REFJ

A THOMSON REUTERS PUBLICATION

LEGAL WRITING: CONFUSING ABBREVIATIONS, WORDS, AND PHRASES

*By Stevens A. Carey**

Based on article published in the Fall 2017 issue of
The Real Estate Finance Journal

**** Stevens A. Carey** is a partner with Pircher, Nichols & Meeks, a real estate law firm with offices in Los Angeles and Chicago.* *The author thanks Craig F. Stanovich for his input regarding CGL insurance, John Cauble, Richard MacCracken and Aaron Potter for providing comments on prior drafts of this Article, and Krista Dyer, Tim Durkin, Miranda Stuart and Kaleb Keller for cite checking.* *This Article is not intended to provide legal advice. The views expressed (which may vary depending on the context) are not necessarily those of the individuals mentioned above, Pircher, Nichols & Meeks or the publication. Any errors are those of the author.*

LEGAL WRITING: CONFUSING ABBREVIATIONS, WORDS, AND PHRASES

by Stevens A. Carey

This Article highlights some common abbreviations, words, and phrases that seem (in the author's experience) to challenge many real estate lawyers and other professionals, including some that are occasionally used interchangeably even though they do not mean the same thing.

A lawyer once told the author that he enjoyed being a transactional real estate attorney because, unlike a trial attorney, he didn't need to worry about the law; he could simply focus on making sure that his contracts accurately reflected the intention of his clients. If transactional work were only so simple. The meaning of a contract and the manner in which it may be enforced are often dependent on the law. And even when attention is paid to the law, a lawyer or other business professional may fail to comprehend or convey the intended meaning because, among other matters, people are limited by their linguistic backgrounds and ultimately their own understandings (and, in particular, the way in which they interpret the words they use).[1]

Unfortunately, some of these understandings may be misunderstandings, which may be easy to develop and sometimes hard to correct. This Article will discuss some relatively common errors that are hopefully easier to spot and avoid than most, despite the frequency with which they seem to occur. At least they seemed easier when this Article was started. Some have grown in complexity as a result of what the author has learned in writing this Article, but all should be familiar subjects:

1. Time Zone Abbreviations: What Time?
2. Latin Abbreviations to Qualify Lists
3. What Does *Include* Include?
4. *Or* and Its Illegitimate Cousin *And/Or*
5. The Danger of Using a Singular Defined Term to Define Multiple Subjects
6. Confusion with Subtraction
7. *Herein* Where?
8. The Required Nexus for Indemnities: *Arising out of* vs. *Caused by*
9. Discretion: *Sole* vs. *Absolute*
10. Knowledge: *Actual* vs. *Best*
11. Provisos and Notwithstanding Clauses

Although some recommendations will be offered, the primary objective of this Article is simply to encourage a better understanding of these subjects and the risks involved.

1. TIME ZONE ABBREVIATIONS: WHAT TIME?

Professionals often (in the author's experience) confuse the abbreviations for daylight-saving[2] time and standard time. This error appears to result from assuming that the "S" in EST, CST, MST, and PST stands for *Saving* or *Savings*. It does not. It stands for *Standard* and these abbreviations represent Standard Time in the Eastern, Central, Mountain and Pacific time zones, respectively. Daylight-Saving Time is represented by EDT, CDT, MDT, and PDT. Fortunately, at least in the author's experience, this mistake usually occurs in emails and similar informal communications when people are merely scheduling appointments and there is no actual misunderstanding of the intended times.[3]

In a legal setting, one might want to be more careful to avoid a fight. In one California case,[4] an insurance company denied a claim for loss due to a fire because the policy expired 48 minutes before the fire was discovered. However, the policy expiration date was based on "standard time." The insured claimed that because daylight-saving time was in effect, the fire had actually been discovered an hour earlier using standard time (and was therefore discovered during the term of the policy). The trial court denied summary judgment, concluding that a triable issue existed as to the meaning of "standard time." On appeal, the appellate court found that California statutes effectively define "standard time" to be the time then in effect, whether "Standard Pacific Time" or "Pacific Daylight Saving Time." But what if a contract mistakenly says *PST* instead of *PDT*? Will common sense prevail? An easy way to avoid this issue (in the Pacific Time Zone) is simply to refer to Pacific Time.

A related concern, when the parties to a contract are in different time zones, is whether and how to identify the relevant time zone. And the answer might not always be obvious. For example, consider a contract to sell California real property by a West Coast seller to an East Coast buyer. If notices must be received during a business day to be effective, must notices to the buyer be received only during business hours in the Eastern Time Zone or should the seller be able to give notices until the end of the business day in the Pacific Time Zone?[5]

2. LATIN ABBREVIATIONS TO QUALIFY LISTS

Latin abbreviations add another layer of complexity, namely a foreign language. Consider the following examples, which have proven to be difficult for some professionals:

- **e.g.** stands for ***exempli gratia***, which means roughly "for example";[6]
- **et al.** stands for ***et alii*** which most commonly means "and other persons";[7]
- **etc.** stands for ***et cetera*** which means "and others";[8]
- **et seq.** stands for ***et sequentes*** which commonly means "and the following ones";[9]
- **i.e.** stands for ***id est*** and means "that is";[10]
- **viz.** stands for ***videlicet*** which means roughly "namely" or "that is to say."[11]

Although many of these abbreviations may be used in other contexts, they seem to generate the most confusion when used with lists. In simple terms, placing *i.e.* at the *beginning* of a list indicates a *complete* list whereas placing *e.g.* at the *beginning* of a list indicates only examples and therefore is typically a *partial* list. A partial list is also indicated by placing *etc.* at the *end* of a list of *things* or by placing *et al.* at the *end* of a list of *people*.

That explanation is straightforward, isn't it? Yet there seems to be considerable confusion over some of these abbreviations. For example, the meanings of *i.e.* and *e.g.* are often reversed – so often that one court took judicial notice of the error:

> [W]e regrettably recognize that contract drafters sometimes use the terms "i.e." and "e.g." imprecisely. In fact, the Contracting Officer in this case testified that she understood the term "i.e." to mean "for example."[12]

While there might be other factors that would allow a court to deviate from the literal Latin translation,[13] who wants to spend the time and money to fight over this issue, and worse yet, lose?[14] Both *i.e.* and *e.g.* may be useful abbreviations, but only when used correctly.

A more benign error, but no less common in the author's experience, is the use of both *e.g.* and *etc.* for the same list. It is conceivable that one might be concerned that *e.g.* is similar to *including* (discussed in Section 3 below) and want to add *etc.* in the same way one might add *but not limited to* to *including*. But even assuming that concern is valid, it is not clear what additional meaning *e.g.* adds when one is using *etc.*[15] Other errors the author has encountered with the use of *etc.* include placing an *and* before *etc.* (which is redundant because *et* means *and*) and using *etc.* (rather than *et al.*) at the end of a partial list of *people*.[16]

Unlike the four abbreviations discussed above (namely, *i.e.*, *e.g.*, *etc.* and *et al.*), *et seq.* rarely appears in contracts, but it is frequently used in research memos, articles and briefs to indicate that additional pages or sections of cited cases, regulations, statutes or similar items may be relevant. In a way, *et seq.* is similar to *etc.* But *et seq.* typically involves a numeric or alpha-numeric sequence that has a final entry, which could be identified instead. For this reason, *et seq.* has been viewed with criticism:

> When citing a statute, it is better to give the reader an end point as well as a beginning one. Otherwise, the reader is left to conjecture just how many sections are encompassed . . . . Hence the phrase *et seq.* . . . should be used sparingly if at all.[17]

The author had not seriously considered this objection prior to writing this Article, which is an explanation rather than an excuse for the many times he has used *et seq.*

The author rarely sees the last abbreviation listed above, namely *viz.*, perhaps for good reason. It is confusingly similar to *i.e.* and is simply odd:

> The abbreviation is odd in two ways. First, how does one derive *viz.* from *videlicet*? The final *z* in the abbreviation represents the medieval Latin symbol of contraction for *et* or *-et* (*OED*). Second, how does one pronounce *viz.*? Preferably by saying "namely."[18]

3. WHAT DOES "INCLUDE" INCLUDE?

Another potentially confusing aspect of lists involves the use of the words *include*, *includes*, and *including*.

3.1 **Alternative Interpretations**. Readers commonly assume that if a list is introduced by *include*, *includes* or *including*, then it is merely a partial (completely nonrestrictive) list of one or more examples of the preceding subject matter. However, these words have been found to have different meanings depending on the context.[19] The writer may have some concern that without one of these words and the list that follows, the reader might not understand the subject matter in the same manner as the writer (e.g., the items in the list might not be apparent and the reader might even argue that they are not included within the subject matter). The particular concern, and therefore the purpose of the list, may vary from document to document. Sometimes the goal is to define, clarify

or even expand the subject matter and sometimes it is merely to highlight important examples. Indeed, using one of these words to introduce a list might indicate:

- a partial (completely nonrestrictive) list, which does not restrict, and merely illustrates part of, the subject matter;
- an exclusive (completely restrictive) list, which limits the subject matter to what is listed;
- a hybrid (partially restrictive) list, which limits the subject matter to the list and other items similar to the items (or within the categories) listed; or
- an expansive list, which adds one or more elements that would not otherwise have been included.

3.1.1 **Partial (Completely Nonrestrictive) List**. As noted at the outset of this Section, a partial (completely nonrestrictive) list is a common interpretation:

> "[I]ncluding" is not to be regarded as limitational or restrictive, but merely as a particular specification of something to be included . . . .[20]

For example, a unanimous consent requirement in an LLC Agreement for any conversion of the LLC to another entity form might add "(including a corporation)" merely to emphasize a key concern.[21] A number of federal and state statutes have adopted what appears to be a partial (completely nonrestrictive) definition.[22]

3.1.2 **Exclusive (Completely Restrictive) List**. However, even the United States Supreme Court has recognized the possibility that an exclusive list may be intended:

> [T]he term "includes" may sometimes be taken as synonymous with "means," . . . .[23]

For example, the author has encountered comprehensive statements of what a schedule should *include*.[24] Similarly, one might say that the states that border California *include* Oregon, Nevada and Arizona (even though that is a complete list and *are* would be a more appropriate verb). However, such a completely restrictive interpretation is an exception rather than the rule.[25] The Supreme Court quote above is mere dicta; even in that case, the court followed the rule that *include* merely indicates "designated particular instances." Indeed, aside from certain decisions involving the interpretation of statutes (especially purported statutory definitions),[26] the author is not aware of any cases[27] that have adopted an exclusive meaning other than due to self-inflicted wounds: where the additional words *but not limited to* were used elsewhere in a document but not in the instance under consideration.[28] In the latter cases, the court found that the absence of the words *but not limited to* indicated that they were not intended to apply (i.e., that the subject matter was *limited to* the elements listed).

> Therefore, it clearly is reasonable to read the word "includes" as meaning "is equivalent to," and to conclude that the specific [items in the list following "includes"] set forth the entire definition. . . . Where, as here, "[there is] certain language in one part of [a document] and different language in another, the court assumes different meanings were intended."[29]

3.1.3 **Hybrid (Partially Restrictive) List**. It is also possible that the word *include*, *includes* or *including* is neither *completely nonrestrictive* nor *completely restrictive*. Sometimes it has been interpreted as only *partially* restrictive (a hybrid of the *partial/completely nonrestrictive* and *exclusive/completely restrictive* interpretations described above): the purpose of the examples may be to limit the subject matter to the items listed and other items similar to the items (or within the categories) listed. If the subject matter is susceptible of more than one meaning, then the examples may be viewed as illustrating one meaning and effectively excluding another. To illustrate this concept, imagine that a farmer's will left all his assets to his wife with one exception: the farmer left his brother all of the farmer's equipment, *including* balers, manure spreaders, bale choppers, mowers, shredders and harvesters. Given such hypothetical facts, the subject matter (equipment) might be interpreted to be limited to farm equipment (which is a common characteristic of the equipment listed) and not include the gym equipment inside the farmer's home. A number of cases have imposed similar limitations in real factual situations. For example, a California case involved the interpretation of a disclosure rule that referred to "professional relationships . . . including [certain examples]." The court found that each of the examples involved an *economic* relationship and therefore the subject matter (professional relationships) was intended to be so limited (and did not include, for example, common membership in a trial lawyers association):

> Although this list is not exclusive, it fairly indicates an intent to limit the definition of "professional relationships" to ones involving economic relationships.[30]

Even when the words *but not limited to* are used or implied, some courts have refused to conclude that there is no limitation at all.

> Even if the word "including" is read as containing the phrase "not limited to," there is no indication in the language . . . of how far beyond the [list the subject matter was] meant to extend . . . .[31]

There may be a *partial* limitation: the subject matter may not be limited to the elements listed; but it may be limited to items that are listed *and* items that are either similar to what is listed[32] or within a category that is listed.[33] As explained by one court:

> [T]he phrase "including but not limited to," which precedes the specification, limits the applicability of [the subject matter] to those *types* . . . therein particularized . . . . "The problem is to determine what particulars that were not mentioned are sufficiently like those that were, in ways that are germane to the subject and purpose . . . , to be [included] by force of the general reference."[34]

3.1.4 **Expansive List**. Sometimes the word *include*, *includes* or *including* has been interpreted to expand the subject matter with one or more items that would not have otherwise been included.

> [T]he word 'including' is sometimes used . . . to add to the general class a species which does not naturally belong to it.[35]

An obvious example is a clause, which often appears in the miscellaneous provisions in the back of a document, stating that "the singular shall include the plural . . . and vice versa, unless the context otherwise requires."[36] Other examples encountered by the author are (1) an indemnification

provision that expands the meaning of a party to *include* certain affiliates for purposes of establishing who is entitled to indemnification, and (2) a statement that a reference to "States" may include the District of Columbia.[37]

3.2 **Restrictive vs. Nonrestrictive**. Although *include*, *includes*, and *including* are sometimes referred to as terms of *enlargement*,[38] that description may merely indicate that the word is being used in a *nonrestrictive* sense.[39] Indeed, it may be easier to think of *partial* (*completely nonrestrictive*) lists and *expansive* lists together as a single *nonrestrictive* category, because the line between the two may be hard to draw. The distinction is particularly difficult when a partial list is used to clarify that certain elements are included that might not be apparent to all readers. For example, a document might provide that written notices *include* emails:[40] to someone who believes that written notices do not include emails, this would be an *expansive* list; to someone who believes that written notices do include emails, it would be a *partial* (*completely nonrestrictive*) list. Similarly, the *exclusive* (*completely restrictive*) and *hybrid* (*partially restrictive*) lists may appear to overlap (a subject may be defined by a list of categories even though all elements within those categories are not specified); and consequently, it may be easier to view them together as *restrictive* lists. In this way, the various interpretations may be divided into two basic types: *restrictive* and *nonrestrictive*.[41]

3.3 **Drafting**.

3.3.1 **Nonrestrictive Lists**. In the author's experience, the parties to a contract usually intend a *nonrestrictive* meaning.[42] And they often use broader language (e.g., *including but not limited to*, *including without limitation*, or *without limiting the generality of the foregoing*) to confirm this interpretation.

> In legal drafting, these cautious phrases are intended to defeat three canons of construction: *expressio unius est exclusio alterius* ("to express one thing is to exclude the other"), *noscitur a sociis* ("it is known by its associates"), and *ejusdem generis* ("of the same class or nature").[43]

One commentator has expressed a strong preference for *including but not limited to*:

> The most straightforward of these expansive phrases is *including but not limited to* . . . . The other variants you should abjure.[44]

But what about the cases that have found a restrictive meaning even when using *but not limited to*?[45] Are these decisions outliers that involve easily distinguishable facts or a court determined to avoid an unfair result? The cases that involve other issues of interpretation (e.g., how to apply multiple modifiers) may be.[46] But those cases (not involving other issues of interpretation) finding that a representative list limits the subject matter by its characteristics to similar items[47] may be harder to dismiss, and seem to result from the application (or misapplication,[48] depending on your perspective) of one of the canons of construction mentioned earlier in this Section 3.3.1.[49]

Query whether *including without limitation* is preferable? The words *without limitation* literally suggest that there is *no* limitation, whereas the words *but not limited to* could be read literally to mean merely that what follows is not a complete list and that there could still be *some* limitation

(e.g., the subject matter may not be limited to the listed items but it could be limited to those items and similar items that are not listed).[50]

Whatever nonrestrictive phrase is chosen, adding it throughout a long document is both cumbersome and dangerous because of the risk of human error. It is too easy to end up with an inconsistency (where *include, includes* or *including* is accompanied with the nonrestrictive phrase in some but not all cases).[51] Why assume that risk when, in some circumstances, the consequences of the discrepancy could be significant?[52] A general clause might be worded as follows:

> Whenever the word "include," "includes" or "including" is used in this Agreement, it is intended to be interpreted in a nonexclusive manner, without any limitation on the generality of the subject matter that precedes such word.

With a general provision, it may be easier to defend against claims that inconsistent use of expansive phrases was intentional.[53]

3.3.2 **Restrictive Lists**. If a restrictive meaning is intended, consider using a different word or words (e.g., *means x, y and z* for an exclusive list and *means x, y, z and other similar items* for a hybrid list), especially when there is a general provision adopting a nonrestrictive meaning of *include, includes* or *including*.

4. *OR* AND ITS ILLEGITIMATE COUSIN *AND/OR*

At first blush, the word *or* seems relatively simple. Although *or* can connect any number of alternatives, the simplest case, in which it connects only two, say A and B, amply illustrates a problem: *A or B* may be ambiguous. *A or B* could have an *exclusive* meaning (either A or B but not both) or an *inclusive* meaning (A or B or both); it could even have other meanings. Sometimes the meaning is clear from the context, but sometimes it is not. *A or B* could be intended to represent two alternatives, three alternatives, or even four alternatives!

4.1 **Two Alternatives: *A alone* or *B alone***. *A or B* represents at least two alternatives, namely *A alone* or *B alone*. Sometimes there are exactly two choices – no more and no less. For example, a right to terminate or not to terminate is binary. One either terminates or does not terminate. One cannot do both and one cannot do neither. As another example, in response to a typical shotgun buy/sell notice in a joint venture, the recipient must elect either to buy or sell. There are no other alternatives. It is obvious that one cannot do both because the alternatives are incompatible. And the documents usually make clear that one cannot do neither (by providing that if no election is made, the choice is automatically made for the recipient, namely to sell).

4.2 **Three Alternatives**. Three alternatives are also possible. However, if there are three alternatives, then while two of the alternatives (either *A alone* or *B alone*) are readily apparent, what is the third alternative? Is it *both A and B* or *neither A nor B*?

- ***A alone, B alone* or *both A and B***. For example, assume a financial partner imposes a key-man requirement on its operating partner that either one specific individual or another specific individual must be an officer of the operating partner who holds a valid contractor's license. The financial partner would likely be happy to have this requirement satisfied by either *or both* individuals, but (of course) *not neither*.

- ***A alone, B alone* or *neither A nor B***. However, assume further that the partnership agreement provides that a violation of the key-man requirement gives the financial partner the right to sell its interest to the operating partner for the financial partner's outstanding capital plus a specified return, or to buy the interest of the operating partner for the operating partner's outstanding capital. The financial partner would likely expect to proceed with either *or neither* of these alternatives but *not both*.

4.3 **Four Alternatives: *A alone, B alone, both A and B,* or *neither A and B***. Even four alternatives are possible. Consider the remedial example above, but assume the remedies are compatible and can both be exercised (e.g., taking over management of the partnership *and* terminating a management agreement with an affiliate of the operating partner). The financial partner might then expect to have four alternatives: exercise one remedy, exercise the other remedy, exercise both remedies or exercise neither remedy.

The author has encountered professionals who use *A and/or B* as a catchall in an attempt to address this conundrum. But courts and commentators have not reacted well to *and/or*.[54] Although *A and/or B* may cover one of the possibilities discussed above,[55] query whether that is the intended interpretation or the interpretation that would be adopted by a court.[56] Strunk and White's THE ELEMENTS OF STYLE puts it simply:

> **And/or.** A device, or shortcut, that damages a sentence and often leads to confusion or ambiguity.[57]

Other criticisms are not as kind:

> [W]e take our position with that distinguished company of lawyers who have condemned its use. It is one of those inexcusable barbarisms which was sired by indolence and dammed [sic] by indifference . . . . I am unable to divine how such senseless jargon becomes current.[58]

The bottom line is that the word *or* should be used with caution (and care) to make clear what alternatives are intended.[59] *And/or* is unnecessary and best avoided. A similar shortcut encountered by the author is a general provision to the effect that *or* includes *both the conjunctive and disjunctive* (unless the context otherwise requires).[60] It may be safer to spell out the intended meaning each time "or" is used.

5. THE DANGER OF USING A SINGULAR DEFINED TERM TO DEFINE MULTIPLE SUBJECTS

Another shortcut that can wreak havoc with legal documents is the use of a singular defined term to define multiple subjects. The opinion committee at a law firm known to the author has a rule prohibiting this practice because of the risk of confusion.

For example, a loan enforceability opinion might involve three different but related borrowers. A lawyer might consider it convenient to define the various borrowers *collectively* as *Borrower* in an attempt to avoid the need to change the many references to "Borrower" in the relevant opinion form. But does this work? A typical loan opinion assumption is "that there are no other documents or agreements between Borrower, on the one hand, and Lender, on the other hand, that might affect the opinion." Would this assumption cover an agreement between only one of the borrowers and the

lender? And how would an opinion that "the loan documents to which Borrower is a party are enforceable against Borrower" be interpreted? Could this enforceability opinion be interpreted to cover only those loan documents to which all the borrowers are parties?

Are these problems avoided if the various borrowers are defined *individually and collectively* (or *individually or collectively*) as Borrower, as the context may require? Would the opinion assumption above then cover an agreement between only two of the three borrowers, on the one hand, and the lender, on the other hand? How would the enforceability opinion be interpreted if only two of the three borrowers were parties to a particular loan document?

A recent U.S. Court of Appeals (Fifth Circuit) case[61] involved a dispute over the interpretation of a purportedly collective definition of *Borrower* and, in particular, whether the bankruptcy of one borrower but not the others was sufficient to trigger a springing recourse guaranty of the entire loan. Although the outcome depended on a typographical error that obscured the application of an *individually or collectively* definition, this case is a sobering reminder of the danger of a singular defined term that represents multiple parties. It is safer to define *Borrowers* collectively and *Borrower* individually, and then make clear whether a provision applies to each Borrower, any Borrower, one or more Borrowers or all Borrowers, or whatever combination is relevant.

6. CONFUSION WITH SUBTRACTION

Subtraction should be easy, but it is sometimes misunderstood, mischaracterized, or mistranslated into English.

6.1 **The Difference Between A and B**. Legal documents often refer to a *difference between A and B* (where each of A and B is a specific amount or the description of an amount that can be determined). To illustrate, consider one of the limits on an insured's recovery under an ALTA 2006 Owner's Policy of title insurance: "the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy."[62] As another example, the author has encountered a lease requiring that "the difference between the percentage rent and the base rent will be paid monthly." What do these statements mean? The answer is that "it depends" because the *difference between A and B* is ambiguous. Although there are other possible interpretations,[63] a "difference between A and B" is usually intended, in the author's experience, to have one of the following alternative meanings:

- The (non-negative) amount that separates A and B;[64]
- A minus B; or
- A minus B, but not less than zero.

If you ask the average person on the street what the difference between two numbers is, you will likely get the first answer listed above, namely the (non-negative) amount that separates A and B (e.g., 3 is the difference between 5 and 2 and also the difference between 2 and 5). However, that is not the correct interpretation in the title insurance and lease examples described above, because no subtraction is intended when B is greater than A. For the same reason, the second alternative above (i.e., A minus B) is not intended in either example. For both these examples, the third choice is correct. In fact, more often than not (in the author's experience), the third alternative is the intended

interpretation of the parties. But not always. Sometimes the parties may be interested in any discrepancy between A and B, regardless of which amount is larger.[65] And sometimes the parties may want to determine A minus B, even though the answer might be negative.[66]

6.2 **A minus B**. It is also common in the author's experience for a legal document to refer to the subtraction of one amount from another (A - B). But that may not be what the parties mean. Often, in the author's experience, the parties do not want to take into account negative results (i.e., if B turns out to be larger than A). If so, the parties should consider whether the first or last alternative described in Section 6.1 is intended.

6.3 **Words and Symbols**. The alternatives described in Section 6.1 may be rewritten succinctly with symbols as follows:

- |A - B|;[67]
- A - B; and
- max (0, A - B).[68]

These alternatives are all the same when A - B is not negative; but when A - B is negative, they yield three different amounts:

- ◊ |A - B| = B - A, which is a positive number and is greater than
- ◊ max (0, A - B) = 0, which, in turn, is greater than
- ◊ A - B, which is a negative number.

In English, these alternatives may be represented as follows:

- zero if A and B are equal and otherwise the amount by which (x) the greater of A and B exceeds (y) the smaller of A and B;
- the amount (whether positive, negative or zero) determined by subtracting B from A; and
- the amount, if any, by which A exceeds B.[69]

In any case, if there is a payment of some arithmetical difference, it is advisable to have clarity as to (1) who is paying whom, (2) when the payment is to be made, and (3) how the calculation is to made.

7. *HEREIN* WHERE?

The term *herein* may be archaic legalese that is both awkward and inelegant, but in the author's experience, it is frequently and repeatedly used in contracts. Unfortunately, it is sometimes not clear what it means. According to BLACK'S LAW DICTIONARY:

> **herein,** *adv.* . . . In this thing (such as a document, section, or paragraph) . . . . This term is inherently ambiguous.[70]

To what *thing* does it refer? The *sentence* in which the term appears? The *grammatical paragraph*? The *section*? The *entire document*? The risk of course is that the term might be interpreted in a different context than the one intended. In one case, the parties to a contract fought over whether "herein" referred to the section in which it appeared or the entire agreement.[71] The U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit reached different conclusions because of the ambiguity:

> The "herein" in "except as otherwise specifically provided herein" is not defined. While it might be read to refer . . . to only [the relevant] section . . . , it could just as reasonably be read to refer . . . to the [agreement] as a whole.[72]

To address this issue, some professionals spell out the context each time the word *herein* would otherwise appear (by replacing *herein* with, for example, *in this Agreement*). This approach may avoid the ambiguity and may also improve the readability of the document. However, some documents use this term so many times, eliminating the term entirely may not be practical. Instead, many professionals add a general corrective clause to the miscellaneous provisions. In light of the fact that the most commonly intended interpretation in contracts is the most expansive *in this Agreement*, the general clause is often similar to the following (which also addresses *hereunder*, a word presenting similar issues):

> Whenever the word "herein" or "hereunder" appears in this Agreement, it means "in this Agreement" or "under this Agreement," respectively.

Of course, if *herein* (or *hereunder*) is intended to refer to less than the entire Agreement in any particular provision, then it should be changed in that instance to reflect the intended context.[73]

8. THE REQUIRED NEXUS FOR INDEMNITIES: "ARISING OUT OF" VS. "CAUSED BY"

Indemnification obligations often, if not usually, require that the indemnified claim, loss, liability, damage or expense have some nexus to the indemnitor's activities (e.g., to a buyer's due diligence activities, a tenant's use of its premises, or a subcontractor's work). While such provisions are common, the wording establishing the applicable nexus may vary considerably from contract to contract. Some professionals seem to assume, for example, that there is no meaningful difference between an indemnification trigger based on the words *caused by* and one based on the words *arising out of*. But are they the same? Although the context is different, most of the litigation over these alternative phrases seems to have arisen in determining whether there is coverage under an insurance policy, and in that context a broader interpretation of *arising out of* seems relatively common in many jurisdictions:

> The phrase "arising out of" is unambiguous and has a broader meaning than "caused by" . . . .[74]

Indeed, broad interpretations of *arising out of* in the context of commercial general liability ("CGL") additional insured endorsements led the insurance industry to replace "arising out of" with the words "caused, in whole or in part, by" in 2004.[75] But what about a contractual indemnity outside an insurance policy? Admittedly, a non-insurance contractual indemnity claim may be interpreted differently than a claim against an insurance company.[76] Nonetheless, insurance cases are

sometimes cited in non-insurance contractual indemnity cases[77] when interpreting these phrases, perhaps because financial responsibility under a non-insurance contractual indemnity is often shifted (at least in part)[78] to insurance carriers.[79] In any case, many courts have distinguished these phrases in a similar fashion in non-insurance contractual indemnities.[80] Thus, it seems risky to treat *arising out of* and *caused by* as equivalent. Moreover, if a CGL insurer includes an ISO CG 24 26 endorsement (which may require, as a condition to coverage for contractual indemnification liability, that the bodily injury or property damage be *caused, in whole or in part, by* the insured),[81] some of the additional risk resulting from using the words *arising out of* instead of *caused by* in an indemnity provision may not be covered by insurance.[82]

Sometimes a broad nexus may be intended; and sometimes it is not. In either case: there may be uncertainty regarding the meaning of the indemnification trigger;[83] and the indemnitor should check its CGL policy and understand the differences between the scope of its indemnity and the scope of its contractual liability coverage. In the context of a real property purchase agreement, in which a due diligence indemnity is often given by a special purpose buyer with no assets other than the deposit, the seller may want to understand those differences as well.

Numerous other phrases are sometimes used to establish the required nexus, including:

- *resulting from*;[84]
- *arising from*;[85]
- *by reason of*;[86] and
- *in connection with* or *related to*.[87]

Indeed, there is a wide spectrum of possibilities for wording the relationship that gives rise to an indemnification obligation.[88] Similar issues may arise in connection with arbitration provisions,[89] attorneys' fees provisions,[90] choice of law provisions,[91] forum selection provisions, jury waiver provisions, or any other provisions that require some nexus to the contract in which they appear.[92] Regardless of the context, thought should be given to the nexus chosen and how it is worded.

9. DISCRETION: *SOLE* VS. *ABSOLUTE*

Many professionals appear to assume that *sole discretion* and *sole and absolute discretion* have the same meaning. Indeed, there are articles,[93] cases[94] and contracts that mention *sole discretion* but fail to distinguish between these two concepts and seem to treat them as though they are equivalent. Moreover, the author has encountered lawyers who use *sole discretion* rather than *sole and absolute discretion* to avoid what they perceive to be a redundancy.[95] But are they the same? If a party is exercising *sole* discretion, it may be *the only one* whose discretion is relevant. But the word *sole* may provide no clue as to what, if any, limits the parties intend to (or the law might) impose on that discretion. It might not be *absolute*! Consequently, *sole discretion* may be ambiguous and therefore makes it easier for a court to find that this standard of discretion is limited (e.g., by the implied covenant of good faith and fair dealing, by presumed intent based on evidence or principles of contract interpretation, or by fiduciary duties). At least two commentators have made this argument for application of the implied covenant of good faith and fair dealing:

> "[S]ole discretion" . . . has an equivocal meaning. It is possible the parties understood it to mean . . . unfettered discretion . . . . It can also be understood to mean . . . the exclusive power to determine the manner of performance but . . . not [being] free to ignore [another party's] interests totally in deciding how to exercise that discretion. Because of its ambivalent meaning, the covenant would be deemed to apply. This is consistent with how most courts have construed this term.[96]

A court might also limit *sole discretion* simply based on the court's determination of presumed intent based on the evidence or principles of contract interpretation:

> Interpreted in the light of the parties' situation, the "sole discretion" phrase was designed to identify [one of the parties] as the decision maker, not to arm it with arbitrary power.[97]

Chancellor Strine of the Delaware Chancery Court made a similar point in relation to fiduciary duties:

> [T]he provision at issue in this case only says that [the party] gets to act in its sole discretion and does not further flesh out what that term means. That bare statement does nothing to absolve [the party] of the duty to act for a proper fiduciary purpose; it simply says that [the party] has the singular (i.e., sole) authority (i.e., discretion) to consider and decide this matter.[98]

If *absolute* discretion is intended, then say it. If it is important to state that no one else's discretion is relevant, then add *sole*. But don't use *sole discretion* in some provisions and *sole and absolute discretion* in other provisions when they are intended to mean the same thing. And don't assume that *absolute discretion* is always absolute. There may still be limitations,[99] but at least the choice of the word *absolute* may make it harder for the court to find limitations. To maximize the odds that *absolute* discretion will be respected, make sure there is consideration and consider adding terms like *for any or no reason* (and to the extent possible under applicable law, expressly eliminating any conflicting fiduciary duties). For example, a general provision in a real property purchase agreement intended to allow *absolute* discretion for approvals (unless a reasonableness or other standard is provided) might be reworded as follows:

> Except as otherwise provided in this Agreement, any approval or consent to be given by a party under this Agreement must be in writing to be effective and may be given or withheld in the sole and absolute discretion of such party, for any reason or no reason.

Finally, don't assume that *sole discretion* is *not* absolute. Sometimes it may be.[100]

10. KNOWLEDGE: *ACTUAL* VS. *BEST*

The author has occasionally (although not often) encountered professionals who view the terms *best knowledge* and *actual knowledge* as synonymous. Given the lack of a common understanding of either of these terms, it is difficult to criticize such a view. There is scant legal guidance as to what these terms mean and what little exists is usually in a different context and sometimes unexpected.[101] Moreover, the meanings typically ascribed to these terms by lawyers may be completely opposite the

meanings assumed by non-lawyers. The author has worked with non-lawyers who believe that a statement to the *best* of their knowledge is nothing more than an honest affirmation of what they think they know, whether or not it is correct, and with no obligation to enhance their knowledge with any investigation or other work. Some of these people view *to my best knowledge* to be equivalent to *I am not aware of anything to the contrary*, and are concerned that *to my actual knowledge* may be read more broadly as *I actually know this to be true*: actual knowledge literally indicating that they have actual knowledge substantiating the accuracy of the statement. By contrast, most attorneys, in the author's experience, believe that *best* knowledge is a higher standard (than *actual* knowledge), which includes constructive knowledge of what the party should have known with reasonable investigation. Some lawyers have compounded the confusion by introducing terms such as best, actual knowledge. Given the uncertainty associated with these terms, it is advisable to define the knowledge intended and specifically whether any constructive or imputed knowledge will be taken into account. When written legal opinions are given, law firms tend to be very careful to limit their knowledge, as illustrated by the following definition from a 2012 joint committee (ABA/ACMA/ACREL)[102] opinion report:

> As used in this Opinion Letter, "Actual Knowledge" means, without investigation, analysis, or review of court or other public records or our files, or inquiry of persons, with respect to the undersigned law firm (the "Opinion Giver"), the conscious awareness of facts or other information by the Primary Lawyer or Primary Lawyer Group.[103]

11. PROVISOS AND NOTWITHSTANDING CLAUSES

Ed Halbach, former professor and dean of the law school at the University of California at Berkeley, warned his students of the dangers of *provisos* and *notwithstanding* clauses: they may result in a document that is hard to read and that may be inconsistent. Before using them, he would say, consider whether you can rewrite the document in a direct manner. For example, imagine that a partnership agreement among two married adults, Sue and Joe, and their son, Ben, states that "amendments must be signed by all parties; *provided that* until Ben reaches the age of 21, amendments will be binding on all parties if signed by Sue and Joe." Wouldn't it be clearer to say that "amendments will be binding on all parties if, and only if, signed by each party who is then 21 or more years old"? Professor Halbach's concern with provisos is shared by numerous commentators:

> Writers on drafting have long cautioned drafters not to use provisos. In fact, the words *provided that* are a reliable signal that the draft is not going well. The problem—recognized five centuries ago by Coke—is that the phrase means too many different things: *provided that* may create an exception, a limitation, a condition, or a mere addition.[104]

Similarly, *notwithstanding* clauses can be awkward in both sound and structure. While they are typically used to resolve conflicts, they do not always achieve their goal. If the conflict is identified, then it can be resolved by simply stating what controls. But surprisingly often, *notwithstanding* clauses are used to make a concept paramount without consideration of what is being trumped. For example, there are conflicting transfer provisions in the 2008 ACTEC[105] Model LLC Operating Agreement (each of which is introduced by a *notwithstanding* clause): one states that the consent of

the members *is not required* for sales to certain related persons; and one states that the consent of the members *is required* for sales that result in a tax termination under I.R.C. Section 708.[106] There should be a statement that identifies which of the two conflicting provisions controls; but there is not. Sometimes the failure to resolve such conflicts can be costly. In a recent Delaware case, the Court of Chancery faced two competing notwithstanding clauses: one that applied a cap on the seller's liability; and one that gave the buyer unlimited rights to make a fraud claim.[107] The court determined that extrinsic evidence was required to resolve the ambiguity that resulted from this "'[i]nelegant drafting.'"[108]

12. CONCLUSION

Given the pressure to be prompt and efficient in today's fast-paced business world, it is no surprise that legal documentation is sometimes replete with drafting errors. Mistakes happen. The author's work is no exception. Often, there simply isn't enough time to address every drafting concern. So what is the answer? Take the time, when it is available, to develop good writing habits and then do the best you can. When researching this Article, the author was merely looking for support for the author's views of a few drafting blunders that have repeatedly surfaced in the author's practice. It soon became apparent that there is much, much more that could and should be addressed to improve legal documentation. Fortunately, there are several excellent resources worth reviewing for drafting tips. The author recommends the following books for further reading (the first two of which are for writing generally and the last four of which are for legal writing):

- WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE (4th ed. 2000);
- THE CHICAGO MANUAL OF STYLE (17th ed. 2017);
- BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE (3d ed. 2013);
- TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2d ed. 2014);
- STEPHEN L. SEPINUCK & JOHN FRANCIS HILSON, TRANSACTIONAL SKILLS: HOW TO STRUCTURE AND DOCUMENT A DEAL (ABA 2015); and
- KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING (4th ed. 2017).

* * *

[1] This limitation was a major concern of the famous California Supreme Court Justice C.J. Traynor when dealing with the parol evidence rule:

> When the court interprets a contract on [the basis of its plain meaning], it determines the meaning of the instrument in accordance with the ". . . extrinsic evidence of the judge's own linguistic education and experience." The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. This belief is a remnant of a primitive faith in the inherent potency and inherent meaning of words.

Pacific Gas & Electric Co. v. Thomas Drayage & Rigging Company, Inc., 69 Cal. 2d 33, 36–37 (Cal. 1968) (citations omitted).

[2] "Although the singular form *daylight-saving time* is the original one, dating from the early 20th century—and is preferred by most usage critics—the plural form is now extremely common in AmE. . . . The rise of the plural form (*daylight-savings time*) appears to have resulted from [grammatical confusion]. . . . Using *savings* as the adjective—as in *savings account* or *savings bond*—makes perfect sense. But in print sources, the singular form still appears three times as often as the plural." BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 226 (3d ed. 2009).

[3] Query whether there might be confusion when dealing with professionals in Arizona where it is MST all year (with the exception of the Navajo reservation). Hawaii also uses standard time all year, but there are no other states in its time zone.

[4] Miracle Auto Ctr. v. Superior Court of San Mateo County, 68 Cal. App. 4th 818 (Cal. App. 1st Dist. 1998).

[5] One commentator suggests that when establishing the time of closing for parties "in different time zones, refer to the time at the location where the closing is to be held." TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO § 8.5.2, at 129 (2d ed. 2014) (hereinafter, "STARK (DRAFTING CONTRACTS)"). For real estate transactions, many if not most of which close through escrow, the location of the escrow may make sense for closing timing. But the escrow location may not be the answer for all the relevant times under the contract (e.g., the expiration of due diligence might be based on where the property is located).

[6] *See, e.g.*, BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 308 (3d ed. 2011) ("**e.g.** [is] the abbreviation for the Latin phrase *exempli gratia* (= for example), introduces representative examples. . . . [When] an enumeration [follows] *e.g.* . . . one expects nothing more than a representative sample of possibilities."); BLACK'S LAW DICTIONARY 629 (10th ed. 2014) (hereinafter, "BLACK'S"). Literally, *exempli gratia* means "for the sake of example" ("*exempli*" meaning "example"; and "*gratia*" meaning "for the sake of"). *See, e.g.*, OXFORD DICTIONARIES, *available at* https://en.oxforddictionaries.com/definition/e.g.

[7] BLACK'S, *supra* note 6, at 669. *See also* GARNER, *supra* note 6, at 330–31 ("**et al.** is most commonly the abbreviated form of the Latin phrase *et alii* (= and others), though it may also be the masculine singular (*et alius*), the feminine singular (*et alia*), or the feminine plural (*et aliae*). It is used only of persons, whereas *etc.* is used of things. American lawyers commonly write *et al, et. al.*, or *et. al*—all of which are wrong.").

[8] BLACK'S, *supra* note 6, at 669 ("**et cetera** . . . usu. indicates additional, unspecified items in a series."). *See also* GARNER, *supra* note 6, at 331; OXFORD DICTIONARIES, *available at* https://en.oxforddictionaries.com/definition/et_cetera ("Used at the end of a list to indicate that further, similar items are included.").

[9] GARNER, *supra* note 6, at 332; *cf.* OXFORD DICTIONARIES, *available at* https://en.oxforddictionaries.com/definition/et_seq. ("From Latin et sequens 'and the following', or from et sequentes, et sequentia 'and the following things'.") and BLACK'S, *supra* note 6, at 671 ("Latin *et sequens* 'and the following one,' *et sequentes* (masc.) 'and the following ones,' or *et sequentia* (neuter) 'and the following ones'").

[10] *See, e.g.*, GARNER, *supra* note 6, at 420; BLACK'S, *supra* note 6, at 863.

[11] *Vidilicet* is a contraction from the Latin words *videbere* (to see) and *licet* (it is permissible). *See, e.g.*, GARNER, *supra* note 6, at 931 ("[T]he term signifies that what follows particularizes a general statement, without contradicting what precedes, or that what follows explains certain obscurities that the writer acknowledges to be lurking in what has just been said."); BLACK'S, *supra* note 6, at 1804 ("**viz.** [means] Namely; that is to say"); *id.* at 1798 ("**videlicet** [means] To wit; that is to say; namely . . . . The term is used primarily to point out, particularize, or make more specific what has been previously stated in general (or occas. obscure) language. One common function is to state the time, place, or manner when that is the essence of the matter at issue."); OXFORD DICTIONARIES,

available at https://en.oxforddictionaries.com/definition/viz. ("**viz.** [means] Namely; in other words (used to introduce a gloss or explanation)").

[12] Northrop Grumman Corp. v. Goldin, 136 F.3d 1479, 1484 n.1 (Fed. Cir. 1998). *See also* Dibble v. Fenimore, 545 F.3d 208, 219 (2d Cir. 2008) ("An unfortunate fact of modern American linguistic practice is that many Americans confuse 'i.e.' and 'e.g.'").

[13] *See, e.g.*, Northrop Grumman, *supra* note 12, at 1484 ("Although we agree with [Black's Law Dictionary's] translation of the Latin abbreviations, those meanings are not conclusive in light of the contract as a whole."); Dibble, *supra* note 12, at 219 ("That the . . . use of 'i.e.' rather than 'e.g.' [to introduce a list of evidence] was merely a slip becomes evident upon examination of the surrounding text, [which] immediately goes on to discuss evidence that was not mentioned in that list . . . ."); Rubinstein Bros. v. Ole of 34th Street, Inc., 101 Misc. 2d 563, 567 (N.Y. Civ. Ct. 1979) (where lease contained an additional example that was not included in the alleged definition following i.e., the court found that "'i.e.' (*id est*) . . . in [this] context has to be given the broader meaning of 'e.g.' (*exempli gratia*)."); American Federation of Musicians v. Philadelphia Orchestra Asso., 252 F. Supp. 787 (E.D. Pa. 1966) (the abbreviation i.e. did not necessarily exclude an item not mentioned that did not exist at the time the contract was made because there was no mutual intent as to that item); LecTec Corp. v. Chattem, Inc., 2010 U.S. Dist. LEXIS 146263 (E.D. Tex., May 20, 2010), at *17 ("The term 'i.e.' may be used [in certain patents] restrictively or to provide examples. . . . [But] interpreting 'i.e.' to preface mere examples would contradict the literal meaning of 'i.e. . . . .'"); Otter Products, LLC v. Treefrog Developments Inc., 2012 U.S. Dist. LEXIS 139253 (D. Colo., Sept. 27, 2012), at *64 ("Further, the use of the latin [sic] term 'i.e.' could well be a grammatical error on the part of the attorney for the Applicant. It is possible, under some conditions, for a reviewing court to correct grammatical errors in patents, such as the improper use of the term 'i.e.' as opposed to 'e.g.'") (footnote omitted). For more on the use of i.e. and e.g. in patents, see OpenTV, Inc. v. Apple, Inc., 2015 U.S. Dist. LEXIS 73281 (N.D. Cal., June 5, 2015).

[14] *See, e.g.*, Seidel v. Comm'r, 2007 Tax Ct. Memo LEXIS 45 (2007) (the petitioner's claim that the abbreviation i.e. meant *for example* was rejected); FTC v. EDebitPay, LLC, 2011 U.S. Dist. LEXIS 15750 (C.D. Cal., Feb. 3, 2011), at *n.6 ("To the extent that Defendants argue that the clause 'e.g., . . .' limits the scope of [the subject matter] . . . they are misguided. The term 'e.g.' means for example. Thus, this language simply provides examples . . . but does not limit . . . .").

[15] *See, e.g.*, GARNER, *supra* note 6, at 308 ("Using the abbreviation *etc.* after an enumeration following *e.g.* creates a superfluity, since one expects nothing more than a representative sample of possibilities. But *etc.* might be required after *i.e.* . . . to show the incompleteness of the list.").

[16] *See id*.

[17] GARNER, *supra* note 6, at 332, which adds: "The problem is exacerbated by the fact that *et seq.* serves also as the abbreviation for the singular *et sequens* (= and the following one), though presumably few users of the phrase know that." *See also* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, Rule 3.3(b), at 75–76 (20th ed. 2015), which prohibits the use of "*et seq.*" ("When citing multiple sections, use two section symbols (§§). Give inclusive numbers; do not use '*et seq.*'").

[18] GARNER, *supra* note 6, at 931.

[19] *See, e.g.*, Auer v. Commonwealth, 621 S.E.2d 140, 144 (Va. Ct. App. 2005) ("[T]he word 'include' is susceptible to more than one meaning . . . ."); Liverpool v. Baltimore Diamond Exch., Inc., 369 Md. 304, 321 (Md. Ct. App. 2002) ("[T]he term 'includes,' by itself, is not free from ambiguity [and] has various shades of meaning . . . .") (citations omitted); Frame v. Nehls, 550 N.W.2d 739, 742 (Mich. 1996) ("[T]he word 'includes'. . . is not determinative of how it is intended to be used."); Union Elec. Co. v. Cuivre River Elec. Coop., Inc., 571 S.W.2d 790, 794 (Mo. Ct. App. 1978) ("The cases leave little doubt that the term 'including' is ambiguous . . . ."); Milwaukee Gas Light Co. v. Wisconsin Dep't of Taxation, 127 N.W.2d 64, 68 (Wisc. 1964) ("Courts have found the word 'including' a perplexing one to interpret."); Premier Products Co. v. Cameron, 400 P.2d 227, 228 (Or. 1965) ("How [including] is interpreted depends upon several factors, -- context, subject matter, possible legislative intention, etc.").

[20] Sims v. Moore, 264 So. 2d 484, 487 (Ala. 1972). *See also* BLACK'S, *supra* note 6, at 880 (which indicates that *including* typically indicates a partial list that means the same thing as *including without limitation*); Todd Constr., L.P. v. United States, 656 F.3d 1306, 1311 (Fed. Cir. 2011) ("[T]he provision . . . uses the 'nonrestrictive term ('including'),' . . . .") (citation omitted); Henry v. Anderson, 827 N.E.2d 522, 524–25 (Ill. App. Ct. 2005) ("'Including' is a nonrestrictive word."); In re Enron Creditors Recovery Corp., 370 B.R. 64, 75 (S.D.N.Y., 2007) ("The use of the term 'includes' often operates as a nonrestrictive modifier . . . ."). For an impassioned defense of a nonrestrictive meaning, see the dissent in Hawaiian Ass'n of Seventh-Day Adventists v. Wong, 305 P.3d 452, 469 (Haw. 2013) ("Our prior cases have interpreted the word 'including' consistently with its common definition, such

that the word indicates a partial list and is essentially equivalent to the phrase 'including without limitation' . . . ."). There are numerous other cases that support the notion that *include*, *includes* and *including* are generally intended to be illustrative and not exclusive. *See, e.g.*, Fed. Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 99–100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."). Auer v. Commonwealth, *supra* note 19, at 144 ("Generally speaking, the word 'include' implies that the provided list of parts or components is not exhaustive and, thus, not exclusive."); DIRECTV, Inc. v. Crespin, 224 Fed. Appx. 741, 748 (10th Cir. 2007) ("[T]he normal use of 'include' [is] introducing an illustrative – and non-exclusive – list . . . ."); Puerto Rico Maritime Shipping Authority v. Interstate Commerce Com., 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) ("It is hornbook law that the use of the word 'including' indicates that the specified list . . . that follows is illustrative, not exclusive."); Epsilon Elecs., Inc. v. United States Dep't of the Treasury, 857 F.3d 913, 921–23 (D.C. Cir. 2017) ("[T]he word [including] typically introduces one or more illustrative examples. . . . In the end, we see no reason to depart in this case from the usual rule that 'including' means 'for example.'"); Chickasaw Nation v. United States, 534 U.S. 84, 89 (2001) ("To 'include' is to 'contain' . . . [and] is meant simply to be illustrative . . . ."); Milwaukee Gas Light Co., *supra* note 19, at 68 ("[W]e accord to 'including' its more commonly accepted meaning of classifying that which follows as being a component part of the whole.").

21 *See, e.g.*, Model Real Estate Development Operating Agreement with Commentary, 63 BUS. LAW. 385, 430 (§ 4.2(c)(iii)) (2008) ("***(iii) Change the Entity Character of the Company*.** Convert or reorganize the Company into another Entity form (including a corporation) . . . .").

22 *See, e.g.*, 26 U.S.C. § 7701(c) ("The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined."); 11 U.S.C. § 102(3) ("In this title . . . 'includes' and 'including' are not limiting . . . ."); 28 U.S.C. § 3003(a) ("For purposes of this chapter . . . the terms 'includes' and 'including' are not limiting . . . ."); Tex. Gov't Code § 311.005(13) ("'Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."); 720 ILCS 5/2-10 ("'Includes' or 'including' means comprehending among other particulars, without limiting the generality of the foregoing word or phrase."); Utah Code § 68-3-12(1)(f) ('"Include,' 'includes,' or 'including' means that the items listed are not an exclusive list, unless the word 'only' or similar language is used to expressly indicate that the list is an exclusive list."); Wis. Stat. § 600.02(1) ("'Includes' means 'including but not limited to'.").

23 Helvering v. Morgan's, Inc., 293 U.S. 121, 125 (1934). *See also* Schauf v. New York, 23 Misc. 2d 585, 587 (N.Y. Sup. Ct. 1960) (in which a statutory definition of "stair" that used "includes," rather than "means," was nonetheless a comprehensive definition: "The word 'includes' must be construed as eliminating any other area. Specific mention of one person or thing implies the exclusion of other persons or things."); Surowitz v. Pontiac, 374 Mich. 597 (Mich. 1965) ("include" was found to be a word of "limitation" in a statutory definition of "school" that used "shall include" rather than "means"); In re Cent. Airlines, Inc., 185 P.2d 919, 924 (Okla. 1947) ("[T]he meaning of the words 'transportation company' . . . is no broader than the subjects indicated . . . after the words 'shall include'."); State Pub. Defender v. Iowa Dist. Ct. for Black Hawk County, 633 N.W.2d 280, 283 (Iowa 2001) ("The term 'including' . . . may also be interpreted as a term of limitation depending on the context in which the term is used, the subject matter, and . . . intent. Thus, for example, where a general term is followed by the word 'including,' which is itself followed by specific terms, the intent may be one of limitation.") (citations omitted).

24 *See* Model Real Estate Development Operating Agreement, *supra* note 21, at 437 n.121 (which notes that the "agreement provides that all relevant information pertaining to capital contributions is to be provided on two schedules" and then states what that information "includes" and lists everything that appears on one of the schedules (and could have easily gone on to list everything in the other)).

25 *See, e.g.*, discussion in Section 15 of ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 132 (2012) ("**15. Presumption of Nonexclusive 'Include'** The verb *to include* introduces examples, not an exhaustive list."); *see also* Fed. Land Bank and the cases subsequently identified in *supra* note 20.

26 *See, e.g.*, Schauf and the cases subsequently identified in *supra* note 23.

27 A possible exception is Meyer v. Meyer (In re Estate of Meyer), 668 N.E.2d 263 (Ind. Ct. App. 1996), which involved a will with a bequest covering "my entire Farm including the Land, Buildings, and Equipment." The issue was whether this bequest included cattle and growing crops. The court said yes to the crops and no to the cattle. To justify its inclusion of the crops, the court found that the crops were by law part of the "Land." In rejecting the cattle, the court said that the testator could have said "but not in limitation of the foregoing," but he did not. One could also view the court's interpretation of the list as hybrid (partially restrictive) because it set forth categories

without setting forth all the items included in the categories (e.g., crops). In any case, it seems fair to view the court's interpretation as restrictive.

[28] *See, e.g.*, Berryhill v. Ga. Community Support & Solutions, Inc., 638 S.E.2d 278, 281 (Ga. 2006) ("More importantly, if the legislature had intended to use the word 'includes' as a broad term of illustration or enlargement, it presumably would have appended the phrase 'but is not limited to,' just as it supplied the phrase 'but not limited to' after the word 'including' in [another subsection]."); Covington Square Assocs., LLC v. Ingles Mkts., Inc., 641 S.E.2d 266, 269 (Ga. Ct. App. 2007) ("The use of the phrase 'but not limited to' in Section 6.3, and its absence in Section 6.4, implies a different operation of the word 'include' as used in Section 6.4, in that it may be read in that context to be a limiting term, similar to 'shall consist of.'"). In *Covington*, there was also a list of exclusions, which would not have been necessary if the list of inclusions was comprehensive. Consequently, the court noted that it was "arguably tenuous" to argue that the express mention of one thing implies the exclusion of another. But in light of the use of "but not limited to" elsewhere in the document, the court cited *Berryhill* for the proposition that "include" (alone) may be read to be a limiting term similar to "shall consist of." The court did not convincingly reconcile how the list of inclusions was limited while the list of exclusions was not.

[29] Berryhill, *supra* note 28, at 281 (citation omitted).

[30] Luce, Forward, Hamilton & Scripps, LLP v. Paul Koch et al., 162 Cal. App. 4th 720, 733 (Cal. Ct. App. 2008). In this case, an arbitrator refused to disqualify himself based on the disclosure of a professional relationship the arbitrator believed he was not required to disclose but nonetheless revealed out of an abundance of caution. The relevant ethics standards at the time required disclosure of certain specified professional relationships and any other professional relationship, "including" some specific examples. Standard 7(d)(8) of the California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration (2005). The court concluded that "professional relationships" did not include the parties' common membership in professional organizations (or their managing boards). *See also* Conservation Law Found. v. N.H. Wetlands Council, 834 A.2d 193, 197 (N.H. 2003) ("[T]he term 'including' . . . limits the items intended to be covered by the rule to those of the same type as the items specifically listed.").

[31] Housing Auth. of Baltimore City v. Bennett, 754 A.2d 367, 374–75 (Md. 2000).

[32] *See, e.g.*, In re Clark, 910 A.2d 1198, 1200–01 (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."). In that case, the court cited a previous holding that "the items particularized in [a statute following the words 'including, but not limited to,'] share two characteristics" and that one of those characteristics did not apply to the matter that was claimed to be included in the list, and therefore that matter was not included. *Id.* at 1201. *See also* Velocity Express v. Pa. Human Rels. Comm'n, 853 A.2d 1182, 1186 (Pa. Commw. Ct. 2004) (which quotes McClellan v. Health Maintenance Organization of Pennsylvania, 686 A.2d 801, 805 (Pa. 1996): "It is widely accepted that general expressions, such as 'including, but not limited to' that precede a specific list of included items should not be construed in their widest context, but apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples."); Shelby County State Bank v. Van Diest Supply Co., 303 F.3d 832, 834 (7th Cir. 2002) ("[A]ll inventory, including but not limited to agricultural chemicals, fertilizers, and fertilizer materials sold to Debtor by [Secured Party]" was limited to inventory sold to the debtor by the secured party. In *Shelby*, the list is *hybrid* in the following sense: it is restrictive because it is limited to inventory "sold to Debtor by [Secured Party]" and it is arguably not exclusive because not all inventory sold by the secured party to the debtor is listed.

[33] *See, e.g.*, Horse Cave State Bank v. Nolin Production Credit Asso., 672 S.W.2d 66, 67 (Ky. Ct. App. 1984) ("all farm machindry [sic], including but not limited to tractor, plow and disc . . . plus all property similar to that listed above . . ." was found to mean "any tractor, plow, and disc owned by the debtor as well as all similar farm machinery."). In *Horse Cave*, the list is *hybrid* in the following sense: it is limited because not all farm machinery is included; but it is arguably not exclusive because the subject matter includes elements that are not specified (i.e., not all the similar farm machinery is listed). As discussed in the body of this Article, some people may view this list as exclusive because all elements of the subject matter are included, directly or indirectly, in the list.

[34] Mahoney v. Baldwin, 543 N.E.2d 435, 436 (Mass. App. Ct. 1989) (quoting Haas v. Breton, 377 Mass. 591, 596 (Mass. 1979), which in turn quotes 2A C. DALLAS SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.18, at 110 (4th ed. 1973)).

[35] Montello Salt Co. v. Utah, 221 U.S. 452, 463 (1911), quoting from Hiller v. United States, 106 Fed. Rep. 73, 74 (2d Cir. 1901), and again later stating at 464–65: "The determining word is, of course, the word 'including.' It may have the sense of addition, as we have seen, and of 'also'; but, we have also seen, 'may merely specify particularly that which belongs to the genus.'"; *see also* Red Wing Malting Co. v. Willcuts, 15 F.2d 626 (8th Cir. 1926) and the cases

it cites, including Kennedy v. Industrial Accident Commission of California et al., 50 Cal. App. 184, 194 (Cal. Ct. App. 1920) ("'Including' . . . in ordinary signification implies that something else has been given beyond the general language that precedes it."), and Blanck et al. v. Pioneer Mining Co. et al., 93 Wash. 26, 30 (Wash. 1916) ("[T]he word 'including' . . . necessarily implies that something is intended to be embraced . . . beyond the general language which precedes it. . . . It thus . . . enlarges the otherwise more limited, preceding general language. . . . The word 'including' introduces an enlarging definition of the preceding general words . . . .").

[36] ACTEC Model LLC Operating Agreement § 12.13 (updated through 2008), *available at* https://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/symposia/2009/richard_barnes_33_103_2.authcheckdam.pdf.

[37] *See, e.g.*, 9 U.S.C. § 81(d)(2) ("The term 'state' includes, where appropriate, the District of Columbia . . . .").

[38] *See, e.g.*, Leach v. State, 170 S.W.3d 669, 673 (Tex. App. 2005) (A Texas statute provided "that 'includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."); DIRECTV Inc. v. Budden, 420 F.3d 521, 527 (5th Cir. 2005) ("[W]e have held that 'the word 'includes' is usually a term of enlargement, and not of limitation.' This largely tracks earlier Supreme Court expressions that 'the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.'") (citations omitted).

[39] Characterizing *include, includes* or *including* as a term of *enlargement* may simply indicate that the *list* (rather than the *subject matter*) is subject to enlargement. *See, e.g.*, Hennefeld v. Township of Montclair, 22 N.J. Tax 166, 198 (N.J. Tax Ct. 2005) (citing an earlier case for the proposition that "the word 'include' is a word of enlargement, not limitation, and that the examples specified were merely illustrative") (citations omitted); Kendrick v. Kendrick, 902 S.W.2d 918, 924 (Tenn. Ct. App. 1994) ("When used in conjunction with a general definition, the term 'includes' is a term of enlargement, not limitation. Thus, the use of the term 'includes' in a statutory definition indicates that the enumerated items that follow are illustrative, not exclusive.") (citations omitted); Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 398 (2012) ("By saying it is a term of enlargement is simply to say that what follows it is merely illustrative of what is intended to be included . . . ."). Cases involving the phrase *including but not limited* lend further support to this interpretation of *enlargement*. *See, e.g.*, In re D.O., 247 Cal. App. 4th 166, 175 (2016) (quoting other cases for the propositions that "including, but not limited to" is a "term of enlargement, and signals . . . that . . . [the subject matter] applies to items not specifically listed" and "connotes an illustrative listing, one purposefully capable of enlargement") (citations omitted). *But see* Montello Salt Co., *supra* note 35 (a case involving the words "and including" in which the United States Supreme Court appeared to view "enlargement" in a more literal way ("in the sense of addition") and indicated that the interpretation of "including" as a word of enlargement is an exceptional (rather than an ordinary) sense of the word); Red Wing Malting Co., *supra* note 35.

[40] *See, e.g.*, ACTEC Model LLC Operating Agreement, *supra* note 36, at 8 n.12 ("by written proxy (including a facsimile transmitted or emailed proxy)").

[41] Even with this simpler two-category breakdown, there may be some confusion as to partial lists: a partial list may either be nonrestrictive (partial/completely nonrestrictive) or restrictive (hybrid/partially restrictive) depending on the facts.

[42] Even though a list is nonrestrictive (so that the list is not found to limit the subject matter), it does not follow that there might not be other limitations on the subject matter. *See, e.g.*, H.G. Sledge, Inc. v. Prospective Inv. & Trading Co., Ltd., 36 S.W.3d 597, 603 n.6 (Tex. App. 2000), where the court (x) acknowledged that the term "includes" was defined by statute to mean a term "of enlargement and not of limitation or exclusive enumeration, and . . . does not create a presumption that components not expressed are excluded," (y) did not find that the list in that case was limited to its common characteristics, which were acknowledged by the parties, but (z) found independent reasons to limit the subject matter (in a manner that did not contradict the list).

[43] *See* GARNER, *supra* note 6, at 439–40.

[44] *Id.* at 440.

[45] *See supra* notes 31, 32, and 33.

[46] *See, e.g.*, Horse Cave, *supra* note 33, and Shelby, *supra* note 32, both of which involved an additional question of interpretation: In Horse Cave, a broad category at the end of the list ("all similar farm machinery") was interpreted to be a comprehensive catch-all for everything that wasn't specifically listed (arguably rendering the words *but not limited to* meaningless); and in Shelby, a modifier at the end of the list ("sold to Debtor by [secured party]") was interpreted to modify the entire subject matter (so that the court effectively moved the modifier to define the subject matter in a manner that, ironically, would have made *including but not limited to* nonrestrictive: all inventory sold to Debtor by secured party, including but not limited to . . .). Moreover, Shelby has been described as a "really bizarre

case" reaching an "inconceivable conclusion" that would likely not be reached outside the 7th Circuit Court of Appeals. James D. Prendergast, *It Can Happen and It Does! – The Cases for UCC Insurance, Part 2*, ABA COM. L. NEWSL. 1, 16–18 (July 2003), *available at* https://www.americanbar.org/content/dam/aba/administrative/business_law/newsletters/CL190000/full-issue-200307.authcheckdam.pdf. Horse Cave also involved a broad description of the personal property subject to a secured party's security interest; and the court may have been influenced by the harsh consequences to the secured party (an invalid lien) of an unrestricted interpretation. Moreover, the subject of omnibus collateral descriptions under the UCC is notoriously difficult. *See, e.g.*, Dean T. Kirby, Jr., *Describing the Collateral Subject to a "Blanket" Lien, or How to Knit a Big, Soft, Warm Blanket*, BUS. L. NEWS 15 (The State Bar of California – Annual Review 2017); Barbara M. Goodstein, *Collateral Descriptions and Blanket Liens: Is the Kitchen Sink Enough?*, Vol. 166 No. 106 N.Y. L.J. 5 (June 4, 2015).

47 *See, e.g.*, In re Clark and Velocity Express, *supra* note 32. Each of these cases makes a bold statement that the statutory use of "including, but not limited to" results in a partially restrictive meaning. Similar statements were made in In re Fulton, 910 A.2d 1180, 1183–84 (N.H. 2006) ("We have previously held that the use of the phrase 'including, but not limited to' in a statute limits the application of that statute to the types of items therein particularized. [The statute in question] describes types of income that share two essential characteristics. First, all of the items listed involve payments in the form of money. [The statute] does not include any items that, although they may carry value, are not monetary.") (citations omitted); and in Roberts v. General Motors Corp., 138 N.H. 532, 538 (N.H. 1994), which relied upon a Massachusetts case, Mahoney v. Baldwin, *supra* note 34. See immediately following note.

48 The *ejusdem generis* canon, as typically formulated, applies when the general subject matter comes *after* (rather than *before*) a list of specifics. According to BLACK'S DICTIONARY, *supra* note 6, at 631, "***ejusdem generis*** ([which is] Latin [for] 'of the same kind or class') [is a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." But the order is reversed when the rule is applied in the *including but not limited to* cases: the general (subject matter) comes *before* the words *including but not limited to* and the list of specific items. There are differing opinions as to whether this canon should apply (and how often it does apply) when the general comes *before* the specific. For a good discussion of the opposing views, see Joseph Kimble, *Ejusdem Generis: What Is It Good For?*, 100 JUDICATURE 48, 51–52 (2016), *available at* https://ssrn.com/abstract=2803520.

49 As to the *ejusdem generis* canon, *see, e.g.*, Haas, *supra* note 34, to which many of the restrictive *including but not limited to* cases cited in this Article can be traced and which (without mentioning *ejusdem generis*) quotes from a section in SANDS (SUTHERLAND), *supra* note 34, which discusses *ejusdem generis*. As to the *noscitur a sociis* canon, *see, e.g.*, Wilson v. Clark Atlanta Univ., Inc., 794 S.E.2d 422, 437 (Ga. Ct. App. 2016) (which relied in part on another case that stated "Under the principle of ejusdem generis, [i]t is widely accepted that general expressions such as 'including but not limited to' that precede a specific list of included items should not be construed in their widest context, but apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples. . . . Similarly, 'under the canon of noscitur a sociis, the words in [a document] should be understood in relation to each other, since words, like people, are judged by the company they keep.'") (citations omitted); United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1200 (D.C. Cir. 2005) ("The words 'including, but not limited to' introduce a non-exhaustive list that sets out specific examples of a general principle. Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated.") (citations omitted). Not surprisingly, the author is not aware of any *including but not limited to* cases that have applied the *expressio unius est exclusio alterius* canon, but this canon has been followed (despite not being mentioned) in some *including* cases to establish a partially or completely restrictive interpretation. *See, e.g.*, Luce, Forward, *supra* note 30, at 734 (which relied in part on a prior case that stated "The expression of some things in a statute necessarily means the exclusion of other things not expressed.") (citation omitted); Schauf, *supra* note 23.

50 But as with the words *including but not limited to*, there have been cases finding that *including without limitation* did not preclude a restrictive meaning. For example, compare Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 934, 939 (11th Cir. 2000) (using the doctrine of *ejusdem generis*, the court found that a list of legal or equitable relief following *including without limitation* did not include punitive damages), and Greathouse v. JHS Sec., Inc., 2015 U.S. Dist. LEXIS 154388 (S.D.N.Y., Nov. 13, 2015), at *15 ("We respectfully disagree with *Snapp* as we believe it . . . accords too much weight to the principle of *ejusdem generis* given the statute's reference to the forms of relief listed as being 'without limitation.'").

51 Even a model agreement encountered by the author made this error. *See* ACTEC Model LLC Operating Agreement, *supra* note 36, which uses the words "expenses (including attorneys' fees)" in Sections 8.3(a), 8.3(b) and 8.3(c), and

the words "expenses (including, without limitation, attorneys' fees and disbursements)" in Section 8.5. The discrepancy in this example was no doubt unintentional, and although not likely to give rise to an issue (the author doubts that one could successfully argue that other expenses, such as disbursements and court costs, would be included under Section 8.5 but not in Section 8.3), it illustrates the difficulty of ensuring uniform wording.

[52] *See, e.g.*, Covington, *supra* note 28 (where security guard costs were found not to be included in CAM charges because "but not limited to" was not used in the CAM charges definition, but it was used in the maintenance clause).

[53] *See, e.g.*, People v. Perry, 224 Ill. 2d 312, 328–31 (Ill. 2007) (despite the numerous times the Illinois legislature used "but not limited to," the Supreme Court of Illinois relied on the "statutory definition of 'includes' in [the relevant statute] and the plain and ordinary meaning of the word" to find that a list following "includes" to be a partial list); Leach v. State, *supra* note 38, at 672–73 (despite absence of words "but not limited to," and their presence elsewhere in related documents, "an inquiry into the plain meaning of the term 'including' is unnecessary" because of Texas statute setting forth general rule establishing non-exclusive enumeration).

[54] *See, e.g.*, GARNER, *supra* note 6, at 57 ("*and/or* has been vilified for most of its life—and rightly so"); Kenneth A. Adams & Alan S. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting*, 80 ST. JOHN'S L. REV. 1167, 1190 (2006) ("Judges and legal-writing commentators have fulminated against use of *and/or* . . . ."); Ted Tjaden, *Do Not Use "and/or" in Legal Writing* (posted July 27, 2011), *available at* http://www.slaw.ca/2011/07/27/grammar-legal-writing/ (citing numerous criticisms); LENNÉ EIDSON ESPENSCHIED, CONTRACT DRAFTING – POWERFUL PROSE IN TRANSACTIONAL PRACTICE § 7.2, at 113–16 (ABA 2010). Many, if not most, of the cases on this subject read by the author involve the use of "and/or" in circumstances where certainty was required and therefore having both conjunctive and disjunctive alternatives was inappropriate (often, for example, in the context of a pleading, affidavit or will). *See, e.g.*, Saylor v. Williams, 92 S.E.2d 565, 567 (Ga. App. 1956) ("The most commonly accepted definition of the expression 'and/or' is that it means either 'and' or 'or.' . . . It is clear . . . that, in construing the term when employed in pleading, it does not mean both. Hence a pleading that does not disclose which of the meanings is to attach -- whether 'and' or 'or' -- is too indefinite. . . ."); Compton v. State, 91 S.W.2d 732, 733 (Tex. Crim. App. 1936) ("If the pleader meant the conjunctive, he should have employed the word 'and'; but if he meant to express the disjunctive, he should have used the word 'or', to use both leads to uncertainty and confusion.").

[55] The relevant possibility may be the second one mentioned above, namely "A alone," "B alone" or "both A and B." *See, e.g.*, FOWLER'S DICTIONARY OF MODERN ENGLISH USAGE (Jeremy Butterfield Ed., Oxford Univ. Press 4th ed. 2015) ("and/or, a formula to show that you can choose between the items it connects or choose both of them"); GARNER, *supra* note 6, at 57 ("**And/or*, though undeniably clumsy, does have a specific meaning (*x *and/or y = x or y or both*)."). *But see infra* note 56.

[56] The phrase "and/or" may also be used in circumstances in which it is intended or interpreted in another manner. Sometimes it may be intended or interpreted to mean "or." *See, e.g.*, KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING § 11.74, at 224 (3d ed. 2013) ("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*."); Ollilo v. Clatskanie People's Utility Dist., 132 P.2d 416, 419 (Or. 1942) ("Construing 'and/or' . . . as meaning 'or'. . . ."); In re Mills' Estate, 89 N.Y.S.2d 201, 202 (N.Y. Sur. Ct. 1949) ("The court interprets the language as indicative of an intention that the expression 'and/or' was used in a disjunctive sense only."). And sometimes it may be intended or interpreted to mean "and." *See, e.g.*, McPherrin v. Hartford Fire Ins. Co., 44 F. Supp. 674, 676 (N.D. Cal. 1942) ("[I]t is contended that . . . the word 'and' alone should be read into it and the word 'or' entirely excluded."); Jones v. Servel, Inc., 186 N.E.2d 689, 693 (Ind. Ct. App. 1962) ("Therefore, the expression 'and/or' can only be interpreted as a conjunctive in this case . . . .").

[57] WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 40 (4th ed. 2000).

[58] Cochrane v. Florida E. Coast Ry., 145 So. 217, 218–19 (Fla. 1932); for an extensive list of authorities criticizing "and/or" see Tjaden, *supra* note 54. *See also* THE CHICAGO MANUAL OF STYLE, Rule 5.250, at 311 (Univ. of Chicago Press 17th ed. 2017) ("***and/or.*** Avoid this Janus-faced term. It can often be replaced by *and* or *or* with no loss in meaning. Where it seems needed . . . , try . . . *or* . . . , *or both* {take a sleeping pill or a warm drink, or both}. But think of other possibilities . . . ."); Howard Posner, *Legal Ease – More of the Same*, CAL. LAW., Nov. 2004, at 21; LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 54–55 (Univ. of Chicago 1993); DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 147 (Little, Brown & Co. 1963); *but see supra* note 54. *See also* FOWLER'S MODERN ENGLISH USAGE 29 (Sir Ernest Gowers Ed., Oxford Univ. Press 1965) ("**and/or.** The ugly device of writing *x and/or y* to save the trouble of writing *x or y or both of them* is common and convenient in some kinds of official, legal, and business documents, but should not be allowed outside them.").

[59] For an insightful discussion of the ambiguity of "or" (and the ambiguity of "and"), see Adams & Kaye, *supra* note 54.

[60] *See, e.g.*, Model Real Estate Development Operating Agreement, *supra* note 21, § 11.8, at 487.

[61] WBCMT 2007 C33 Office 9720, L.L.C. v. NNN Realty Advisors, Inc., 844 F.3d 473 (5th Cir. 2016).

[62] ALTA Owner's Policy (6-17-06), Condition 8(a)(ii), at 3.

[63] It could also mean B minus A. It could also mean B minus A, but not less than 0.

[64] This alternative may also be described as the (non-negative) distance that separates A and B on the number line. In other words, it means 0 if A and B are equal, and otherwise the amount determined by subtracting the smaller of A or B from the larger of A or B.

[65] For example, if an estimated payment differs from the amount that is ultimately payable, then any difference may require an adjustment.

[66] For example, in joint ventures, the parties may allow for negative promote hurdle balances. *See* STEVENS A. CAREY, REAL ESTATE VENTURES: FORMULATING AND INTERPRETING PROMOTE HURDLES AND DISTRIBUTION SPLITS Ch. 0, § 3, at 26 (ABA 2016).

[67] |x| is called the "absolute value" of "x". It is always a non-negative number: if $x \geq 0$, then $|x| = x$; and if $x < 0$, then $|x| = -x$.

[68] Max (0, x) means the maximum of 0 and x and, in particular, 0 if x = 0. In other words, max (0, x) means 0 if x = 0 and otherwise the greater of 0 and x. Like |x|, it is always a non-negative number: if $x \geq 0$, then max (0, x) = x; and if $x < 0$, then max (0, x) = 0.

[69] Another possible formulation is "the excess, if any, of A over B." But some people think of division when they see "A *over* B" and therefore find this formulation confusing. The author has frequently encountered "the positive difference between [sic] A minus B," but this language is confusing when A minus B is not positive (especially, when A equals B and the relevant amount should be zero).

[70] BLACK'S, *supra* note 6, at 843. *See also* GARNER, *supra* note 6, at 408 ("**herein** (= in this) is a vague word in legal documents, for the reader can rarely be certain whether it means *in this subsection*, *in this section* (or *paragraph*), *in this document*, or *in this transaction*. A more precise phrase, such as any of the four just listed, is preferable.").

[71] Bayerische Landesbank v. Aladdin Capital Mgmt. LLC, 692 F.3d 42 (2d Cir. 2012). Section 29 of the contract in question was a "no-third party beneficiary" provision that (x) disclaimed any third party beneficiaries other than those "specifically provided herein," and (y) included a reference to a particular third party beneficiary. The existence of the exception (the reference to the particular third party beneficiary) in Section 29 was used to support the argument that "herein" referred only to Section 29 (rather than the entire agreement). Although this argument prevailed at the district court level, it was overturned on appeal. The interpretation of "herein" is not something any contract drafter wants to litigate.

[72] *Id.* at 53–54. Although the Second Circuit reversed the decision, "the district court found, that because [the contract provision] expressly names [one] intended third-party beneficiary, but does not expressly name [the alleged third party beneficiaries] anywhere in the section, the [alleged third party beneficiaries] were not 'otherwise specifically provided herein,' and therefore the parties to the Agreement did not intend for the [alleged third party beneficiaries] to be third-party beneficiaries . . . ." *Id.* at 53.

[73] For more on "HERE- AND THERE- WORDS," see GARNER, *supra* note 6, at 407.

[74] Austl. Unlimited, Inc. v. Hartford Cas. Ins. Co., 198 P.3d 514, 521 (Wash. App. 2008). *See also* Driggers Eng'g Servs. v. CNA Fin. Corp., 113 F. Supp. 3d 1224, 1229 (M.D. Fla. 2015) ("Under Florida law, the term 'arising out of' is 'broader in meaning than the term caused by . . . .'") (citation omitted); Nat'l Fire Ins. Co. of Hartford v. Radiology Assocs., LLP, 694 F. Supp. 2d 658, 662 (S.D. Tex. 2010) ("In addition, '[a]rising out of' are words of much broader significance than 'caused by.'"); Health Net, Inc. v. RLI Ins. Co., 206 Cal. App. 4th 232, 262 (Cal. Ct. App. 2012) (quoting a 2005 case: "As used in various types of insurance provisions, . . . '[a]rising out of' are words of much broader significance than 'caused by.'") (citation omitted); AIF Realty, LLC v. TD Banknorth, N.A., 25 Mass. L. Rep. 267 (Mass. Supp. 2008), at 3 ("In the context of insurance contracts, . . . [t]here is a continuum in which the phrase 'caused by' is deemed to be narrower in scope than 'arising out of.'"); Fed. Ins. Co. v. Tri-State Ins. Co., 157 F.3d 800, 804 (10th Cir. 1998) ("[T]he general consensus [is] that the phrase 'arising out of' should be given a broad reading such as 'originating from' or 'growing out of' or 'flowing from' or 'done in connection with'—that is, it requires some causal connection to the injuries suffered, but does not require proximate cause in the legal sense."); 3D COUCH ON INSURANCE § 101:52, at 101-96–101-100 (3d rev. ed. 2013) ("Courts have split on where 'arising out of' falls on the causation scheme with some courts finding it equivalent to 'but for' causation and others finding it somewhere between 'but for' causation and proximate causation.") (citation omitted); *cf.* M. Dematteo Constr. Co. v. A. C. Dellovade, Inc., 652 N.E.2d 635 (Mass. App. Ct. 1995) (which found "no

meaningful distinction" to differentiate "arising out of" from "caused by" in holding that the applicable subcontractor indemnity was not void under the Massachusetts anti-indemnity statute, which prohibited indemnification for matters not "caused by" the subcontractor indemnitor); W&W Glass Sys., Inc. v. Admiral Ins. Co., 937 N.Y.S.2d 28, 29 (N.Y. App. Div. 2012) (stating that "the phrase 'caused by . . .' does not materially differ from the general phrase, 'arising out of'" while finding coverage under a nonstandard additional insured endorsement). It seems unlikely that "caused by" will be uniformly interpreted (e.g., in light of the fact that "caused by" may be, and sometimes is, modified by "directly," "proximately" or similar modifier, the absence of such a modifier might support a broader interpretation of "caused by" when a court feels it is appropriate).

[75] *See, e.g.*, Jack P. Gibson & W. Jeffrey Woodward, *The 2004 ISO Additional Insured Endorsement Revisions*, CONSTRUCTION LAW., Summer 2005, at 5; David S. White, *Risk-Shifting Agreements In Construction Contracts: Why Insurance May Not Work The Way It Used To*, PRAC. REAL EST. LAW., Jan. 2007, at 43. For a summary of the cases interpreting "arising out of" in the pre-2004 additional insured endorsements, see PATRICK J. WIELINSKI, W. JEFFREY WOODWARD & JACK P. GIBSON, CONTRACTUAL RISK TRANSFER: STRATEGIES FOR CONTRACT INDEMNITY AND INSURANCE PROVISIONS, at XI.P.1 (IRMI 2012); *see also id.* at XI.C.110–15. Note that the phrase "arising out of" in the context of a coverage *exclusion* might be construed against the insurer in a more limiting fashion. *See, e.g.*, Warrilow v. Norrell, 791 S.W.2d 515, 526 (Tex. App. 1989) ("ambiguous terms and standards of causation in exclusion provisions must be strictly construed against the insurer"); Auto Owners Ins. Co. v. Pers. Touch Med Spa, LLC, 763 F. Supp. 2d 769, 782 (D.S.C. 2011) ("South Carolina courts have concluded that 'the term 'arising out of' when used in an insurance policy exclusion should be narrowly construed to mean 'caused by.'"); R. Steven Rawls, *"Arising Out of": How Strong Is the Connection?*, IRMI EXPERT COMMENTARY (Aug. 2010), *available at* https://www.irmi.com/articles/expert-commentary/arising-out-of-how-strong-is-the-connection (observing that Montana has case law interpreting "arising out of" broadly in determining whether there is coverage and narrowly in determining whether an exclusion applies); COUCH, *supra* note 74, at 101-100 ("However, if these phrases ['arising out of' and 'resulting from'] are used in an exclusionary provision rather than a grant of coverage, these phrases will be interpreted narrowly against the insurer."). However, many cases (including cases cited by Couch in the footnotes to § 101:52) support an expansive interpretation of "arising out of" even in an exclusionary clause. *See, e.g.*, Rizzo v. Ins. Co. of Pa., 969 F. Supp. 2d 1180, 1198 (C.D. Cal. 2013) ("Although exclusions are generally construed narrowly, California courts interpret the term 'arising out of' broadly.") (citation omitted); Driggers, *supra* note 74; Nat'l Fire Ins. Co., *supra* note 74; Health Net, *supra* note 74.

[76] *See, e.g.*, Crawford v. Weather Shield Mfg., Inc., 44 Cal. 4th 541, 552 (2008) ("Though indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly. Ambiguities in a policy of insurance are construed against the insurer . . . ."); Leitao v. Damon G. Douglas Co., 693 A.2d 1209, 1211 (Super. Ct. App. Div. 1997) ("[A]mbiguous clauses should be strictly construed against the indemnitee."). *See also supra* note 75.

[77] *See, e.g.*, *The Maryland Survey: 1997-1998: Recent Decisions: The Maryland Court of Appeals (A. The Meaning of "Arising Out of" in Indemnification Clauses)*, 58 MD. L. REV. 681, 696 (1999) ("To decipher the general meaning of 'arising out of,' the Court of Appeals analogized to insurance policies . . . ."); Crimson Exploration, Inc. v. Intermarket Mgmt., LLC, 341 S.W.3d 432, 443 (Tex. App. 2010), which cites an insurance case to support its statement that "the term 'arising out of' means that there is simply a 'causal connection or relation,' or 'but for causation,' rather than either direct or proximate causation."

[78] The recovery from the insurer may be limited. *See, e.g.*, *Contractual Liability Insurance—The CGL Policy's Contractual Liability Coverage*, IRMI (Contractual Risk Transfer) ¶ 10 (2017), *available at* https://www.irmi.com/online/crt/ch010/1l10c000.aspx ("The CGL insuring agreements . . . provide coverage only in connection with 'bodily injury,' 'property damage,' and 'personal and advertising injury.' These terms of coverage by themselves eliminate the possibility that many kinds of claims stemming from contractual liability will be eligible for CGL coverage. (For instance, breach-of-contract claims often involve only economic loss, which does not meet the CGL policy definitions of "bodily injury," "property damage," or "personal and advertising injury.")"). Moreover, as discussed *infra* note 81, contractual liability coverage by reason of an "insured contract" may be limited to that "part of [the] contract . . . under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person . . . ."

[79] *See, e.g.*, Leitao, *supra* note 76, at 1211 (a case involving construction, which notes (quoting another case) the "judicial recognition that ordinarily the financial responsibility for the risk of injury during the course of a construction project is shifted in any event by the primary parties to their insurance carriers"); Kuhn v. State of Alaska, 692 P.2d 261, 263 (Alaska 1984) (quoting an earlier Alaska Supreme Court case: "This revision in judicial thinking [by which a majority of jurisdictions have rejected the old view that broadly worded indemnities that cover

an indemnitee's own negligence violate public policy] is attributable to the widespread contemporary use of insurance . . . .").

[80] *See, e.g.*, Int'l Marine, L.L.C. v. Integrity Fisheries, Inc., 860 F.3d 754, 761 (5th Cir. 2017) ("To be clear, we continue to subscribe to the general rule . . . that indemnity agreements containing language such as 'arising out of' should be read broadly."); JNJ Found. Specialists, Inc. v. D.R. Horton Inc., 717 S.E.2d 219, 222 (Ga. Ct. App. 2011) ("Under Georgia law pertaining to indemnity provisions, "'arising out of' [means] 'had its origins in,' 'grew out of,' or 'flowed from.'" Importantly, "the term 'arising out of' does not mean proximate cause in the strict legal sense, nor [does it] require a finding that the injury was directly and proximately caused by the insured's actions.") (citations omitted); Leitao, *supra* note 76, at 1212 ("In similar contexts, we have construed the words 'arising out of' in accordance with their common and ordinary meaning as referring to a claim 'growing out of' or having its 'origin in' the subject matter of the [indemnitor's] duties."). *See also supra* note 67.

[81] Contractual liability coverage is provided by a CGL policy in a convoluted way. First, there is an exclusion (2b) in the standard ISO CGL policy for "contractual liability" which excludes coverage for obligations to pay damages by reason of assumption of liability under a contract. And then there is an exception for liability under an "insured contract," which is defined to include a lease (excluding certain indemnities covering fire damage), and "f. That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another to pay damages because of 'bodily injury' or 'property damage' to a third person or organization." Under the ISO CG 24 26 endorsement, the "insured contract" definition is modified to add a causation requirement: "that part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization, provided the 'bodily injury' or 'property damage' is *caused in whole or in part by you or by those acting on your behalf* . . . ." (emphasis added). An ISO CG 21 39 endorsement would be even worse (eliminating entirely the indemnification protection in part f of the definition of "insured contract").

[82] SCOTT C. TURNER, 1 INSURANCE COVERAGE OF CONSTRUCTION DISPUTES § 10:13, at 10-23–10-24 (Thomas Reuters 2017) ("Under this newly added language, if the insured is not at least partially responsible for the tort committed, for which it has agreed to indemnify another, the 'insured contract' definition may not be satisfied, such that the exclusion bars coverage. Therefore, the altered language may leave the insured without coverage where it has assumed the liability of another, but the claim does not involve bodily injury or property damage claims that were caused in any way by the insured."). (The book inadvertently refers to the "standard ISO policy in effect since April of 2013" instead of "ISO CG 24 26 since 2004," but the author has been advised that this reference will be corrected in a subsequent update.) Of course, there may be other reasons why the scope of the indemnity exceeds the scope of the CGL insurance coverage. *See supra* note 78.

[83] If the parties intend to require culpability as a condition to indemnification, then "caused by" may accomplish the goal. *See, e.g.*, United Rentals Highway Techs., Inc. v. Wells Cargo, Inc., 128 Nev. 666, 668 (2012) ("to the extent caused by" required proximate cause and resulted in no liability under the indemnity because the indemnitor was found not to be at fault in a lawsuit brought by the injured party against the indemnitor). But not always. *See, e.g.*, *supra* note 74 and *infra* note 88.

[84] The words "resulting from" have sometimes been interpreted to require a narrower or more direct causation than "arising out of," but "resulting from" has often been interpreted broadly in a manner similar to "arising out of." *See, e.g.*, Lancer Ins. Co. v. Garcia Holiday Tours, 345 S.W.3d 50 (Tex. 2011) (finding "no significant distinction between the two phrases" in a holding against the insurance company that confirmed coverage, and surveying the case law and commentators on the varying interpretations of "resulting from"); Leitao, *supra* note 76, at 1212 ("Although the words 'resulting from' perhaps imply some causal relationship between the [indemnitor's duties] and the claim, we do not interpret this clause as requiring fault on the [indemnitor's] part as a prerequisite to indemnification. Instead, we view these words as requiring only a substantial nexus between the claim and the subject matter of the [indemnitor's] duties."); Stephan & Sons v. Anchorage, 629 P.2d 71, 76 n.16 (Alaska 1981) ("We are in general agreement . . . that 'arising or resulting from' should be broadly interpreted."); Rappold, *infra* note 86; Austl. Unlimited, *supra* note 74, at 521 ("'arising out of' . . . has a broader meaning than . . . 'resulted from.'"); Lone Mt. Processing, Inc. v. Bowser-Morner, Inc., 2005 WL 1894957 (W.D. Va., Aug. 10, 2005) (equating "by reason of" with "arising out of" and then "arising from").

[85] *See, e.g.*, Interface Grp.-Nevada, Inc. v. Freeman Decorating Co., 473 S.E.2d 573, 575 (1996) ("'Arising from' does not mean the same thing as 'proximately caused by.' Instead, this contractual term has been held to encompass 'almost any causal connection or relationship. . . .'") (citations omitted); Stephan & Sons, *supra* note 84.

[86] Rappold v. Ind. Lumbermens Mut. Ins. Co., 431 S.E.2d 302, 304 (Va. 1993) ("by reason of" had the same effect as "resulting from").

[87] *See, e.g.*, Rice v. Downs, 248 Cal. App. 4th 175, 177 (2016) ("clauses [using the words] 'arising from' or 'arising out of' . . . , i.e., excluding language such as 'relating to . . .' or 'in connection with . . . ,' are 'generally considered to be more limited in scope . . . .'"); Jackson v. Lajaunie, 270 So. 2d 859, 864 (La. 1972) ("'In connection with' is a broader term than 'arising out of' . . . ."); AIF Realty, LLC, *supra* note 74, at 6 ("The phrase 'arising out of' . . . is deemed to be narrower in scope than 'in connection with.'"); TINA L. STARK, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE § 10.08, at 269 (2003) (hereinafter, "STARK (NEGOTIATING AND DRAFTING)") ("'Arising out of' and 'relating to' are not redundant phrases. 'Arising out of' means 'originating from,' 'growing out of,' or 'flowing from.' It indicates some degree of connection, although it does not mean 'proximately caused by.' 'Relating to' signifies a much broader relationship."). See Int'l Marine, *supra* note 80, for possible limitations on interpretation of "related to." In some contexts, there may be other limitations (e.g., when the damage is caused by the indemnitee's negligence).

[88] Imagine a spectrum with the "minimum nexus" on the left and the "maximum nexus" on the right. One might expect: "in any way related to" and "in any way connected to" to fall at the left end of the spectrum (requiring no causal connection); "sole direct cause" or "sole proximate cause" to be at the right end of the spectrum (requiring sole legal liability for the matter); and somewhere in between the endpoints, (x) a "but for" causation standard (requiring merely that the matter would not have occurred otherwise) and (y) to the right of the "but for" causation standard, a "proximate" causation standard (requiring legal liability for the matter). One might also expect: "arising out of" to be to the left of "caused by," with "arising out of" at the same point or near the "but for" causation standard; and "caused by" at the same point or near a "proximate" causation standard. But it is difficult to generalize given the number of variables involved, including the identity of the parties, who drafted the indemnity, the relevant jurisdiction and the other facts. Indeed, there are cases that have found (1) limitations when using "related to" (*see, e.g.*, Int'l Marine, *supra* note 80, at 759, which narrowly interpreted "related to," saying "[T]he contract could not 'be read in a vacuum to apply to any situation for which a colorable argument could be made that loss of property was somehow related . . . .'"), (2) "arising out of" to require proximate cause (*see, e.g.*, Lone Mountain, *supra* note 84, which relied on a narrow interpretation of "arising out of"), and (3) "caused by" to be the same as "arising out of" and to be satisfied by a "but for" causation standard (*see, e.g.*, W&W Glass, *supra* note 74, which broadly interpreted "caused by"). Causation is particularly challenging. *See, e.g.*, GARNER, *supra* note 6, at 141 ("As one writer aptly put it, 'There are few words in the English vocabulary that have given rise to more legal problems than the words *cause* and *causing*.' Technically speaking, everything that contributes to a given result is, as a matter of fact, a cause of that result.") (citation omitted).

[89] Barry H. Garfinkel & James D. Fry, *Ambiguity in "Arising" Phrases: Caution for Drafters of Intended Narrow Arbitration Clauses*, AAA HANDBOOK ON COMMERCIAL ARBITRATION Ch. 9 (2d ed. 2010).

[90] *See, e.g.*, the recent unpublished decision Tolman v. Johnson, 2017 Wash. App. LEXIS 1213, at 8 (2017) ("'Arising out of' has a broader meaning than 'caused by' or 'resulted from.'"); *see also* RICHARD M. PEARL, CALIFORNIA ATTORNEY FEE AWARDS §§ 4.25, 4.26 (3d ed. CEB 2017).

[91] *See, e.g.*, STARK (NEGOTIATING AND DRAFTING), *supra* note 87, § 6.02[3], at 122; § 10.08, at 269; STARK (DRAFTING CONTRACTS), *supra* note 5, § 16.4, at 226–28.

[92] For general discussion of the phrase "arising out of or relating to," see ADAMS, *supra* note 56, §§ 13.18–13.32, at 250–52.

[93] *See, e.g.*, Thomas J. Hall & Stacey Trimmer, *Good Faith and Lenders' Exercise of Contractual "Sole Discretion"*, 129 BANKING L.J. 483 (June 2012), which, despite the title, focuses primarily on cases involving "sole and absolute discretion"; George Bundy Smith & Thomas J. Hall, *Limits on the Exercise of 'Sole and Absolute' Discretion*, Vol. 246 No. 116 N.Y. L.J. 3 (Dec. 2011), which, despite the title, discusses both "sole and absolute discretion" cases and "sole discretion" cases without mentioning any distinction.

[94] *See, e.g.*, Patel v. Dunkin' Donuts of Am., Inc., 496 N.E.2d 1159, 1161 (Ill. App. Ct. 1986) ("at its own discretion and on its own terms"); Super Valu Stores, Inc. v. D-Mart Food Stores, Inc., 431 N.W.2d 721, 723 (Wis. Ct. App. 1988). Both these cases involved the right of a franchisor to compete with a franchisee in its "sole discretion," and in both cases, the courts did not identify any limit on the contractual right of the franchisor to make this decision (and in particular, the decision was not subject to any limitation by reason of the implied covenant of good faith and fair dealing). The franchise non-compete decisions may be influenced by a judicial reluctance to encourage restraints on trade.

[95] If there is a redundancy, it may be preferable to eliminate "sole" rather than "absolute" because sole may be less likely to add any meaning: it is often, if not usually, clear from the context that the party making the decision is the only ("sole") one making the decision; and, as further discussed in the body of this Article, "absolute" may result in fewer, if any, restrictions on the manner in which the decision may be made.

[96] Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 HASTINGS L.J. 585, 627 n.199 (1996). *See also* Larwin-Southern California, Inc. v. JGB Inves. Co., 101 Cal. App. 3d 626 (1979) (buyer's approval of tentative map with conditions satisfactory to buyer in its "sole judgment and discretion" required subjective good faith determination under the implied covenant). However, the supporting cases cited by Diamond and Foss do not distinguish between "absolute" and "sole" discretion and some of the arguments in those cases could be read to apply to either. *See, e.g.*, BA Mortg. & Int'l Realty Corp. v. Am. Nat'l Bank & Trust Co., 706 F. Supp. 1364, 1377 (N.D. Ill. 1989) ("Parties with unfettered contractual discretion cannot be allowed to exercise that discretion in bad faith."). Moreover, as Diamond and Foss acknowledge, there are some cases (especially in the franchise context when free competition agreements are challenged) stating that "sole discretion" means unfettered discretion. *See, e.g., supra* note 94.

[97] Guntert v. City of Stockton, 43 Cal. App. 3d 203, 213 (1974) (18-month termination right in lease, based on landlord's determination in its "sole discretion" that a development proposal for the premises was viable, was subject to a reasonableness standard: "[W]e interpret the contract to impose the 'reasonable person' standard on the [landlord]. Contrary to the city's contention, the phrase 'sole discretion' does not necessarily imply arbitrary power, unfettered by the demand for reasonableness."). *See also* Storek & Storek, Inc. v. Citicorp Real Estate, Inc., 100 Cal. App. 4th 44 (2002) (implied covenant not applied to lender "sole discretion" disbursement condition in loan, but objective reasonableness was the relevant standard); Tymshare, Inc. v. Covell, 727 F.2d 1145, 1154 (D.C. Cir. 1984) ("[T]his phrase ['sole discretion'] is not necessarily the equivalent of 'for any reason whatsoever, no matter how arbitrary or unreasonable.' As applied to some contractual powers, it may indeed connote the sort of unfettered authority appellant would wish. But just as . . . certain express powers, even without an expansive modifier, are implicitly absolute (the power to call a demand note) while others are not (the power to terminate certain continuing contractual arrangements); so also, the reasonably understood effect of an expansive modifier varies from case to case depending upon the nature of the power at issue. Where what is at issue is the retroactive reduction or elimination of a central compensatory element of the contract — a large part of the *quid pro quo* that induced one party's assent — it is simply not likely that the parties had in mind a power quite as absolute as appellant suggests.").

[98] Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC, Del. Ch. LEXIS 116, 114 (Del. Ch., Aug. 8, 2011) (the court distinguished "contractual provisions stating that the general partner has 'sole discretion' to make a decision for any reason, and then clarify that such 'sole discretion' means that the general partner need not consider any other interests, like those of the limited partners . . . ."). It is not surprising that the "sole discretion" of a fiduciary may be limited. *See also* Lucas v. Lucas, 365 S.W.2d 372, 376 (Tex. App. 1962) (stating in a case involving trustees of a trust that "'sole discretion' . . . may not be exercised arbitrarily.") (citations omitted). Indeed, even if "sole discretion" were changed to "sole and absolute discretion," a similar conclusion might be reached. *See, e.g.*, Cantor Fitzgerald, L.P. v. Cantor, 2001 Del. Ch. LEXIS 137, 24–25 (Del. Ch., Nov. 5, 2001) ("[A]ny 'sole and absolute' discretion granted by a particular provision is subject to the global requirement that every partner abide by its duty of loyalty . . . and that [it] exercise 'good faith' in making all determinations and judgments.").

[99] *See, e.g.*, Smith & Hall, *supra* note 93; Hall & Trimmer, *supra* note 93; Richard Bruce & Co. v. J. Simpson & Co., 40 Misc. 2d 501, 504; 243 N.Y.S.2d 503, 506 (Sup. Ct. 1963) ("The term 'absolute discretion' must be interpreted in context and means under these circumstances a discretion based upon fair dealing and good faith – a reasonable discretion."). Moreover, as discussed in note 96, some arguments in the "sole discretion" cases could be read to apply to "absolute discretion" as well. The language in Larwin, *supra* note 96 at 640, is similarly broad: "Axiomatically, 'where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in *good faith and in accordance with fair dealing*.'" (citations omitted). The holding in Larwin was based on presumed intent to avoid an illusory contract due to lack of consideration. In such cases (and in cases where a party, after a binding contract has been established, can unilaterally determine the scope of its performance obligations), even "absolute discretion" might not always be free from application of the implied covenant. *Cf.* Storek & Storek, Inc. v. Citicorp Real Estate, Inc., *supra* note 97, at 61 ("[W]hen the promisor is expressly given absolute discretion to perform . . . , courts will imply a covenant of good faith to limit the promisor's express contractual authority only when necessary to create mutuality.").

[100] *See, e.g.*, franchise cases involving free competition provisions, *supra* note 94; *see also* Shoney's LLC v. MAC East, LLC, 27 So. 3d 1216, 1220 (Ala. Sup. Ct. 2009) ("Succinctly stated, under Alabama law 'sole discretion' means an absolute reservation of a right. It is not mitigated by an implied covenant of good faith and fair dealing in contracts because an unqualified reservation of a right in the sole discretion of one of the parties to a contract expresses the intent of the parties to be subject to terms that are inconsistent with any such implied covenant.").

[101] *See, e.g.*, Stevens A. Carey, *California Purchase and Sale Issues for Buyers*, PRAC. REAL EST. LAW., July 2016, at 38, 53 (§ 6.3).

[102] "ABA" stands for the American Bar Association; "ACMA" stands for the American College of Mortgage Attorneys; and "ACREL" stands for the American College of Real Estate Lawyers.

[103] *See* Joint Drafting Committee, *Real Estate Finance Opinion Report of 2012*, 47 REAL PROP. TR. & EST. L.J. 213, 257 (Ch. 2, ¶ 4.7) (Fall 2012).

[104] *See* GARNER, *supra* note 6, at 727; *see also* LENNÉ, *supra* note 54, § 7.2, at 116–19; and for further references, see Joseph Kimble, *Plain Language: Down with Provided That*, MICH. B.J., July 2004, at 40.

[105] "ACTEC" stands for the American College of Trust and Estate Counsel.

[106] *See* ACTEC Model LLC Agreement, *supra* note 36. The first provision (§ 9.4) begins with the words: "Notwithstanding any other provision of this Agreement to the contrary, ..." The second provision (§ 9.7) begins with the words: "Notwithstanding any other provision contained herein, ..." To add to the confusion, "herein" is not defined, but it wouldn't make sense if it meant "in this Section" because that is the only sentence in the Section and no contrary concept is included in that sentence.

[107] EMSI Acquisition, Inc. v. Contrarian Funds, LLC, 2017 Del. Ch. LEXIS 73, at 13–14 and 30 (Del. Ch., May 3, 2017), respectively.

[108] *Id.* at 30.