything in the body of the contract (see 3.18).

201 This concept is adequately addressed in the recitals.

202 Be restrained in using *here-* and *there-* words (see 13.260).

203 Use instead "except that" (see 13.541–45).

204 Delete “in any way”—it’s rhetorical emphasis (see 1.60).

205 The term “benefit plan” is by itself sufficiently broad.

206 The phrase “in accordance with their terms” is superfluous.

207 Use instead the *MSCD* form of concluding clause (see 5.4).

208 Use the *MSCD* form of signature block for companies (see 5.25 and sample 9).

209 Use the *MSCD* form of signature block for individuals (see 5.33 and sample 9).

APPENDIX 1-C: AFTER

TERMINATION AGREEMENT

This termination agreement is dated _____, 20__, and is between RMA WIDGETS, INC., a Delaware corporation ("**RMA**"), and _____, an individual (the "**Employee**").

The Employee is an employee of RMA. To give the Employee additional incentive to remain an employee of RMA, RMA wants to specify what payments, if any, RMA will be required to make to the Employee if RMA ceases to employ the Employee in the context of a change of control of RMA.

RMA and the Employee therefore agree as follows:

1. **Term.** The initial term of this agreement ends at midnight at the end of December 31, 20____ [year following year of this agreement]. The term of this agreement (consisting of the initial term and any one-year extensions in accordance with this section 1) will automatically be extended by consecutive one-year terms unless no later than one year before any such extension begins RMA notifies the Employee that it does not wish to extend this agreement. If a Change of Control occurs, then (1) any notice that RMA previously delivered in accordance with this section 1 that would preclude any extension commencing after the Change of Control will be deemed ineffective and (2) the term

of this agreement (consisting of the initial term and any one-year extensions in accordance with this section 1) will automatically be extended by two years and will then terminate without the possibility of automatic extension.

2. **Termination of Employment.** Each of RMA and the Employee may terminate the Employee's employment with RMA at any time and for any reason, except that (1) for RMA to terminate the Employee for Cause after a Change of Control occurs, RMA must notify the Employee of that termination and specify in reasonable detail the conduct of the Employee constituting the basis for termination for Cause, and (2) for the Employee to terminate for Good Reason after a Change of Control occurs, the Employee must, no later than 60 days after the date that the Employee knew or should reasonably have known of the one or more events or circumstances constituting the basis for termination for Good Reason, notify RMA of the Employee's termination for Good Reason and specify those events or circumstances in reasonable detail, and the Employee's termination will be effective five business days after the date that notice is delivered.

3. **Benefits on Termination.** (a) If after a Change of Control RMA terminates the Employee without Cause or the Employee terminates for Good Reason, then RMA shall pay the Employee, no later than one business day before termination of the Employee's employment becomes effective, the

following amounts, subject to any applicable payroll or other taxes that RMA is required by law to withhold:

(1) all amounts that RMA is required to pay the Employee under any general RMA severance policy;

(2) as severance instead of any further base salary for periods after the date that termination of the Employee's employment becomes effective, an amount equal to 24 times the Employee's monthly base salary (as in effect in the month preceding the month in which the termination becomes effective or as in effect in the month preceding the Change of Control, whichever is greater); and

(3) all legal fees and expenses that the Employee incurs as a result of termination of the Employee's employment, including any fees and expenses incurred by the Employee in seeking to obtain or enforce, including by arbitration, any right or benefit under this agreement.

(b) If after a Change of Control RMA terminates the Employee without Cause or the Employee terminates for Good Reason, then all agreements between RMA and the Employee prohibiting or restricting the Employee from owning, operating, participating in, or providing employment or consulting services to, after termination of the Employee's employment becomes effective, any business that competes with RMA will automatically terminate when termination of the

Employee's employment becomes effective, but only to the extent those contracts so prohibit or restrict the Employee. The Employee acknowledges that nothing in this section 3(b) constitutes a license to use any confidential information of RMA or affects any provisions of any such agreement regarding nondisclosure or nonuse of confidential information of RMA, even if any such nondisclosure and nonuse prevents the Employee from competing with RMA or interferes with the Employee's ability to do so.

(c) The Employee will not be required to mitigate the amount of any payment under this section 3, including by seeking other employment. The amount of any payment or benefit under this section 3 will not be reduced by any compensation the Employee earns from any other employment or from any other source.

4. **Gross-Up Payment.** (a) If any Employee Change-of-Control Payment would be subject to the excise tax imposed by section 4999 of the Code or any interest, penalties, or additions to tax with respect to that excise tax (collectively, the "**Excise Tax**"), then RMA shall pay the Employee an additional amount of cash (a "**Gross-Up Payment**") such that after the Employee pays all taxes (including any interest, penalties, or additions to tax imposed with respect to those taxes), including any Excise Tax, imposed on the Gross-Up Payment, the Employee would retain an amount of the Gross-Up Payment equal to the Excise Tax imposed on the

Total Payments, as determined in accordance with this section 4.

(b) On the day a Change of Control occurs, RMA shall retain an independent accounting firm. RMA shall cause the accounting firm to make all determinations required under this section 4 (including whether RMA is required to make a Gross-Up Payment and the amount of that Gross-Up Payment) and to provide detailed supporting calculations of each such determination to both RMA and the Employee no later than 15 business days after the date of termination of the Employee's employment, unless RMA requests that it does so sooner. For purposes of determining the amount of any tax in accordance with this section 4, the Employee's tax rate will be deemed to be the highest statutory marginal state and Federal tax rate (on a combined basis and including the Employee's share of FICA and Medicare taxes) then in effect.

(c) The Employee shall cooperate with the accounting firm as it determines whether a Gross-Up Payment is required, including by providing the accounting firm with any information or documentation that the accounting firm requests. The Employee and RMA will be bound by any determination by the accounting firm regarding whether a Gross-Up Payment is required and the amount of any Gross-Up Payment.

(d) RMA shall pay any Gross-Up Payment no later than 30 days after the accounting firm determines that RMA is required to make that

Gross-Up Payment. The Employee and RMA shall report any Gross-Up Payment on their respective tax returns consistent with the determination of the accounting firm.

(e) RMA and the Employee shall promptly deliver to each other copies of any written communications, and summaries of any oral communications, with any tax authority regarding whether section 280G or 4999 of the Code applies to any portion of the Total Payments. In the event of any controversy with the Internal Revenue Service or any other tax authority in that regard, RMA may elect to control, at its own expense, resolution of that controversy, and the Employee and RMA shall cooperate in resolving that controversy.

(f) If the Internal Revenue Service or any other tax authority makes a final determination that the Excise Tax to be imposed on the Total Payments is greater than was determined by the accounting firm or reflected in the Employee's tax return in accordance with this section 4, RMA shall, no later than 30 days after it receives notice of that determination, pay the Employee any additional amount required to ensure that RMA has paid the Employee a Gross-Up Payment calculated on the basis of the amount of Excise Tax that the tax authority determines must be paid.

5. **Successors.** By means of a written agreement satisfactory to the Employee, RMA shall require any successor (whether direct or indirect or by purchase, merger, consolidation, or otherwise) to all or

substantially all of RMA's assets to assume RMA's obligations under this agreement and agree to perform them in the same manner and to the same extent that RMA would have been required to if that succession had not taken place.

6. **Definitions.** For purposes of this agreement, the following definitions apply:

"**Acquiring Person**" means any person (as that term is used in sections 13(d) and 14(d) of the Exchange Act) that, together with all affiliates and associates (as those terms are defined in Rule 12b-2 promulgated under the Exchange Act) of that person, is the beneficial owner (as that term is defined in Rule 13d-3 promulgated under the Exchange Act) of 20% or more of the shares of RMA common stock then outstanding, but does not include RMA, any RMA subsidiary, any employee benefit plan of RMA or of RMA subsidiary, or any entity holding shares of RMA common stock that is organized, appointed, or established for, or in accordance with the terms of, any such plan.

"**Cause**" refers to (1) the Employee's intentional and continued failure to substantially perform the Employee's duties as employee (other than any such failure resulting from any physical or mental condition of the Employee or any such actual or anticipated failure resulting from the Employee's having terminated for Good Reason) or (2) the Employee's engaging in intentional misconduct that, from the perspective of a reasonable person in RMA's position, is sufficiently harmful to RMA,

monetarily or otherwise, as to merit attention, with any action or failure to act on the Employee's part not being considered intentional for purposes of clauses (1) and (2) of this definition if that action or failure to act was in good faith or if the Employee reasonably believed that the action or failure to act was in the best interests of RMA.

"**Change of Control**" refers to occurrence of any of the following events and circumstances:

(1) a change of control of RMA that falls within the scope of item 6(e) of Schedule 14A of Regulation 14A promulgated under the Exchange Act, or any successor provision, whether or not RMA is then subject to that reporting requirement;

(2) any person (as that word is used in sections 13(d) and 14(d) of the Exchange Act) is or becomes the beneficial owner (as defined in Rule 13d-3 promulgated under the Exchange Act), directly or indirectly, of securities of RMA representing 35% or more of the combined voting power of RMA's then outstanding securities;

(3) as the direct or indirect result of one or more contested elections for positions on RMA's board of directors, the Continuing Directors cease to constitute a majority of RMA's board of directors; and

(4) a majority of the Continuing Directors determine that a change of control of RMA has occurred.

"**Code**" means the Internal Revenue Code of 1986.

"**Continuing Director**" means any person who (1) is a member of RMA's board of directors, (2) is not at the same time an Acquiring Person or an affiliate or associate (as those terms are defined in Rule 12b-2 promulgated under the Exchange Act) of an Acquiring Person, or a representative of an Acquiring Person or of any such affiliate or associate, and (3) either (A) became a member of RMA's board of directors after the date of this agreement, if that person's initial nomination for election or initial appointment to RMA's board of directors was recommended or approved by a majority of the then Continuing Directors, or (B) was a member of RMA's board of directors on the date of this agreement.

"**Employee Change-of-Control Payment**" means any payment or benefit received or to be received by the Employee in connection with a Change of Control or termination of the Employee's employment (whether under this agreement or any other plan or agreement with RMA, any person whose actions result in a Change of Control, or any person constituting a member of an affiliated group, as that term is defined in section 280G(d)(5) of the Code).

"**Exchange Act**" means the Securities Exchange Act of 1934.

"**Good Reason**" refers to occurrence of any of the following events after a Change of Control (or, in the case of clause (8), in connection with a Change of Control), except in connection with termination

or reassignment of the Employee by RMA for Cause or in connection with the Employee's death or any physical or mental condition of the Employee that would permit the Employee to qualify for a disability benefit under RMA's long-term disability plan:

(1) RMA assigns the Employee employment responsibilities that, when compared to the Employee's responsibilities immediately before the Change of Control, are commensurate with reduced status or seniority or both;

(2) RMA reduces the Employee's base salary to below what it was immediately before the Change of Control;

(3) except as required by law, RMA amends RMA's incentive compensation program so as to affect the terms or administration of the program in a manner adverse to the interest of the Employee, as compared to the terms and administration of that program immediately before the Change of Control;

(4) except for purposes of temporary travel on RMA's business to an extent substantially consistent with such travel by the Employee during the period immediately before the Change of Control, RMA requires the Employee to be based more than 50 miles from where the Employee's office was located immediately before the Change of Control;

(5) except as required by law, RMA fails to continue any compensation plan, stock ownership plan, stock purchase plan, bonus plan, life insurance plan,

health-and-accident plan, disability plan, or other employee benefit plan in which the Employee is participating immediately before the Change of Control, or fails to implement plans providing the Employee with substantially similar benefits;

(6) except as required by law, and in each case to an extent that, from the perspective of a reasonable person in the Employee's position, is sufficiently important to merit attention, RMA takes any action that would adversely affect the Employee's participation in, or reduce the Employee's benefits under, any such plans or deprive the Employee of any fringe benefit enjoyed by the Employee immediately before the Change of Control;

(7) except as required by law, RMA fails to provide the Employee with the number of paid vacation days to which the Employee was entitled immediately before the Change of Control in accordance with RMA's vacation policy as then in effect; and

(8) RMA breaches its obligations under section 5, in which case RMA will be deemed to have terminated the Employee for Good Reason on the date on which the succession in question became effective.

7. **Assignment.** This agreement is personal to the Employee. The Employee shall not assign any of the Employee's rights or delegate any of the Employee's obligations under this agreement to any other person, other than by will or intestate succession.

8. **Arbitration.** As the exclusive means of initiating adversarial proceedings to resolve any dispute arising out of this agreement or termination of the Employee's employment with RMA, a party may demand that the dispute be resolved by arbitration administered by the American Arbitration Association in accordance with its commercial arbitration rules, and each party hereby consents to any such dispute being so resolved. Judgment on any award rendered in any such arbitration may be entered in any court having jurisdiction.

9. **Modification; Waiver.** No amendment of this agreement will be effective unless it is in writing and signed by the parties. No waiver of satisfaction of a condition or failure to comply with an obligation under this agreement will be effective unless it is in writing and signed by the party granting the waiver, and no such waiver will constitute a waiver of satisfaction of any other condition or failure to comply with any other obligation. To be valid, any document signed by RMA in according with this section 9 must be signed by an officer of RMA authorized to do so by RMA's board of directors.

10. **Notices.** (a) For a notice or other communication under this agreement to be valid, it must be in writing and delivered (1) by hand, (2) by a national transportation company, with all fees prepaid, or (3) by registered or certified mail, return receipt requested and postage prepaid

(b) Subject to section 10(d), a valid notice or other communication under this agreement will be effective when received by the party to which it is addressed. It will be deemed to have been received as follows:

(1) if it is delivered by hand, delivered by a national transportation company, with all fees prepaid, or delivered by registered or certified mail, return receipt requested and postage prepaid, upon receipt as indicated by the date on the signed receipt; and

(2) if the party to which it is addressed rejects or otherwise refuses to accept it, or if it cannot be delivered because of a change in address for which no notice was given, then upon that rejection, refusal, or inability to deliver.

(c) For a notice or other communication to a party under this agreement to be valid, it must be addressed using the information specified below for that party or any other information specified by that party in a notice in accordance with this section10.

To RMA: RMA Widgets, Inc.
500 Third Avenue
Suite 400
New York, NY 10022
Attention: Board of Directors and Corporate Secretary

To the Employee: [Name]
[Address]

(d) If a notice or other communication addressed to a party is received after 5:00 p.m. on a business day at the location specified in the address for that party, or on a day that is not a business day, then the notice will be deemed received at 9:00 a.m. on the next business day.

11. **Severability.** The parties intend as follows:

(1) that if any provision of this agreement is held to be unenforceable, then that provision will be modified to the minimum extent necessary to make it enforceable, unless that modification is not permitted by law, in which case that provision will be disregarded;

(2) that if an unenforceable provision is modified or disregarded in accordance with this section 11, then the rest of the agreement will remain in effect as written; and

(3) that any unenforceable provision will remain as written in any circumstances other than those in which the provision is held to be unenforceable.

12. **Counterparts.** If the parties sign this agreement in several counterparts, each will be deemed an original but all counterparts together will constitute one instrument.

13. **Governing Law.** The laws of the state of New York, without giving effect to its principles of conflicts of law, govern all adversarial proceedings arising out of this agreement or termination of the Employee's employment with RMA.

14. **Scope of Agreement; Entire Agreement.** This agreement does not grant the Employee any rights with respect to continued employment by RMA. This agreement constitutes the entire understanding between the parties with respect to the subject matter of this agreement and supersedes all other agreements, whether written or oral, between the parties, except that this agreement does not supersede or limit the Employee's rights under any benefit plan.

The parties are signing this agreement on the date stated in the introductory clause.

RMA WIDGETS, INC.

By: _____
Janet Doe
Vice President, Human Resources

_____
[EMPLOYEE]

APPENDIX 2

See p. xxxi regarding the intended function of the following "model statement of style for contract drafting." And see p. xxxiii regarding the intended function of the proposed text for an e-mail cover note included in the model statement of style.

[NAME OF ORGANIZATION]

Statement of Style for Contract Drafting

Version of [date]

Introduction

With the aim of ensuring that our contracts are as clear and efficient as possible, we have adopted this statement of style for contract drafting. It specifies guidelines regarding the look of and, more importantly, the language used in our contracts. It applies to everyone in our [organization] who is responsible for drafting or reviewing contracts. We believe that complying with this statement will save us time and money, make us more competitive, and reduce our risk.

Any kind of writing would benefit from use of a style guide. That's particularly the case with contract drafting, given that contract language is so

limited and stylized and given that the ramifications of unclear contract language are potentially drastic.

Lawyers have traditionally treated contract drafting as a craft, with differences in drafting usages being regarded as a matter of personal preference. That approach has contributed to the inconsistency and lack of clarity that afflicts mainstream contract language. By adopting this statement of style, we're breaking with that tradition.

Following **A Manual of Style for Contract Drafting**

Once we decided to adopt contract-drafting guidelines, we were faced with two alternatives. We could take advantage of an existing style guide for contract drafting, or we could create our own entirely from scratch.

Only one style guide for contract drafting is currently in existence—*A Manual of Style for Contract Drafting* (*MSCD*), by Kenneth A. Adams. Published by the American Bar Association and currently in its third edition, *MSCD* is a work of practical scholarship that has gained a wide following in the legal profession. If we want to piggy-back off of an existing style guide, *MSCD* would be the only candidate.

We could conceivably create our own version of *MSCD*, but that would be unrealistic—it would require more resources and expertise that we have available to devote to the task. And why reinvent the wheel?

We could prepare a skimpier version, one perhaps a couple of dozen pages long. But any such guide could only skate over the surface of the many subtle issues underlying contract language, so it would be of little value—with any form of writing, the devil is in the details. All published style guides for general writing are book-length. Given the technical and demanding nature of contract language, it would be unrealistic to expect that one could make do with anything less for purposes of contract drafting.

Consequently, we have decided to follow *MSCD*. Our guidelines regarding style can be summarized as follows: Comply with the recommendations made in *MSCD*.

In future versions of this statement we might supplement that guidance, either generally or for purposes of particular kinds of contracts. That's because sometimes *MSCD* invites you to choose from different alternatives, depending on the context.

Surrendering Autonomy

We expect that some of our [lawyers] [contracts professionals] will bridle at having to conform to the recommendations in *MSCD*. But sacrificing autonomy is essential to improving the quality and consistency of contract language.

You may be reluctant to assume that *MSCD*'s analysis is reliable. But that's no basis for not following *MSCD*'s recommendations—to some extent, using any reference work requires a leap of

faith, and *MSCD* has established its value. If you take issue with anything in *MSCD*, we suggest that you prepare a detailed analysis and submit it to me; I'll present it to Ken Adams, who welcomes such input. (Simply parroting the conventional wisdom wouldn't constitute detailed analysis. Neither would simply saying that you don't agree with *MSCD*.)

Some of the recommendations in this statement of style or in *MSCD* relate to usages that aren't likely to result in any dispute and that may not even affect readability. We nevertheless ask that you comply with those recommendations. Drafters make dozens, or hundreds, of choices regarding usages when drafting a contract, so minor decisions can have a big impact cumulatively. Furthermore, consistency is a worthwhile objective in itself.

No one will be looking over your shoulder to make sure that you comply with the style guide. But it does have the backing of our [organization]. If you deviate from it or, more particularly, if you insist that junior [lawyers] [contracts professionals] deviate from it in drafting contracts on your behalf, don't be surprised if you're asked to explain why.

Layout

We want our contracts have a consistent look. And we don't want our personnel fiddling unnecessarily with contract layout—how blocks of text are positioned on the page, and how they're enumerated. So all contracts we draft should use the numbering scheme recommended in *MSCD*, in either the

"articles" or "sections" version. To facilitate that, we have installed on each of your computers The Numbering Assistant, a numbering utility that includes among the built-in schemes the two version of the *MSCD* numbering scheme.

The *MSCD* scheme uses a Microsoft typeface called Calibri. Once you get used to Calibri, you should like it well enough. Typographers certainly regard it more favorably than Times New Roman or Arial. And on the technological front, it's a safe choice.

Using either version of the *MSCD* scheme also results in ragged-right text, rather than fully justified text. Typographers are unanimous that for purpose of word-processed documents, using ragged-right margins makes text easier to read.

For more information on these layout issues, see *MSCD*.

[Drafting Guidelines and Outside Counsel

We can't unilaterally impose our drafting guidelines on outside counsel. But over time we will favor those firms that make an effort to draft contracts that are consistent with our guidelines.]

Drafting Guidelines from the Perspective of the Reviewer

When you're reviewing a draft submitted by the other side in a transaction, that's not the time to administer drafting lessons. The other side probably wouldn't respond favorably to a general critique of their use of *shall* and their tolerance of archaisms.

But *MSCD* discusses plenty of issues that could create confusion resulting in dispute—for example, whether a given provision is a condition or an obligation, or whether it exhibits syntactic ambiguity. Those are the kinds of issues to focus on when reviewing a contract.

Alerting the Other Side to Our Use of Drafting Guidelines

Readers shouldn't notice any jarring difference between a contract containing traditional usages and one drafted consistent with this statement of style. *MSCD* works within the prevailing idiom, and it's in widespread use throughout the legal profession.

But that said, on reviewing an *MSCD*-compliant draft, anyone who's a traditionalist might seek to change the language back to what they're used to. An obvious response would be to tell anyone requesting changes that you're only going to consider changes that have a bearing on meaning, and that nothing would be gained by devoting lawyer time to discussing changes that have no bearing on the deal terms. It's standard deal etiquette that you should stick with the drafter's language unless you have good reason to ask for a change.

But once the other side sends over their markup, it might be difficult simply to ignore extraneous changes, particularly if your side is eager to do the deal. So we recommend that you include the following in any email that accompanies your first draft of any contract:

The language used in the attached draft complies with the recommendations contained in Kenneth A. Adams, *A Manual of Style for Contract Drafting* (ABA 3d ed. 2013).

That book explains that many traditional drafting usages are inconsistent with clear, modern, and effective drafting, and it recommends alternatives. Consequently, you may find that some usages that you use routinely in your contracts aren't present in this draft.

Before you ask that any traditional usages be restored to this draft, please consider whether restoring them would change the meaning of any contract provisions or make them clearer. If it wouldn't, making those changes would serve no purpose.

And please consult *A Manual of Style for Contract Drafting* to see what it has to say about any usage that you seek to restore—it may be problematic in ways you hadn't considered.

It's in the interests of both sides not to spend time making, or even discussing, changes that have no bearing on the deal or that might create confusion.

Words and Phrases to Avoid

The most straightforward *MSCD* recommendations are those urging you not to use a given word or phrase because it's confusing or wordy. Here's a partial list of words and phrases that should as a general matter be absent from your contracts:

at no time
best efforts
covenant
formal, formally
for the avoidance of doubt
form and substance
hereinafter referred to as
including but not limited to
including without limitation
in consideration of the foregoing
incorporated by reference
indemnify and hold harmless
in lieu of
intending to be legally bound (but see MSCD 2.156)
in the event of
in witness whereof
it being understood
Latinisms
may at its sole discretion
moral turpitude
notwithstanding
now therefore
of any kind
prior to
provided, however, that
provided that
pursuant to
remit, remittance
represents and warrants
reserves the right to
(s) (at the end of a noun)
said
same (used as a pronoun)

set forth in
shall be
shall have the right to
sole and exclusive
such as
such (used as a pointing word)
subsection
termination or expiration
terms and conditions
that certain
third party
true and correct
under no circumstances
unless the context requires otherwise
until such time as
whatsoever
whereas
willful
without limiting the generality of the foregoing
witnesseth

Drafting Corporate Resolutions

Related to drafting contracts is the drafting of corporate resolutions. The traditional language of corporate resolutions is if anything more problematic than the traditional language of contracts. That's why *MSCD* proposes a major overhaul of the language of corporate resolutions. [In drafting corporate resolutions for [organization] and its affiliate, use the approach recommended in *MSCD*.]

Transition

Each [lawyer] [contracts professional] in our [organization] will be supplied with a copy of *MSCD*, and we will make available additional training. But we recognize that the transition to a new approach to contract language won't be quick or easy. For one thing, all our precedent contracts use traditional language.

But slow change is still change, and it's preferable to sticking with the current inefficiencies and incoherence. And we'll soon start reaping the rewards.

We'll be monitoring the transition. If you have any questions or comments, please contact me.

[Name]

[Title]

The works listed below are cited more than once in this manual, using a shortened form of citation.

Black's Law Dictionary (9th ed. 2009).

Butterick, Matthew, *Typography for Lawyers* (2010)

The Chicago Manual of Style (16th ed. 2010).

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Corbin, Arthur L.,*Corbin on Contracts* (Joseph M. Perillo ed., rev. ed. 2012).

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Garner, Bryan A., *Garner's Dictionary of Legal Usage* (3d ed. 2011).

Garner, Bryan A., *Garner's Modern American Usage* (3d ed. 2009).

Huddleston, Rodney & Pullum, Geoffrey K., *The Cambridge Grammar of the English Language* (2002).

Lord, Richard A., *Williston on Contracts* (4th ed. 2012).

Murray, John E., Jr., *Murray on Contracts* (5th ed. 2011).

References are to paragraph numbers except where specified as page number (p.).

A

E

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S

Kenneth A. Adams is a consultant, writer, and speaker on contract drafting.

He gives public seminars in the U.S. with West Legalworks and in Canada with Osgoode Professional Development, as well as internationally. He conducts inhouse seminars worldwide for companies, law firms, and government agencies. He helps companies improve their contracts and their contract process, and he acts as an expert witness in contract disputes.

Mr. Adams is also a lecturer in law at the University of Pennsylvania Law School and founder of Koncision Contract Automation, a developer of online documentassembly contract templates. For information about Koncision, go to www.koncision.com.

As part of its "Legal Rebels" project, in 2009 the ABA Journal, the flagship magazine of the American Bar Association, named Mr. Adams one of fifty leading innovators in the legal profession.

Mr. Adams writes extensively on contract drafting. In addition to this manual, he's author of *The Structure of M&A* Contracts (West 2011). He's a longtime blogger; his current blog, Adams on Contract Drafting, is at www.adamsdrafting.com. In 2009, 2010, and 2012, the ABA Journal included

Mr. Adams's blog in its "Blawg 100"—its annual list of the hundred best law blogs.

A U.S. citizen, Mr. Adams was raised in Africa and Europe; he received his secondary and college education in England. After graduating from the University of Pennsylvania Law School in 1989, he practiced as a corporate attorney with major U.S. law firms in New York and Geneva, Switzerland. He currently resides in Garden City, New York. He can be reached at kadams@adamsdrafting.com.